

*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:** 17866-15-16 KE

**ODR File Number:** 19245-16-17 KE

**ODR File Number:** 19399-16-17 KE

**ODR File Number:** 19562-17-18 KE

**Child's Name:** C.M.

**Date of Birth:** [redacted]

**Dates of Hearing:**

8/4/2017, 8/10/2017, 9/22/2017, 9/26/2017, 9/28/2017, 11/16/2017, 11/21/2017,  
11/22/2017, 12/04/2018, 12/05/2018, 03/07/2018, 03/16/2018, 03/19/2018,  
03/27/2018

**Parents:**

[redacted]

*Counsel for Parents*

Pro se

**Local Education Agency:**

West Chester Area School District  
782 Springdale Drive  
Exton, PA 19341

*Counsel for the LEA*

Sharon Montanye Esq.  
Sweet, Stevens, Katz & Williams  
PO Box 5069, 331 Butler Avenue  
New Britain, PA 18901

**Hearing Officer:** Charles W. Jelley Esq.    **Date of Decision:** July 30, 2018

## **The Scope of the Dispute**

Over the span of the Student's four years in high school, the Parents filed four due process Complaints.<sup>1</sup> In two of the Complaints, the Parents alleged denial of a free appropriate public education (FAPE). In the other two Complaints, the Parents allege the District's revaluations were incomplete, inadequate and inappropriate. To remedy the inappropriate evaluation claims they now seek an independent education evaluation (IEE). To remedy the alleged FAPE violations, the Parents are seeking reimbursement for payment of school taxes and out of pocket expenses, *i.e.*, reimbursement for the 9<sup>th</sup> grade, 10<sup>th</sup> grade and 11<sup>th</sup> grade school years.<sup>2</sup> The District denies any substantive or procedural claims.

## **Procedural History:**

- March 31, 2016, Parents filed a Complaint alleging a denial of FAPE during the Student's 9<sup>th</sup> (2014-2015) and 10<sup>th</sup> grade (2015-2015) school years.
- April 6, 2016, Parents filed an Amended Complaint.
- April 16, 2016, Parents filed another Amended Complaint.
- Shortly thereafter District filed a Partial Motion to Dismiss the Parents' Complaint and its Amendments for all claims that occurred more than two years before filing.
- In the alternative, District argues that the remaining claims are barred by a series of "Agreement and Release" agreements or "Waiver and Release" agreements covering FAPE claims for each school year at issue.

---

<sup>1</sup> 20 U.S.C. §§1400-1482. The federal regulations implementing the IDEA are set forth in 34 C.F.R. §§300.1 – 300.818. Due to the number of issues, the number of school years and the two different evaluations, the hearing was completed in multiple sessions. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. References to Parents in the plural will be made even when it appears that one or the other was acting on behalf of both. Due to the number of issues and the number of school years involved, the Parties asked to file written closing statements. The District filed a 22 page closing statement. The Parents filed a 157 page closing statement. The Parties submitted multiple exhibits. The transcript covers over 2400 pages. This hearing officer has reviewed all of the exhibits, and read the transcripts and the Parties' closing statements.

<sup>2</sup> In 2013-2014 the Student was in 9<sup>th</sup> grade. In 2014-2015 the Student was in 10<sup>th</sup> grade. In 2015-2016 the Student was in 11<sup>th</sup> grade. In 2016-2017 the Student was enrolled in the 12<sup>th</sup> grade. Although the Student earned enough credits to graduate with the class of 2017, by agreement of the Parties, the Student did not graduate. The Parents contend the Student was denied a FAPE in the 9<sup>th</sup>, 10, and 11<sup>th</sup> grade school years.

- Parents argue that District coerced them into signing the “Agreement and Release” documents such that they are now void.<sup>3</sup>
- June 6, 2016, Parents filed another Complaint requesting an Independent Educational Evaluation for an allegedly flawed March 21, 2014 reevaluation report (RR), preempting the District’s right to grant an IEE request or deny the request and file for a hearing to defend its evaluation.
- Hearing Officer directed parties that the IEE issue would be consolidated with the FAPE issues, but the District would bear the burden of proof on the IEE issue.
- June 22, 2016, after oral argument on the Motion to Dismiss, hearing officer rejected the Parents’ coercion argument, finding that first “Agreement and Release” was a stand-alone valid, enforceable contract waiving any and all FAPE claims for the 2013-2014 and part of the 2014-2015 school years.
- Hearing Officer also concluded he could not enforce the “Settlement and Release” agreement.
- Following this conclusion, District moved to take an immediate appeal on the question of the enforceability of the otherwise released claims.
- Hearing Officer granted District’s Motion to file an immediate appeal to enforce the “Settlement and Release” agreement.
- In June 2016 the District filed an action in Commonwealth Court.
- In June 2016 the Hearing Officer consolidated remaining FAPE claims with the IEE claim and hearing dates were scheduled.<sup>4</sup>
- July 14, 2016, Commonwealth Court entered a preliminary Order temporarily staying all administrative proceedings under two case numbers.
- July 28, 2016, Commonwealth Court entered a second Order staying all administrative proceedings until further Order of Court.
- On May 19, 2017, Parents filed another Complaint, alleging FAPE claims for the 2016-2017 (11<sup>th</sup> grade) school year.

---

<sup>4</sup>To create a complete record for each issue and each school year, the Parties were directed to try the facts in dispute, beginning with the first school year at issue and then move forward to each successive school year. Once the evidence was completed for a school year, the record for that school year or claim, was closed. As many of the admitted exhibits overlapped several of the school years, the Parties were directed to identify what exhibits matched the proofs for each school year in dispute. Both Parties submitted a comprehensive list detailing what exhibits corresponded to each school year and ODR action in dispute. Exhibits not assigned to a school year were not considered in deciding the dispute in another school year. The exhibits considered for each claim for each action are noted in the Findings of Fact for each school year.

- June 19, 2017, Commonwealth Court affirmed hearing officer’s initial Ruling finding an enforceable “Agreement” and rejecting the Parents’ coercion argument.
- However, Commonwealth Court declined to enforce the “Settlement and Release” agreement but instead directed hearing officer to develop an administrative record and decide what effect the “Settlement and Release” agreement may have had on the provision of the Student’s FAPE.<sup>5</sup>
- At the first hearing session, Parents made an oral request, on the record, for a second IEE claiming the March 2017 RR was flawed.
- District, on the record, rejected the oral request to fund a second IEE, and filed a Complaint formally denying the request.

The instant Decision is an adjudication and Final Order of all denial of FAPE and IEE claims. After giving careful consideration to each Party’s positions, I now find as follows: (1) in light of all the circumstances, including the “Settlement and Release Agreements” executed each school year, the District provided the Student with a FAPE for the 2013-2014, 2014-2015, 2015-2016, and 2016-2017 school years. I also find that the District’s March 2014 reevaluation report (RR) and the District’s March 2017 RR are a comprehensive assessment of the Student’s needs, in all areas of suspected disability. Therefore, for all of the following reasons, all claims for a denial of FAPE, all demands for an IEE and all demands for reimbursement are denied.

---

<sup>5</sup> More specifically, the Commonwealth Court directed this hearing officer as follows:  
 [c]reate a record, and to decide how, if at all, the Waiver Agreement impacts the Parents' complaints. . . . Thus, a hearing officer could decide that in light of all the circumstances, including the Waiver Agreement, the education provided to Student during the 2015-2016 school year met the requirements of the IDEA. Conversely, a hearing officer could decide that despite the Waiver Agreement, other arrangements for Student were required by the law. W. Chester Area Sch. Dist. v. A.M., 164 A.3d 620, 632-622 (Pa. Commw. Ct. 2017)

## **Issues**

Did the District deny the Student a FAPE during the 2013-2014 school year, and if the answer is yes, are the Parents entitled to reimbursement?<sup>6</sup>

Did the District deny the Student a FAPE during the 2014-2015 school year, and if the answer is yes, are the Parents entitled to reimbursement?

Did the District deny the Student a FAPE during the 2015-2016 school year, and if the answer is yes, are the Parents entitled to reimbursement?

Did the District deny the Student a FAPE during the 2016-2017 school year, and if the answer is yes, are the Parents entitled to reimbursement?

Did the District conduct a comprehensive evaluation of the Student's needs, in all areas of suspected disability, in March 2014, and if the answer is no, is the Student entitled to an independent educational evaluation?

Did the District conduct a comprehensive evaluation of the Student's needs, in all areas of disability, in March 2017, and if the answer is no, is the Student entitled to an independent educational evaluation?

## **Findings of Fact**

### **The March 21, 2014 Reevaluation Report**

1. On March 21, 2014, the District provided the Parents with a copy of the Student's Reevaluation Report (RR). The RR included a variety of assessments, with updated Parental input, including a March 17, 2014, private evaluation from [a hospital for children] (hereinafter Hospital). The Hospital evaluator concluded the Student met the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition 5 (DSM 5) criteria as a person with Autism, with no language or intellectual impairment, and a Social Anxiety Disorder. The evaluator noted the Student has limited insight into peer relations and noted restricted behavior and interests and how these interfere with functioning in everyday

---

<sup>6</sup> The Parents did not offer any specific testimony regarding any alleged violations for the 2013-2014 school year; therefore, the denial of FAPE claims are denied.

- environments. The report also noted the Student required support for stereotyped behaviors, interests and activities (S#1 p.16).
2. The RR team reviewed and discussed the Hospital evaluation (S#1).
  3. The RR included input from all teachers, progress reporting on the current goals, and input from the speech therapist along with updated academic achievement testing. The speech therapist reported the Student's social language development scores from the Social Language Development Test-Adolescent (SLDT-A). The SLDT-A measures social language, problem solving, social interactions and interpretation of abstract language/irony. The analysis of the Student's standard scores (SS) indicated the Student demonstrated "Below Average" ability in forming inferences, interpreting idioms and abstract phrases. The Student displayed "Excellent" ability to form statements; however, the Student had significant difficulty in justifying solutions. Many of the Student's answers did not reflect responses that were relevant to the specific assessment topics. The Student displayed a strong ability to say the right thing during conversations; however, the Student earned an SLDT-A Total Test Score of 85, which places the Student in the "Low Average" range in ability in Social Language Development (S#1 pp.17-19).
  4. On the Student's social language assessment, including measurements of problem solving skills, social interaction skills and abstract language skills, Student demonstrated a pattern of strengths and weakness in social language skills. While the Student could listen to a sample of social problem situations and come up with solutions that were both logical and appropriate, the Student had difficulty stating the specific reason for the solutions. The Student scored below average in understanding the correct response in a conversation and interpreting social situations. Overall, given the structured assessment situations, the evaluator concluded while the Student knows "what" to say, the Student does not consistently demonstrate competency in accurately "reading" or understanding functional social situations. Functionally, the Student presents as a person with pragmatic communication weaknesses (S-1 p.18-19).
  5. The evaluator used the Woodcock Johnson Test of Achievement 3<sup>rd</sup> Edition to assess the Student's academic achievement. The Woodcock Johnson Test of Achievement 3<sup>rd</sup> Edition is a set of tasks that assess several curricular areas such as reading, math, and written language.

- Performance on this assessment is reported by SS which have a mean of 100 indicating an Average Score.
6. While the Student scored in the High Average range in math and written expression, the Student's reading scores fell in the Average range. Overall, the Student has the ability to quickly and accurately read short sentences, do simple math calculation and write sentences (S#1 pp.20-22).
  7. Using the Behavior Rating Inventory of Executive Function (BRIEF) the District collected data on eight (8) aspects of executive functioning which provides insight into the Student's understanding of self-control and problem-solving. The BRIEF questionnaire was completed by three respondents, two teachers and a Parent. The three reporters all agreed the Student has marked executive functioning difficulties in the areas of behavioral shifting, attentional shifting and cognitive shifting across the home and school settings. For this particular Student, the respondents found that confronting a change to a normal routine may cause emotional distress. The respondents also agreed that the Student has difficulties shifting from one task to another or from one question to another. For example, the Student requires additional explanations or demonstrations to grasp demands of a task when first presented (S#1 pp, 23-25.).
  8. An analysis of the BRIEF data indicated that the Student displays "Significant Concerns" in the ability to modulate emotions, initiate problem solving, sustaining working memory, planning and organizing, problem solving approaches and in the ability to organize the environment and materials (S#1 p.25).
  9. As part of the reevaluation, the team reviewed the Student's progress. An analysis of the June 2013 to January 2014 progress monitoring reflects steady progress on all IEP goals in the regular and special education settings. From 2003-2004 to 2012-2013, the Student's scores on the state wide Pennsylvania System of School Assessment (PSSA) improved from Basic, to Advanced and finally to Proficient. In 2012-2013 the Student scored Proficient in Reading, Math, Science and Writing (S#1 p.4-10).
  10. The RR includes multiple objective and anecdotal statements describing the Student's strengths, deficits and needs (S#1 p.26).

11. At the end of the 9<sup>th</sup> grade school year, the Student earned strong grades in the mid B range and was promoted to the next grade. The Student's regular education report card grades ranged from 100% in Sociology to a low of 83% in English (S#25 p.2).

### **The 9th grade Individualized Education Program**

12. The Parties met on multiple occasions to develop the 9th grade IEP. The first IEP meeting of April 2014 was followed by a second IEP meeting on May 29, 2014; all IEP meetings were properly noticed and the notices were legally sufficient (S-2 pp.1-5).
13. The IEP notes the Parents acknowledged receipt of their procedural safeguards (S-2 pp.3-4).
14. The 9th grade IEP is 55 pages long and includes benchmark data dating as far back as May 2013, along with up to date curriculum based assessments, timely progress monitoring data, and Parent input/survey data (P-6 pp.7-17).
15. The summary of the existing data was written in an easy to read fashion and objectively stated the Student's progress in all areas of suspected disability (P-7 p.17).
16. The IEP clearly described the Student's participation in regular education and special education (S-2 pp.51-55).
17. The 9<sup>th</sup> grade IEP included updated present levels, measurable goals, detailed program modifications and 31 different forms of specially-designed instruction (S-2).
18. The 9<sup>th</sup> grade IEP included descriptive present levels of performance, and anecdotal reports about the Student's speech and language progress, along with specific notations that the Student still needed to improve peer communication skills. The classroom teacher's input included a short plain statement describing the Student's social and academic skills. In addition to the benchmark data, the progress monitoring and summary of grade level test scores, the IEP also included curriculum based assessments. This combination of assessment data, in conjunction with the progress monitoring, provided the Parents with a clear picture of the Student's actual level of progress, expected levels of progress and involvement in regular education curriculum and specially-designed instruction (S-2 pp.13-26).
19. The present levels and the progress monitoring data note the Student earned passing grades in all regular education subjects. The progress monitoring updates objectively described how the Student is making

meaningful progress on the academic, speech, social and academic goals. The report card grades in combination with the progress monitoring data suggest that the Student is making and has made meaningful progress (S-2 pp.13-26).

20. The progress monitoring schedule clearly defined how and when progress would be assessed, reviewed and reported to the Parents (S-2 pp.38-41).

21. The 9<sup>th</sup> grade IEP included measurable transition goals, services/activities, including a clear description of the frequency of the services, the length of the services including the identification of the lead person and agency responsible for the transition services/activity (S-2 pp.31-33).

22. The 9<sup>th</sup> grade IEP included clear, concise, and easy to read descriptions of the type, frequency and duration of the related services and multiple supports for personnel (S-2 pp.50-51).

23. By the end of 9<sup>th</sup> grade the Student earned the following final grades:

Class	Final Grade
Sociology	100%
Health and Fitness	97%
English 9 Academic	83%
Concert Band	90%
Honors Biology	85%
American History	86%
Algebra 1 Academic	84%
Honors African-Asian Studies	89 % (S-25)

24. During 9<sup>th</sup> grade, in Algebra 1 the Student's peers did not [always] work with the Student. The Student stated the refusal to [work with the Student] in Algebra 1 happened "a couple of times" and "It wasn't very much." The Student did not find the negative peer incidents in Algebra 1 "worth reporting". The negative peer interactions in Algebra 1 did not cause the Student to "struggle" in Algebra 1. The Student did not feel like anything more needed to be done to address the negative peer interactions during 9<sup>th</sup> grade (N.T. 1535, 1537, 1541-1543).

25. Over a weekend break, outside of school, the Student pretended to be someone else and initiated a series of vulgar text messages with a peer. Once the teachers and the administrators learned of the text message exchange the Student and the peer were called to the office. The Student described the

incident as a “schism” that was quickly resolved. The Student and the peer made up in “like a day” (N.T. pp.1541, 1545; P-10 pp. 2-6).

26. The 9<sup>th</sup> grade negative peer interactions were not severe, persistent or ongoing (N.T. 1547, P-10).

### **The 10<sup>th</sup> grade Individualized Education Program**

27. On April 9, 2014, after reviewing the RR, the District staff and the Parents met to develop the 10<sup>th</sup> grade IEP (S#2).
28. The present levels of academic achievement in the 10<sup>th</sup> grade IEP included a review of the Student’s then current report card grades, prior progress reports for each of the academic, speech and social/language/communication goals, the Woodcock Johnson Achievement test scores, the SLDT-A speech/language test scores, the BRIEF test scores, and the Parents’ private evaluator’s DSM 5 diagnoses of autism and anxiety disorder (S#2 pp.8-29).
29. The present levels included a transition career assessment, along with a comprehensive list of strengths, and academic, social, behavioral, and speech/language needs. The present levels included functional present levels/needs related to the Student’s organizational and executive functioning deficits identified in the reevaluation report. The present levels also included a Career Assessment of the Student’s transition interests, preferences and strengths (S#2 pp. 7-28).
30. The IEP includes a transition goal calling for the Student to attend college. To accomplish the transition goal the IEP listed twelve (12) transition services/activities. The services/activities included supports such as providing the Student with an SAT/PSAT accommodations application, opportunity to attend career day, and ongoing support and monitoring to reach the organizational/self-monitoring goal (S#2 pp.20-23, 30-31).
31. The IEP included four measurable goals linked to the Student’s social, speech/language, and organizational strengths and needs listed in the reevaluation report (S#2 pp.37-40).
32. The IEP included 41 program modifications and SDIs, and self-monitoring organizational techniques, including supplementary aids and services needed to achieve the four IEP goals. The IEP specifies that the program modifications and specially-designed instruction (SDI) techniques, supplementary aids and services are provided in the regular and special education settings (S#2 pp.41-49).
33. The IEP included speech/language therapy as a related service and multiple supports for school personnel (S# p.49).

34. The District provided the Parents with a Notice of Recommended Educational Placement/ Prior Written Notice (NOREP/PWN) describing the District's intent to provide the Student with specially-designed instruction, supplemental supports and related services identified in the April 9, 2014, IEP (S#2 pp.56-57).
35. On or about June 15, 2014, the IEP team considered and held a specific discussion about the Student's participation with nondisabled peers in extracurricular activities or other nonacademic activities (S#2 pp.51-52).
36. On September 18, 2014, October 16, 2014, and December 8, 2014, the IEP team met to review the Student's progress and discuss revisions to the 10<sup>th</sup> Grade IEP (S#2).
37. In the Spring of 2014, 60 students tried out for the [sport] team. The coach objectively rated all students, on a scale of 1 to 10, on seven different player skills. At the conclusion of the tryouts, the Student did not make the team (S#2, S#4).
38. On May 5, 2014, some 18 days after receiving the NOREP/PRN and IEP the Parents rejected in part and consented in part to the NOREP/PWN and IEP. The rejection centered on the Parents' request to include an SDI that would place the Student on the [sport] team, regardless of the Student's performance in the team tryouts (S#2 p.57).
39. The Parents did consent to the placement and program at the high school. The Parents requested and the District rejected the Parents' request to mediate the dispute (S#2 p.57).
40. On June 11, 2014, the IEP team met again to develop the Student's 10<sup>th</sup> grade IEP and SDIs (S#5 pp. 5-6).
41. During the June 11, 2014, IEP team meeting the Parents and the District discussed the Student's participation on the high school [sport] team and/or participation on other athletic teams, including but not limited to, the Student participating in the fall and winter [sport] work outs. The team also discussed the Student's participation on the track team. At the conclusion of the IEP team meeting the District members of the team concluded that participation on the [sport] team was not a unique need that required specially-designed instruction (S#2 pp.57-58, S#4, S#5 p.11).
42. Although the regular education teachers did not recommend Honors Geometry, the District, after the Parents executed a "Course Placement Waiver Agreement," agreed to schedule the Student for Honors Geometry. Consistent with the District's course selection process the Parents signed a Course Placement Waiver Agreement, overriding the teachers' recommendation. As a consequence of the Parents' and the District's

agreement to place the Student in Honors Geometry, the Student did not have a regularly scheduled lunch period (S#16 pp.13-14).

43. For a short time, at the beginning of the 10<sup>th</sup> grade school year, due to the Student's honors class schedule, the Student was not scheduled for lunch period. When the lunch issue was brought to the attention of the guidance counselor, the IEP team worked out a plan that enabled Student to either snack or eat lunch during one of the afternoon academic classes (N.T. p.1551-1557).
44. When school started in August 2014, the Parents requested and the District agreed to modify the Student's schedule and the District's policy on eating in class. The modification of the District policy allowed the Student to eat lunch during class (S#5 p.11).
45. The ongoing progress report includes a notation by the Honors Geometry teacher that the Student earned a poor grade of 53% on one quiz, and consistent with the SDIs the Student was about to take the retest. The Honors Geometry teacher also stated that using the extended time for quizzes and tests the Student was learning at the appropriate rate consistent with the rate of the Student's peers (S#6 p.19).
46. At the October 16, 2014, and December 8, 2014, IEP meetings the team reviewed and discussed the Student's regular education grades in the Honors classes (S#5 p.11).
47. In 10<sup>th</sup> grade the Student took the following classes and earned the following final grades:

Class	Final Grade
Honors Western World History	80%
Physical Education	96%
Health 10	88%
[Foreign Language]	87%
Honors Geometry	71%
Honors English	70%
Concert Band	89%
Choir	96%
Honors Chemistry	62%

(S-25)

## **Allegations of Bullying in the 10<sup>th</sup> grade**

48. The Student recalled one incident, in 10<sup>th</sup> grade, when a peer made an inappropriate statement in [a] class. After the off-color remark in health class, the Student met with the guidance counselor and the special education teacher to review strategies on how to deal with negative remarks. After meeting with the teacher and the guidance counselor, the Student was able to continue in health class without repercussions or interference (N.T. 1535, 1568-1573, 2567-2571; P-10 p.12).
49. The Student did not regard the 10<sup>th</sup> grade negative peer interactions as bullying (N.T. p.1619).
50. The 10<sup>th</sup> grade negative peer interactions were not persistent, ongoing or severe (N.T.1619).
51. Throughout the school year, the speech therapist and the special education teacher would work with the Student on pragmatic peer-to-peer social skills language exchanges (N.T. 1569-1572).

## **The Student's Grades in the Honors Classes**

52. By October of 10<sup>th</sup> grade, the special education teacher, the Honors Chemistry teacher and the Honors English teacher were talking with the Student about the need for additional SDIs or transferring into college level classes (N.T. 1557-1559).
53. The teachers offered to provide the Student with extra help when they noticed the Student was struggling with the amount of the work and classroom grades were going down. The special education teacher would stay after school up to three times a week to tutor the Student or work on things such as processing emotions, completing assignments, and anything else that was bothering the Student. On numerous occasions, the Student was a no show. (N.T. 1578-1583, 1591-1592, 1600-1601, 1611-1614, 1559-1561, P-10).
54. The honors classes were fast paced environments; the Student struggled to keep up with the constant quizzes and the expectations to produce more in-depth homework assignments. For example, the Student complained about the Honors English class vocabulary expectations and the complexity of the 9th grade college level writing demands (N.T. 1614-1618).
55. The Student did not believe more SDIs, such as full credit for late assignments or adapted tests would have made a difference in passing Honors Chemistry (N.T. 1621).

56. The IEP team agreed that the Student would earn full credit for any Honors Chemistry lab completed, at any point, during the respective marking period. The IEP team decided that during the daily meetings with the IEP case manager, the Student would review the Honors English vocabulary words. To assist the Student in preparing for tests/quizzes the team decided that the IEP case manager would assist the Student in reviewing all study guides for all classes (S#5 p.11).

57. On December 8, 2014, the IEP team met to discuss the Student's failing grades in Honors Chemistry and Honors English. The District offered and the Parents rejected the District's proposal that the Student transfer into college level academic English and Chemistry. The honors courses and the academic classes covered basically the same course content; however, as in 9th grade, the pace was faster than in the college level classes. The IEP team discussed the benefits of transfer from Honors Chemistry to academic college level Chemistry. The Chemistry teacher told the Parents and the IEP team that the honors class course content was aligned such that the Student could transfer in January and not be behind the other college level chemistry students. Assuming the Student would have transferred from Honors' Chemistry, the Student would have been slightly ahead and would have benefited from the review and reteaching of the content. (S#5 p.11)

58. In place of the honors classes, the IEP team suggested that the Student participate in a study skills period four days a week and take Chemistry lab. The change in the schedule would also have permitted the Student to have a regularly scheduled lunch period. The Parents rejected the IEP team's proposal. (S#5 p.11, S#5 pp.13-14)

### **The First Settlement and Release Agreement**

59. To resolve the stalemate over the Student's Honors class participation and the IEP team's recommendation that the Student transfer, the Parties entered into a six paragraph Agreement wherein the District agreed to implement the April 9, 2014 and the December 8, 2014, IEPs. The Agreement provided that the Parents would release the District from any and all denial of FAPE claims arising out of the Student's continued participation in Honors Geometry. The Parents requested and the District agreed that the District would not implement the study skills class instruction and progress monitoring (S-5).

60. In exchange, the Parents agreed that the April 9, 2014, and the December 8, 2014, IEPs as written and implemented were “reasonably calculated to provide a FAPE” for the Student (S-5).
61. The Agreement provided and the Parents agreed that they would not file a legal claim against the District and also agreed to hold the District harmless for “... agreeing to implement the April 9, 2014, and the December 8, 2014, IEPs, as written, including participation in Honors English and Honors Chemistry” (S-5).
62. The Parents made a knowing, voluntary, intelligent decision when they rejected the District’s offer to place the Student in the Study Skills class, along with the associated benefits of “progress monitoring, ongoing data collection, data analysis that otherwise would have been provided in the Study Skills class.” (S-5).
63. The “Agreement and Release provided that “the Parents reserved the right to make future claims if the District failed to implement the agreed upon April 9, 2014, and December 8, 2014 IEPs (S#5 p.2 paragraph 3).
64. The Agreement and Release also provided: (1) that the Parents warrant that they have been provided and are fully aware of their rights under federal and state law; (2) that they are fully aware of their rights and the Student’s rights; (3) that they were fully satisfied with the Agreement; (3) that the agreement was in the Student’s best interest; (4) that they had an opportunity to consult with counsel or an advisor about the agreement; (5) that they were satisfied with their representation from counsel/advisor of their choice; and, (6) that they were aware and understood that they would be signing away important legal rights (S#5 pp.2-3).
65. The Parents made hand written insertions to the Agreement and Release stating “[redacted Parents] would like [redacted Student] to remain in all of [redacted Student’s] currently scheduled honors level academic courses and never to be scheduled for a study skills class.” The Parents initialed the insertion and signed and dated the Agreement (S#5 p.3).
66. Pursuant to the Agreement and Release the District continued to implement the April 9, 2014, and December 8, 2014, IEPs (S#5).

### **The Student Made Progress in Speech/Language**

67. On March 26, 2015, the IEP team reviewed the Student’s regular education classroom grades. At the time of the IEP conference, the Student

was passing all classes, with the exception of Honors Chemistry wherein the Student had a grade of 66% (S#5).

68. During the IEP conference, the speech therapist reviewed the Student's June 2014, November 2014 and January 2015 progress reports. The Progress Reports establish that the Student was making steady progress on the speech/language goals. For example, while one goal expected the Student to integrate an understanding of social thinking concepts with 80% accuracy, by November 2014, the Student was achieving at 85% rate of success (S#5, S#6).

69. In January 2015, during the second half of 10<sup>th</sup> grade, the Student was identifying 4 out of 5 unfamiliar words/idiomatic expressions. In comparison to the Student's baseline of 75%, the increase in the Student's performance reflects meaningful progress (S#5).

70. The speech therapist reported while at times the Student seemed to "fade out," overall the Student was making "good gains" and was attentive in therapy (S#5).

71. In January 2015, the Student's teachers reported that the Student was able to begin a conversation, without prompting, in 4/5 observations, maintain the conversation 5/5 times and disengage when the conversation was over 4/5 times. Student's positive performance, when compared to the baseline in the present levels, signifies meaningful progress, meaningful benefit and significant learning. (S#5)

72. During the IEP meeting, the team discussed the Student's Advanced PSSA Keystone Algebra score of 1549 and Advanced Biology score of 1599. An Advanced score is the highest score on the PSSA. The Advanced scores, for this Student, were an indicator of meaningful benefit, meaningful progress and significant learning. (S#5)

73. As part of the progress monitoring of the implementation of the specially-designed instruction in the regular education setting, the [foreign language] teacher reported that after not doing well on the first quiz of the school year, the Student had earned a class average of 86% after participating in a skit with a group of students (S#5 p.19).

74. The special education case manager and the teachers used direct observation and checklists to track the Student's social skills progress. The regular education staff reported that over the course of 5 individual observations in German 2, Honors Chemistry, Honors English and Choir the

Student did not make any unexpected comments that were off topic (S#5 p.21).

75. The Student's 10<sup>th</sup> grade transition needs were listed, proposed courses of study/classes were described and 21 different Services/Activities were targeted to accomplish the transition goal (S#5 pp. 26-28).

76. On April 21, 2015, the IEP team met at the Parents' request to discuss concerns related to speech/language therapy. The team agreed that the Student needed additional prompting to initiate social interactions. To support the Student's pragmatic language skills at work, the speech therapist agreed to work with the Student on job related speech/language needs (S#5).

77. The IEP included 42 SDIs to support learning the measurable speech/language/social goals, and the measurable academic goal to improve organizational skills (S#5 pp. 35-43).

78. As a follow up to a February 20, 2015, mediation session the IEP team met to revise the Student's present levels of performance. During that meeting the District and the Parents agreed that the Student would receive three additional days to complete an assignment for full credit, the Student would use graphic organizers to complete assignments, and the District would provide the Student with adapted tests. At the same meeting, the team reviewed the Student's Honors Chemistry grade and discussed the selection of courses for 11<sup>th</sup> grade (S#5).

### **The Parents Unilaterally Selected the 11<sup>th</sup> Grade Classes**

79. When the IEP team met, the District members of the team suggested that the Student take 11<sup>th</sup> grade Academic English, American History, Algebra 2, Earth/Space Science, Honors [Foreign Language], Concert Band, Choir and Gym. The Parents disagreed, and instead insisted that the Student take Honors English, Honors Algebra 2, Honors American History, Honors Earth/Space Science, Honors [Foreign Language], Concert Band, Choir and Physical Education. They executed another "Course Waiver Agreement" (SD#6 p. 15).

80. When the 10<sup>th</sup> grade school year ended, the Student earned a failing grade of 62% in Honors Chemistry (S#25 p.2).

81. On June 15, 2015, the IEP team met and discussed the Student's failing grade in Honors Chemistry. The District members of the team proposed two options. The Student could attend summer school, at the Parents' expense, or the Student could take Academic Chemistry in 12<sup>th</sup>

grade. The Student did not take Chemistry either in summer school or during 12<sup>th</sup> grade (S#6, p. 14, S-25).

82. On November 5, 2015, the IEP team met to review the Student's first quarter progress. During the meeting the team discussed the Student's failing grades in Honors Algebra 2, Honors English, Honors [Foreign Language], Honors Earth/Space Science and the Student's grade of 71% in Honors American History. After reviewing the teacher feedback, grades and assignment completion rates, the IEP team proposed that the Student take Academic Earth/Space Science, American History, Algebra 2, Honors [Foreign Language] and add a Study Skills class 5-days a week. The Parents rejected the change in classes. To resolve the dispute the District and the Parents entered into another Waiver Agreement and Release (S#6 pp.1-3, 12-14).

### **The 11<sup>th</sup> grade Individualized Education Program**

83. On March 26, 2015, the IEP team met to review the Student's progress. As of March 2015, but for failing Honors Algebra 2 and Earth Space Science, the Student was earning passing grades in all other classes (S#7 p.7).
84. The 11<sup>th</sup> Grade IEP included 32 SDI's needed to reach the two measurable annual goals. The first goal targeted extending the Student's pragmatic language skills by demonstrating conversational mechanics including taking turns and comprehending abstract language in a social exchanges. The second goal targeted improving study skills (S#6 p.3, 34, 37-43).
85. The IEP included a measurable transition goal and 16 services and activities to reach the goal (S#6 pp.25-28).
86. The IEP team reviewed the Student's January 2016 failing grade of 64% in Earth/Space Science. The Earth/Space Science teacher expressed concern that the Student earned a 64% and a 65% on the first two quizzes. The Student's lab partner performed the labs and prompted the Student to record the results. In American History, the Student earned a 73% and struggled to turn in assignments, even when given extended time (S#6 p.7, 11, S#18 p.11).
87. For the second marking period, the Student made progress on the IEP goal of eliminating the use of a self-monitoring checklist by scoring 3.6/5 (S#7 p.8).

88. Early on, Honors Algebra 2, Honors American History, Honors English and Honors Earth Space Science proved to be very hard. Although the special education teacher and the other teachers would stay after school and the Student worked with a peer for tutoring during the school day, the Student continued to fall behind in Honors classes (N.T. 1636-1638, S-25).

89. When the 11<sup>th</sup> grade school year ended the Student earned the following final grades:

Class	Final Grade
Sports Physical Education	86
Honors [Foreign Language]	82
Honors English	68
Honors Earth Space Science	69
Concert Band	100
Choir	97
Honors American History	73
Honors Algebra 2	59

(S#25)

90. When the school year ended the District offered, and the Student agreed, to retake Algebra 2 in summer school. After taking the online summer school class, the Student earned a passing grade of 76 (N.T. 1705-1701, 1718-1720).

### **Allegations of Bullying in 11<sup>th</sup> Grade**

91. Although the Student started the 11<sup>th</sup> grade year on an optimistic note, things outside of school were happening at a quick pace. The Student had ongoing behavioral health issues at home, the Student changed family-based therapists and then the Student stopped taking the prescribed anxiety medications. (N.T.1624-1626)

92. At times, when the Student traveled the hallway, the other students would push the Student. The Student classified the “pushing” as not a “big thing.” On one occasion a teacher reported witnessing a peer knocking the Student’s calculator to the floor while moving from class to class. When the assistant principal investigated the incident, he learned that the Student was “pushing himself” on the other student who did not want to be friends with the

- Student. To resolve the peer on peer dispute the assistant principal told the Student to stay away from the other student. Upon learning of the incident, the speech therapist continued to work with the Student, one period a week, on pragmatic language social skills including how to understand body language, gestures and phrases (N.T. 1638-1640, 1671-1673, S-6, P-10).
93. To support the Student in the Honors Algebra 2 class, the teacher made sure the Student would have extended time to complete all testing in the study skills class (N.T. 1642-1644).
94. By October, even with the tutoring, the Student was overwhelmed, Honors Algebra 2, was becoming “too much” to handle (N.T. 1646-1649, 1674).
95. Over the course of several days, when the Student became more “pushy,” the Student and the peers began to exchange insulting text messages. On one occasion, the Student’s phone was damaged when a peer knocked it to the floor after [redacted] (N.T. 1638, 1705-1712).
96. Outside of school, [a peer] was taking pictures of the Student and sending them to others in the school. In November, the Student retaliated against the peer [by] pretend[ing] to be another person and began to hurl insults at the peer [redacted]. Although the account was up for only several days, the peer found out and began to increase the frequency and intensity of the insults. The Student believes that the backlash from [these incidents] caused the other students to stay away (N.T. 1649-1651, 1653-1665, 1657-1670, 1674).
97. When the Student told the assistant principal about the ongoing peer problems, the assistant principal immediately investigated the complaint. Once the investigations were completed, he told all the students to stop texting each other and directed the students not to have in person or online contact. The assistant principal followed up with the Parents about the results of the investigation. Once the investigation was completed, the special education teacher and the guidance counselor offered to meet with the Student if the conflict continued (N.T. 1665-1675, 1707-1712, 1726-1728).
98. Although the conflict somewhat faded, the problem the Student had in blending in with the group continued to affect peer relations. The Student testified convincingly that the grading, work demands and performance problems in the honors classes were not related to the peer conflicts. For example, in Honors English, the writing, the reading, the vocabulary, the quizzes, and the expected level of analysis all contributed to the Student’s failing grades. In Algebra 2, the Student had problems with the pre-calculus

problems, the pace and the amount of content to be learned. To the extent the peer conflicts existed, the Student was not distracted in the other classes (N.T. 1719, 1724-1729, 1794).

### **The 11<sup>th</sup> Grade Waiver Agreement and Release**

99. To resolve the dispute over the Student's participation in Honors Algebra 2, Honors English, Honors [Foreign Language], and Honors Earth/Space Science, the Parents executed a third "Settlement and Release" about the Student's FAPE in 11<sup>th</sup> grade (S#6).
100. The "Waiver Agreement and Release" acknowledged that the Parents rejected the District's November 5, 2015, IEP. The Parents acknowledged that even with the implementation of all the SDIs and addressing the IEP goals the Student was in danger of failing all the honors classes. The Waiver Agreement, like the first, contained a specific acknowledgment, by the Parents, that the November 2015, IEP was an offer of FAPE. The Parents requested and the District agreed to implement the November 5, 2015, IEP in exchange for a full and complete release of liability arising under federal and state law governing the education of students with disabilities. The Waiver Agreement allowed the Parents to terminate the Waiver Agreement, at which time the District agreed to fully implement the agreed upon offer of FAPE articulated in the November 5, 2015, IEP. If the Parents terminated the Agreement, the District agreed to modify the Student's class schedule and begin to immediately place the Student in college level classes, including adding the Study Skills class (S#6 pp.1-2).
101. The Waiver and Release further provided as follows: (1) that the Parents warrant that they have been provided and are fully aware of their rights under federal and state law; (2) that they are fully aware of their rights and the Student's rights; (3) that they were fully satisfied with the Agreement; (3) that the agreement was in the Student's best interest; (4) that they had an opportunity to consult with counsel or an advisor about the agreement; (5) that they were satisfied with the representation from counsel/advisor of their choice; and, (6) that they were aware and understood that they would be signing away important legal rights. The Parents executed the Agreement on November 13, 2015 (S#6 pp. 2-3 Paragraph #7).

## **The March 20, 2017 Reevaluation Report is Appropriate**

102. On January 3, 2017, as part of the mandatory three year reevaluation requirement, the District provided the Parents with Prior Written Notice about a proposed Reevaluation and Request for Consent to perform updated testing. The Parents gave partial consent and requested a “full three point psycho-educational evaluation” (S#20 pp. 1, 3).
103. On March 20, 2017, the District provided the Parents with a copy of the RR. The RR summarized the Student’s educational history from the 8<sup>th</sup> grade to the present (S#20 pp.5-47).
104. The RR included updated Speech/Language testing. The speech therapist used the Test of Pragmatic Language Skills-Second Edition (TOPL-2), a formal assessment of pragmatic and social dimensions of language to gauge the Student’s everyday communication and social interaction skills. On the TOPL-2, the Student earned a standard score of 99. A standard score of 100 is average. The assessment revealed the Student displayed strengths in attending to setting, event, situations and context dimensions of social language (S#20 pp.19-22).
105. On the Clinical Evaluation of Language Fundamentals-5<sup>th</sup> Edition-Metalinguistics (CLEF-5 Metalinguistics), a norm referenced assessment to evaluate a student’s ability to make inferences and construct conversationally appropriate sentences, the Student earned one low score and three average scores. The Student earned a Metalinguistic Profile scale score of 6. The Metalinguistic Profile assesses the Student’s use of words, concepts, multiple meanings, inferences, predictions, conversational knowledge and predictions. An average scaled score is 8. The Student’s Making Inferences, Figurative Language and Conversational Skills scaled score of 9 falls in the Average range, and Student earned another scaled score of an 8 in Multiple Meanings. The sums of the Student’s various scaled scores were then combined to create a series of index scores for a Total Metalinguistic Index, Meta-Pragmatic Index and Meta-Semantic Index. The Student’s Standard Scores of 85 to 100 are considered Average (S#20 p.20).
106. The Student earned an average Meta-Pragmatic Index score of 93. The Meta-Pragmatic Index reflects the Student’s ability to use content and context to make a situational-appropriate inference and to initiate appropriate conversations (S#20 pp.20-21).
107. The Student’s Meta-Semantics Index score of 91 is average. The Meta-Semantic Index score is an overall measure of the Student’s ability to

- process and understand both sentences with multiple meanings and abstract, idiomatic expressions (S#20 p.21).
108. The Student's Total Metalinguistic Index, when used with the Meta-Pragmatics Index and the Meta-Semantics Index, quantifies the Student's overall language performance. The Student's Total Metalinguistic Index score of 91 places the Student in the solid average range (S#20 p.21).
  109. Although the Student's scores fell in the average range, the therapist recommended that the Student continue to receive speech/language therapy on a consultative basis (S#20 pp.22, 47).
  110. To assess the Student's overall cognitive ability the psychologist administered the Wechsler Adult Intelligence Scale Fourth Edition (WAIS-IV) (S#20 pp.22-24).
  111. On the WAIS-IV, the Student earned the following scores: Verbal Comprehension, SS of 108, at the 70%ile, which is an Average score; Perceptual Reasoning, SS of 94, at the 34%ile which is an Average, score; Working Memory, SS of 89, at the 23%ile, which is a Low Average score; Processing Speed, a SS of 65, at the 1%ile, which is an Extremely Low score. The subtest scores yield a Full Scale IQ of 85, at the 23%ile, which is a Low Average score, and a General Ability IQ score of 101, at the 53%ile, which is an Average score (S#20 pp. 22-27).
  112. The evaluator noted a significant difference among the WAIS-IV indices that combine to formulate the Full Scale IQ. The evaluator advised the team that the Student's full scale score was not the best indicator of the Student's overall cognitive functioning (S#20 pp.22-24).
  113. On the Kaufman Test of Educational Achievement-Third Edition, the Student scored in the average range, earning a standard score of 96 in Reading, 105 in Math, and 102 in Written Language. The Student's overall Academic Skills Battery standard score of 101 places Student in the average range when tested in untimed conditions (S#20 pp.32-33, 47).
  114. To evaluate the Student's emotional and behavioral concerns, the psychologist administered the Behavior Assessment System for Children, Third Edition (BASC-3)-Parent & Teacher Scales-Adolescent. The BASC-3 is designed to gather information regarding emotional and behavioral concerns. The Student, the Parent and two of the current teachers completed individual rating scales. The BASC-3 ratings were then converted into T-scores. T-scores ranging from 41-59 are considered average. Scores in the Clinically Significant range suggest a high level of maladjustment. Scores in the At-Risk range identify either a significant problem that may not be severe enough to require formal treatment or a potential problem that needs careful monitoring. The BASC-3 also provides measures of Adaptive

behavior. T-scores for Adaptive behavior are reversed, meaning low scores indicate maladjustments, while high T-scores indicate stronger adaptive skills. (S#20 pp.34, 37).

115. All of the raters expressed significant concerns about the Student's Adaptive Skills and Withdrawal behaviors. The Withdrawal scale examines the Student's tendency to avoid social contact. One teacher and the Mother expressed significant concerns about social skills. All of the raters indicated Clinically Significant concerns about the Student's Developmental Social skills. All informants rated the Student's Executive Functioning and Resiliency as a concern. Both the home and the school agreed that the Student displays behaviors associated with Internalizing Problems such as anxiety and depression, in combination with difficulties with pro-social, desirable behaviors including adaptability, social skills, study skills, functional communication and activities of daily living (S#20 p.37).
116. To gain further insight into the Student's social, emotional and behavioral needs, the psychologist also administered the Beck Youth Inventories for Children and Adolescents-2<sup>nd</sup> Edition. The five BYI-2 self-rating scales can be used separately or in combination to assess a child's experience of depression, anxiety, anger, disruptive behavior, and self-concept. (S- 20 p. 39)
117. Four of the Student's scores fell in the Average Range, while Self Concept fell in the Lower than Average range (S-20 p.47).
118. When the results of the BASC SRP and the Beck scales are compared they indicate that the Student is experiencing atypical amounts of internalizing difficulties (S-20 p.47).

## **General Legal Principles**

### **Credibility Determinations**

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief *Schaffer v. West*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). In IDEA disputes the hearing officer applies a preponderance of proof standard. Accordingly, the burden of persuasion on the denial of FAPE claims rests with the Parents who requested this hearing on the multiple denial of FAPE claims. Since the hearing officer assigned the burden of proof to the District on the IEE claim the Parents filed, and the District was the moving party regarding

the Parents' second IEE claim, the District will bear the burden of proof about the appropriateness of both its evaluations.

Hearing officers, as fact-finders, are charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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 now finds the District's witnesses were credible, and their testimony was essentially consistent with respect to the actions taken or not taken by the District in providing the Student a FAPE. I give more weight to the District's witnesses' testimony, as each witness provided a clear, cogent and convincing explanation of how he/she provided the Student with specially-designed instruction and responded to the Student's needs and individual circumstances each year. To ensure the Mother's point of view was given due weight, as she did the direct and cross examination of all the witnesses, the Mother was sworn in at each session. Due to inconsistencies, gaps and exaggerations in their testimony I gave the Mother's and the Father's testimony less weight about the alleged defects in each NOREP, each IEP, and each "Settlement and Release" agreement at issue. Based upon the differences in the testimony between the Parents' description and the Student's description of the negative peer interactions, I do not find the Parents' testimony about the alleged "bullying" persuasive. Likewise, I do not find the Parents' testimony that they were coerced into entering into any of the "Agreements" or the "Course Waiver Agreements" persuasive.

I gave the Student's testimony about the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> grades the same weight as the District's witnesses about the implementation of each IEP, the negative peer interactions and the Student's participation in, and the instruction offered and provided in, the Honors classes.

### **IDEA Evaluation and Reevaluation Principles, Criteria and Standards**

In order to meet their FAPE obligations, school districts must conduct a comprehensive evaluation of a student in all areas of suspected disability, identify those students with a disability, develop a comprehensive IEP tailored to the Student's unique needs, and have the IEP in place before the start of each school year 20 U.S.C. § 1412(a)(1)(A); 20 U.S.C. § 1414(d). The comprehensive evaluation is used as a basis to develop, define and determine the scope and breadth of the services that meet the child needs.

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." *Id.* § 1414(b)(2)(C).

The IDEA regulations impose additional criteria that school officials must use 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 or the reevaluation confirms the child's potential disabilities, identifies the child's individual circumstances, and examines whether the child still needs specially-designed instruction. Assuming the child is eligible, the LEA must then develop a legally sufficient IEP, including measurable ambitious goals, with challenging objectives, related services and specially-designed instruction, all of which must be provided in the least restrictive setting 20 U.S.C. § 1414(b)(2)(A).

### **Independent Educational Evaluation Standards, Principles and Criteria**

Parents have three avenues to obtain an IEE. First, they can obtain an IEE at public expense if they disagree with an evaluation obtained by the LEA and the LEA agrees to fund the independent evaluation. Second, if the LEA's evaluation is found inappropriate by the decision of a hearing officer after an administrative due

process hearing, the hearing officer can order the LEA to fund the costs of the IEE. 34 C.F.R. §300.502(b)(1), (2)(ii). Third, they can self-fund the evaluation and present it to the district for review.

Once a parent has requested an IEE, the LEA “must, without unnecessary delay,” file a due process complaint to show that its evaluation is appropriate or assure that the IEE is provided. 34 C.F.R. §300.502(b)(2)(i), (ii). If the LEA agrees to fund an IEE, the LEA must provide parents with information about where the independent evaluation may be obtained, as well as the school district’s criteria applicable for independent evaluations. (34 C.F.R. § 300.502(a)(2); *Letter to Blum*, 211 IDELR 2237 (OSEP 1980). Upon receipt of the request, the LEA must also provide parents with a list of pre-approved assessors, but there is no requirement that the parent select an evaluator from the district-created list. *Letter to Parker*, 41 IDELR 155 (OSEP 2004), *Letter to Blum*, 211 IDELR 2237 (OSEP 1980), 34 CFR 300,502(a)(2). Therefore, the focus of the inquiry, in an IEE dispute that goes to a due process hearing, is whether the district appropriately assessed the student in all areas of suspected disability. *See, e.g., Avila v. Spokane Sch. Dist. 81*, 69 IDELR 204 (9th Cir. 2017)(*unpublished*). When the district files the due process complaint in an IEE dispute, the district shoulders the burden of proof.

### **IDEA FAPE and Specially-Designed Instruction**

The IDEA requires a school district to provide a “free appropriate public education” (FAPE) to students who qualify for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that the FAPE requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education,” under the IDEA to require “significant learning” and “meaningful benefit.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). Districts meet the obligation of providing FAPE through the implementation of a program 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). “[T]he measure and adequacy of an IEP can only be determined as of the time it is offered to the Student, [aka “the snapshot”] and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993). Recently in *Endrew F. v. Douglas County School District RE-1*, 580 U.S. \_\_\_, \_\_\_, 137 S. Ct. 988, 1001, 197

L.Ed.2d 335, 352 (2017) the Court explained that, “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” However, while the program must provide meaningful benefit, a school district is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012); *Andrew, supra*.

## **Bullying and a Denial of a FAPE**

According to the United States Department of Education (USDOE) aspirational *Dear Colleague Letters*, bullying is characterized by aggression used within a relationship where the aggressor [*i.e.*, the bully], has more real or perceived power than the target [*i.e.*, the victim], and the aggression is repeated, or has the potential to be repeated. Bullying can take the form of physical, verbal, or psychological actions inflicting or attempting to inflict discomfort upon another through a real or perceived imbalance of power. *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013); *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013); *Dear Colleague Letter*, 111 LRP 45106 (OCR/OSERS 07/25/00).

Bullying can range from outright aggression to far more subtle and covert behaviors, such as name calling, ridiculing, or shaming another. Cyberbullying, or bullying through electronic technology (*e.g.*, cell phones, computers, online/social media), can include fake online profiles, offensive text messages or emails, and/or false social media rumors or embarrassing or altered photos posted, sent or exchanged on social networking sites. *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013). All of the above are hurtful, interfere with learning and have long term consequences.

Confrontations or episodic negative interactions, on the other hand, between peers that are not characterized by an imbalance in power, that are not pervasive, severe or ongoing generally do not constitute bullying. *See, Jackson County Sch. Bd.*, 113 LRP 22741 (SEA FL 12/27/12), *aff'd on other grounds, A.L. v. Jackson County Sch. Bd.*, 64 IDELR 173 (N.D. Fla. 2014), *aff'd in part*, 66 IDELR 271 (11th Cir. 2015, *unpublished*) (ruling that an isolated instance of rough play between peers did not amount to bullying), *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013); *Dear Colleague Letter*, 111 LRP 45106 (OCR/OSERS 07/25/00).

The USDOE *Dear Colleague Letters* and the case law discussed herein also suggest, persuasively, that if a student is receiving meaningful educational benefit despite bullying, then the Student is receiving FAPE. "Any bullying of a student

with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA, that must be remedied.” *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013). The question then becomes, assuming bullying is occurring: ‘When does bullying rise to the level that denies a FAPE?’

Three U.S. Circuit Courts of Appeal have held that bullying can be a basis for a denial of FAPE claim. *Shore Regional High School Board of Education v. P.S.*, 41 IDELR 234 (3d Cir. 2004); *M.L. v. Federal Way School District*, 105 LRP 13966 , 394 F.3d 634 (9th Cir. 2005); *Charlie F. v. Board of Education of Skokie School District 68*, 24 IDELR 1039 (7th Cir. 1996); *T.K. and S.K. v. New York City Department of Education*, 67 IDELR 1 (2d Cir. 2016). Since these decisions, the district court and hearing officer decisions have proceeded to flesh out the emerging contours of when acts of bullying are a denial of FAPE. In *Harrisburg City School District*, 55 IDELR 149(SEA PA 2010) the hearing officer ruled that neither alleged bullying nor low grades established that the district denied FAPE to a fifth-grader with SLD. Likewise in *T.B. v. Waynesboro Area Sch. Dist.*, 56 IDELR 67 (M.D. Pa. 2011) the court found even though the Student had difficulty interacting with peers and was the victim and at times the perpetrator of bullying, the student with ADHD, a speech-language impairment, and Asperger syndrome was not entitled to tuition reimbursement where the student progressed in school. *See also, El Paso County Sch. Dist. 3*, 60 IDELR 117 (SEA CO 2012).

Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his/her IEP. The school should, as part of its appropriate response to allegations of bullying, investigate the complaints, and then convene the IEP team to determine whether, as a result of the bullying, the student's unique needs or individual circumstances have changed. As part of the review of the student’s unique needs and or individual circumstances, the team must determine if the then current offered and implemented IEP is no longer providing FAPE. *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013). If the IEP team concludes bullying is a denial of FAPE factor, the subsequent IEPs must include ambitious goals and challenging objectives that aim to improve educational results and functional performance of the bullied student. *See, Questions and Answers on Endrew F. v. Douglas County Sch. Dist. RE-1*, 71 IDELR 68 (OSERS 2017). If the team determines the student is not being bullied but continues to have negative peer interactions, the team should also review and revise the IEP to provide specially-designed instruction to address the recurring negative interactions.

Finally, in *J.E. v. Boyertown Area School District*, 57 IDELR 273 (3d Cir 2011, unpublished) the court held that speculation that a student will be subjected to bullying in a particular school is unlikely to establish that the district has failed to offer the Student FAPE.

With these multiple intertwined legal principles in mind, I will now turn to analyze the merits of the Parents' multiple claims, contentions and request for appropriate relief.

### **The Parents' First Due Process Complaint Raising FAPE Claims prior to April 2016 was Timely Filed; the Parents' IEE claims were timely filed**

During the District's opening remarks its counsel made an oral statute of limitations motion, seeking to bar claims arising more than two years before the filing of the 2016 Complaint. In particular, the District contended that any claims arising two years before the filing of the Complaint are time barred. Rather than have an immediate "knew or should have known" (KOSHK) hearing the District elected to allow the Parents to present evidence about events that occurred two years before the filing of the Complaint. In their closing arguments, the District now seeks a KOSHK Ruling on the denial of FAPE claims.

Upon reviewing the Parties' closing statements, the transcripts, the relevant exhibits, and making a fine-grained analysis of the factual record, I now find the Parents' claims dating back more than two years before the filing of the March 2016 Complaint and April 2016 Amended Complaints are not time barred. The Parents' Complaint regarding an IEE was timely.

A timely legally sufficient due process complaint requires two elements. First, the due process complaint must include an alleged violation that relates to the identification, evaluation, the provision of FAPE or the educational placement of the child 20 U.S.C. §1415(b)(3). Second, the due process complaint must be filed within two years of when parents either knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. §1415(f)(3)(c); 20 U.S.C. §1415(b)(6)(B); *A.K. ODR No. 2591-1112-AS (March 27, 2012)*<sup>7</sup> Once the

---

<sup>7</sup> Hearing Officer Culleton in *A.K.* at 7-9, tracking the plain language meaning of the term "action" concluded: 20 U.S.C. §1415(b)(3)(agency initiation or change requiring written prior notice); 20 U.S.C. §1415(c)(1)(A), (B)(characterizing agency initiations or changes as "action[s]"); 20 U.S.C. §1415(b)(6)(A)(agency actions subject to complaint and request for due process); 20 U.S.C. §1415(b)(6)(B)("alleged action" subject to due process as read in *pari materia* with 20 U.S.C §1415(b)(6)(A)). Thus, the "action that forms the basis of the complaint" refers to an agency's action or inaction with regard to "initiat[ion] or change[of]... the identification, evaluation, or educational placement, or the provision of a free appropriate public education to the child." See also, *Vitallo v. Cabot*

parents are placed on either actual or inquiry notice about the alleged violation and the action, they must file a timely complaint. *G.L.* 802 F.3d at 614; *Nazareth Area School District*, at 6-7; *Wilson v. El-Daief*; 600 Pa. 161, 964 A.2d 354, 363, 366 n.12 (Pa. 2009).

The record is preponderant that by March/April 2016 the Parents were in possession of sufficient facts to file a claim about alleged FAPE violations. The Parties were meeting on a regular basis; the District provided the Parents with their procedural safeguards; and, the District's proposed "actions" were clearly spelled out in the NOREPs. Accordingly, after conducting a fine-grained analysis, following the plain language of the statute, I find the Parents filed a timely complaint that includes claims two years before the filing of the due process complaint. Filing a timely complaint, while important, is not dispositive that the Complaint has merit. That said, as for the 8<sup>th</sup> grade school year, the Parents did not provide any substantive evidence about the 8<sup>th</sup> grade school year; accordingly, those claims are dismissed with prejudice.

### **Analysis and Application of Generally Applicable Law to the Facts**

#### **The District's 2014 Reevaluation was Appropriate and Comprehensive<sup>8</sup>**

A comprehensive evaluation in all areas of suspected disability is the foundation of an appropriate offer of FAPE. The Parents assert the District's 2014 reevaluation is lacking in several respects which makes the reevaluation insufficient. The Parents further contend the IEP team's reliance on the 2014 reevaluation renders the subsequent IEPs procedurally and/or substantively deficient. First, they contend the reevaluation team did not give due weight, include, and/or address the 2014 Hospital findings and diagnoses (P#11, P#12). Next, they argue the District, in conducting the 2014 reevaluation, failed to consider or gauge the alleged effects of alleged acts of peer-on-peer bullying on the Student's performance. The Parents assert that these cumulative defects, individually or collectively, denied the Parents the opportunity to meaningfully participate and/or denied the Student FAPE. For the following reasons, the Parents' multiple intertwined contentions about the 2014 RR are rejected.

---

*Corporation*, 399 F.3d 536, 538 (3rd Cir.2005) (explaining that discovery of substantial/sufficient critical facts is part of due diligence burden)

<sup>8</sup> Since a reevaluation, in this instance immediately precedes the offer of FAPE, this hearing officer will first address the Parents' claim for an IEE and the District's burden that the reevaluation provided was appropriate.

## **The District's 2014 Ability and Achievement Assessments are Appropriate**

The District's RR team reviewed, prioritized and included the data from the Hospital evaluation into the 2014 RR. First, the RR incorporated the information about the Student's anxiety, autism, social communication skills deficits, ability testing and restricted social skills and activities deficits. Second, the 2014 RR included the results of the Student's 2008 WISC ability testing. In 2008, the Student earned a full scale IQ of 78, in the Borderline Range. The record is also clear the RR team accepted the Parents' private Hospital DAS III ability testing, which for the most part confirmed the District's already existing testing data. While the DAS testing noted the Student's Verbal and Nonverbal Reasoning was in the "Average" range, the Hospital results did not in any significant fashion contradict what the District's team already knew about the Student. The 2014 RR included the Student's 2008 WIAT achievement testing results. The Student's 2008 WIAT standard scores (SS) ranged from a low of 80 in Written Expression to a high Oral Expression SS of 118. These results do not differ from the Hospital DAS III results and are higher than the Student's 2008 WISC ability testing.

To assess the Student's current achievement levels, the 2014 evaluator used the Woodcock Johnson Third Edition Achievement testing battery. Like the WIAT, the DAS III and the WISC, the Woodcock is a nationally recognized, reliable, valid, "technically sound instrument" and "common assessment tool". The Student's Woodcock Third Edition scores ranged from a SS of 86, in the "Low Average" range in Reading Fluency to a high SS of 113, in the "High Average" range, in Math Calculations. Eight of the Woodcock subtest SS were in the "Average" range and seven SS were in the "High Average" range (SD-1 p.20). All of the SS were higher than the Student's full scale WISC and DAS III IQ scores. As discussed later a comparison of the 2008 WIAT SS to the 2014 Woodcock SS demonstrates a steady upward trend line.

When the WISC, WIAT and Woodcock scores are compared and contrasted, they reveal several notable findings. First, the Student's achievement SS are greater than the Student's measured full scale ability. This uncontested fact is a strong indicator of meaningful progress. Second, the fact that the Student's achievement scores on standardized tests over the years have remained constant also leads to a conclusion that the Student's rate of learning as compared with Student's same-age cohort is keeping pace with the Student's expected ability level, rate of performance and current learning demands. These two facts provided a solid basis to conclude the Student is making meaningful progress. The District's multiple

assessments provide the necessary data that explains the Student's ability, needs and circumstances. Curiously, rather than challenge the standardized test data, the Parents argue *ipse dixit*, that these otherwise sound instruments were not enough. This bootstrapped argument misses the mark here, as the Parents did not present any evidence about what additional "technically sound," "valid" and "reliable" ability or achievement testing instruments should have been administered. An IEE request is not a *carte blanche* ticket to a second opinion. Therefore, the Parents' claims that the ability and achievement testing portions of the RR are inappropriate are rejected.

### **The Speech and Language Assessments Are Appropriate and Comprehensive**

Like the Hospital evaluator, the speech therapist on the RR team appreciated the issues around how the Student's pragmatic language skills deficits contributed to the peer conflicts. The speech therapist's 2014 evaluation provided practical insight into how the Student's social language, problem solving, social interaction skills and abstract language skills deficits impacted peer communications (S#1 p.17). The speech therapist's data added a detailed, thoughtful analysis of how the Student's pragmatic language needs impacted the Student's day-to-day pragmatic language and social skills performance. The speech therapist described in practical terms how and why the Student needs to learn about language based inferences, social cues, idioms, nonverbal communications and abstract phrases. The RR speech and language data provided useful present levels to the IEP team who in turn could develop challenging goals to improve the Student's social and pragmatic language skills deficits. The RR as a whole painted a clear picture of how the Student's pragmatic language skills contributed to peer relationship troubles. The speech therapist, the psychologist, and the teaching staff, acting on the Parents' input, cogently explained how the RR could be used to develop a series of personalized language based goals. Therefore, I find the Student's speech/language evaluation was appropriate and comprehensive.

### **The Assessment of Executive Functioning Was Appropriate**

Building on the Hospital evaluator's concern about the Student's organizational skills, the District's evaluator administered the BRIEF to evaluate the Student's executive functioning skills. The BRIEF assessed the Student's ability to self-monitor, and manage oneself and one's resources needed to achieve a goal (compare S-1 p. 16-17 with S-1 pp. 22-24). The BRIEF assessment added additional insight into how the Student's executive functioning impacted the way the Student learns new skills in the regular education classroom. The BRIEF scores

confirmed the Student had marked difficulties with behavior shifting, attentional shifting and/or cognitive shifting across the home and school environments. The Student's BRIEF profile suggested that changes in the normal routine (*e.g.*, changing classes, or advancing from grade to grade, or fast paced instruction), may produce emotional distress, (*e.g.*, *anxiety*), or foster repetitive inquiries. Under pressure, the Student's executive functioning challenges could adversely affect the Student's ability to predict what will happen next or when an expected or postponed event will occur. The Student's BRIEF profile provided valuable data about what type of SDIs the Student may need in the regular education classroom. The BRIEF testing also helped to create SDIs, otherwise absent, from the Hospital conclusions describing the Student's needs (*i.e.*, "Supports for restricted, stereotyped Behaviors, Interests and Activities." (Compare Hospital report at P-12 p.1 with District Reevaluation at S-1 pp.22-24). The BRIEF testing helped to round out the comprehensive assessment of the Student's needs.

The reevaluation report tracked the applicable regulations, including a direct observation of the Student, a review of supplemental data such as the Student's PSSA results, progress monitoring, and classroom grades. The RR included several easy to read tables describing what each assessment measured, along with a helpful narrative explaining the implications of the Student's scores. In addition to a narrative describing the test results, the reevaluation report also included easy to read charts clarifying the Student's overall performance. The record is preponderant that the team carefully, "reviewed the existing evaluation data," including the Hospital assessment, "collected additional data," as needed, including the Parents' input and supplemented the then current data with a direct observation of the Student.

Contrary to the Parents' protests, the applicable regulations do not require that a particular assessment result, like the Hospital report, trump a comprehensive educational assessment targeting how the Student's disability adversely affects the Student's educational performance. *Cf. Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580*, 259 F. Supp.2d 880, 885 (D. Minn. 2003) ("The fact that the Slamas were not allowed to choose every facet of their daughter's education was not, however, a denial of FAPE ... no parent of a public school child -- whether the child is disabled or not -- is entitled to select every component of the child's education"); *G.K. ex rel. C.B. v. Montgomery Cty. Intermediate Unit*, Civ. A. No. 13-4538, 2015 U.S. Dist. LEXIS 94667, 2015 WL 4395153 (E.D. Pa. July 17, 2015).

The RR team reviewed and gave due weight to the Hospital testing. After giving the Hospital testing due weight, the team supplemented the RR with practical

educational assessments that targeted learning. Accordingly, I find the reevaluation report provided the IEP team, including the Parents, with sufficient data about the nature of the Student's IDEA disability, eligibility, progress, individual circumstances and need for specially-designed instruction. Therefore, I find the District met its burden of proof, the March 2014 RR is appropriate, and the Parents' claim for an IEE is denied.

## **The Multiple School Year FAPE Claims are Denied**

### **The 9<sup>th</sup> and 10<sup>th</sup> Grade IEPs are appropriate**

The disputes about the three school years, 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> grades, covered in two Complaints will be separately analyzed to determine IDEA compliance.

The denial of FAPE complaints require the hearing officer to apply the IDEA, *Rowley-Andrew* FAPE rule. As for the "Settlement and Release Agreements" the Commonwealth Court directed this hearing officer to decide "... despite the Waiver Agreement, [if] other arrangements for Student were required by the law." *West Chester Area Sch. Dist. v. A.M.*, 164 A.3d 633 (Pa. Commw. Ct. 2017).

Applying the *Rowley/Andrew* FAPE standard, I find that the 9<sup>th</sup> grade, 10<sup>th</sup> grade and 11<sup>th</sup> grade IEPs when offered and implemented provided the Student a FAPE. As for the Commonwealth Court's direction about the "Settlement and Release" agreements, I find that no other legal arrangements were required by law. Consistent with the IDEA requirements, after entering into the "Settlement and Release Agreements" or the "Course Placement Waiver Agreements," the District continued to meet with the Parents about the Student's needs. After each meeting, the Parents made a knowing, voluntary choice about what they would or would not consent to regarding the provision of the Student's FAPE. Each IEP offered and implemented after the "Settlement and Release" agreement" and/or the "Course Waiver Agreement," was implemented and progress monitored. Consistent with the IDEA and the binding agreements, for all of the reasons set forth below, I find, at all times relevant that the District complied with the substantive and procedural requirements of the IDEA; accordingly, no other arrangements were required by law. Therefore, for the following reasons the Parents' denial of FAPE claims, requests for reimbursement and other appropriate relief for the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> grade school years are denied.

### **The 9<sup>th</sup> Grade IEP provided the Student with a FAPE**

The Parties met on multiple occasions to develop the 9th grade IEP. The first IEP meeting of April 2014, was followed by a second IEP of May 29, 2014. The IEP meetings were properly noticed and the notices were legally sufficient. The IEP notes the Parents acknowledged receipt of their procedural safeguards.

The 9th grade IEP is 53 pages long and includes benchmark data going as far back as May 2013. The summary of the existing data was written in an easy to read fashion. (P-6 pp.7-17). The IEP clearly described the Student's participation in regular education and special education. The IEP included updated present levels including curriculum-based assessments, measurable goals, detailed program modifications and 31 different forms of specially-designed instruction. The narrative portion of present levels included anecdotal reports about the Student's speech/language progress along with specific notations that the Student still needed to improve peer communication skills. The classroom teachers provided a short statement describing the Student's social and academic skills in the regular education classroom. In addition to the benchmark data, the progress monitoring and summary of the then current grade level test scores and curriculum based assessments was provided. The IEP included individualized academic, speech/language, social skills and communication goals; at times the goals were intertwined, and they were appropriate. To ensure the goals were met the IEP included related services and supports (P-6).

While not dispositive, the present levels and the progress monitoring data notes the Student earned passing grades in all regular education subjects. The progress monitoring updates note how the Student was making meaningful progress on the academic, speech, and social goals. The progress monitoring schedule clearly defined how and when progress would be assessed, reviewed and reported to the Parents. This combination of various forms of assessment data in conjunction with the progress monitoring provided the Parents with a clear picture of the Student's actual level of progress, expected levels of progress, involvement in regular education curriculum and specially-designed instruction.

For the 9<sup>th</sup> grade school year, the IEP was reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. The present levels and the measurable goals, in combination, objectively stated the Student's expected progress in all areas of suspected disability, needs and circumstances. The SDI's and related services provided the supports necessary for Student to made progress on the goals. Moreover, the report card grades in combination with the progress

monitoring data clearly support a finding that Student made ongoing, meaningful progress.<sup>9</sup>

Therefore, I find the Parents did not meet their burden of proof for their assertions that the 9th grade IEP, the specially-designed instruction, the goals or the extent of participation in regular education did not meet the IDEA FAPE standards. The Parents' denial of FAPE claim and claim for reimbursement for 9<sup>th</sup> grade is denied.

### **The 10<sup>th</sup> Grade IEP provided the Student with a FAPE**

The Parents make multiple challenges to the appropriateness of the 10<sup>th</sup> grade IEP. First, they contend, the District erred when the team refused to include SDIs that would have allowed the Student to participate and play on the [sport] team. Second, they contend the fact that the Student did not pass Honors Chemistry is evidence of a denial of a FAPE. Third, they contend the Student was bullied and that too caused a denial of a FAPE. Fourth, they make broad generalizations that the IEP lacks SDIs to address anxiety and social skills. For the following reasons, each argument is rejected.

The 10<sup>th</sup> grade IEP is 58 pages long and contains 5 measurable goals. The first goal addresses organizational skills, while the other 4 goals target social skills and/or pragmatic language skills. Each of the goals is associated with prescriptive, descriptive and measurable present levels of performance. The present levels include teacher input, detail the then current school year grades, results of the quarterly progress monitoring, benchmarks, statewide test results, achievement testing, updated speech/language data, social skills data, executive functioning data, and the Parents' Hospital data.

The IEP includes a post-secondary transition goal, along with 22 suggested services/activities to support the Student in reaching the transition goal. The transition goal calls for the Student to attend college. Based on a review of the existing data, the transition goal and the other IEP goals were challenging and reasonably calculated, when presented to the Parents, to enable the Student to make meaningful progress. The IEP contains 42 different individualized forms of specially-designed instruction. The IEP includes a clear and concise description of the Student's participation in regular and special education throughout the school

---

<sup>9</sup> When viewed in light of a student's potential and individual circumstances grades can be a factor indicating a student's receipt of FAPE. *See, Falzett v. Pocono Mountain Sch. Dist.*, 44 IDELR 121 (3d Cir. 2005, *unpublished*) (holding that a student's A average and above-average scores on the Secondary School Admission Test showed that district offered FAPE).

day. The ambitious goals were measurable, the present levels were clear and the SDIs addressed the Student's unique needs and circumstances. The IEP included a clear schedule for measuring and reporting progress to the Parents. Therefore, applying the IDEA, *Rowley*, *Endrew* and *Fuhrmann* I find the IEP when offered provided the Student with a FAPE.

### **Participation in [Sport] is not an IDEA FAPE Circumstance**

At the conclusion of the 9<sup>th</sup> grade to 10<sup>th</sup> grade IEP conference, the Parents agreed to the Student's placement, the goals and the extent of participation in the regular education school day, *i.e.*, the 10<sup>th</sup> grade class schedule. However, when presented with the NOREP, the Parents disagreed with the District's refusal to include specially-designed instruction that would enable the Student to participate and play [sport] on the high school [sport] team (P-6 p.18, S-2 p.57). Absent the [sport] related SDI the Parents rejected the NOREP and asked for a meeting. The Parents' denial of FAPE argument based upon the Student's participation on the [sport] team misses the mark.

The IDEA's equal opportunity to participate in nonacademic extracurricular requirement(s) does not mean that a student with a disability is automatically entitled to participate, with or without SDIs, in a competitive team sport. The 10<sup>th</sup> grade 2015 IEP team met in April 2015, June 2015, and September 2015 to discuss the Parents' request to include a [sport] related goal or SDI. After reviewing the Hospital report, the RR, the progress monitoring and the Student's 9<sup>th</sup> grade fall 2014 and spring 2015 [sport] workout data sheets the District members of the team did not identify a unique need for or recommend any [sport] related nonacademic SDI's or goals. The Parents misread the IDEA's nonacademic and extracurricular participation regulations. *In re: Dear Colleague Letter of January 25, 2013*, 62 IDELR 185 (OCR 2013) the Office of Civil Rights (OCR), interpreting the IDEA nonacademic and extracurricular regulations, advised districts that the IDEA participation requirement "does not mean every student with a disability has the right to be on an athletic team, and it does not mean that school districts must create separate or different activities just for students with disabilities." OCR advised districts that they may require a certain level of skill or ability in order for all students to participate in a selective or competitive extracurricular program. That said, they also advised districts that the selection or competition criteria, must not otherwise exclude students with disabilities or otherwise limit a student's extent of participation. *See, Blissfield (MI) Cmty. Schs.*, 62 IDELR 95 (OCR 2013); 34 CFR 300.107 (While the IDEA does not require districts to provide nonacademic services and extracurricular activities to

students with disabilities, districts are required to take the steps necessary to afford students an equal opportunity for participation in these activities. 71 Fed. Reg. 46,583 (2006).).

The testimony from the District staff about how the team reviewed the Parents' [sport] SDI request is clear, convincing and cogent. During 9<sup>th</sup> grade, the Student, along with 69 other peers, participated in the Fall and Spring [sport] workouts. Player selection criteria was based upon objective rating criteria. The coach gave each player a score of 1-to-10 on five (5) different [sport] related athletic skill sets. The player rating criteria also included a timed distance sprint/run assessment. Out of a possible score of 50 points, on the five (5) different athletic skill sets, the Student earned a low score of 17. The Student's run test score of 8.18 seconds was the slowest of all the 9<sup>th</sup> graders. The player rating data sheets were reviewed by the IEP team and shared with the Parents. At the hearing, the Parents did not challenge the Student's ratings, the competitive selection criteria or the run test results. After a careful and thoughtful review of the record, I find the evidence is preponderant: the Student did not meet the competitive selection criteria applied to all other nondisabled teammates. Simply stated, the Parents did not meet their burden of proof that participation on the [sport] team was a unique need or FAPE related individual circumstance.

I find the IEP team correctly determined that the Student's unique needs could be met within the four corners of the proposed and implemented IEP. When the Student was not selected to be on the [sport] team, the IEP team gave due weight to the request, reviewed the existing data and suggested a viable non-FAPE related option, encouraging the Student to participate in activities that did not require a selective/competitive try-out process. Without hesitation, the Parents flat out rejected the suggestion that the Student participate in any alternatives suggested by the IEP team.

Accordingly, absent evidence of a need or FAPE related individual circumstance the refusal to include a nonacademic extracurricular SDI or a [sport] participation goal, under these facts, was not a denial of FAPE. The Parents' denial of FAPE claim and request for reimbursement is denied.

### **Failing Honors Chemistry is not a Denial of FAPE**

Next, the Parents take the position that the failure to pass Honors Chemistry is tantamount to a denial of FAPE. This contention is an incorrect statement of the IDEA, the applicable regulations and existing case law.

As the school year progressed and when the Student could not keep up, the Parties met on multiple occasions to review the then existing data. When the Parents rejected the District proposal to transfer into college level chemistry, they executed a “Settlement and Release Agreement.” Throughout 10<sup>th</sup> grade, the District made a good faith attempt to use the IEP process as the primary vehicle to offer a FAPE. The Parents, on the other hand, attempted to use the IEP process as leverage, to obtain the guarantee of a passing grade in several honors classes. After waiving the Student’s regular education rights some eight months (8) earlier when they placed the Student in the honors classes, and after waiving the Student’s FAPE rights again in December 2015 (see S-5 “Settlement and Release” and S-14 “Course Waiver Agreement”), and then after getting what they wanted, *i.e.* enrollment in honors classes, they cannot now point the finger at the District claiming a denial of a FAPE. The Parents’ alternative arguments, coercion, unfairness or failure to follow the IDEA, under these facts, are also rejected.

As discussed above, the record for this school year is preponderant: the 10<sup>th</sup> grade IEP was appropriate. Despite the failing Honors Chemistry grade, the Student made meaningful educational progress on all of the IEP goals. The record is also preponderant that despite the Agreement, as far as they were permitted, the regular and special education staff implemented the specially-designed instruction in all of the regular education classes. The teachers stayed after school, extra time was added to allow the Student to complete the tests and the District made sure the Student had a peer tutor. All of these services were either part of the existing IEP or add-ons after the “Settlement and Release” agreement. Modifications were made, the agreed upon goals were pursued, and the progress monitoring tracked the Student’s growth; but for not passing the disputed honors class, the Student advanced from grade to grade.

The “Settlement and Release” agreement provided that the Parents could void the “Agreement,” at any time, after which the District with open arms, would allow the Student to take the college level classes along with a special education study skills class. The Parents failed to offer any cogent testimony why, when they knew the failing grades were imminent, they did not reconsider their unilateral decision. The Parents also failed to offer any convincing testimony why participation in the honors classes was a FAPE related circumstance. It was the Parents’, not the District’s, refusal to collaborate in revising the IEP that predetermined the eventual outcome here. Curiously, the Parents never explained why they rejected the IEP team members’ advice about the benefits of participation in the college level classes versus the benefits of participating in the honors classes. The Parents never

presented any persuasive evidence that the Student's failing grade was related to the Student's disabilities. Assuming *arguendo*, the Parents' "something" more could have been done argument is plausible, the Parents were never clear as to what the "something" was. As for the one demand to modify the content, scope and length of the Chemistry testing rubric, the record is preponderant that the request was outside the SDI boundaries.

The chemistry teacher's testimony that cogently addressed why the Parents' suggested modifications to the Honors Chemistry testing rubric was not an offer of FAPE is persuasive. If the District followed the Parents' suggestion, they would have transformed the Honors Chemistry grading rubric into the college level chemistry standards. Specially-designed instruction means "adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery of instruction to address the **unique needs of a child that results from the child's disability**; and to ensure access of the child to the general curriculum." 34 CFR §300.39(emphasis added). The Parents never offered any testimony that the troubles in the honors class were related to the lack of an SDI or goal statement. In fact, the Parents' proposal would have made a farce of the District wide assessment honors level curriculum standards and grading scheme. On its face, the Parents' request would not have provided the Student with access to the Honors Chemistry curriculum. The teacher concisely explained that, in Honors Chemistry, the Students are required to solve multiple three to four (4) step problems to arrive at the correct answer, while in college level chemistry, the Students are expected to solve one or two step problems before they arrive at the answer. The Parents' request would have turned the concept of specially designed instruction on its head. In essence, while the Parents would not allow the Student to take college level chemistry, they wanted the Honors Chemistry teacher to assess the Student using a college level assessment rubric and then give the Student an Honors Chemistry grade. This type of request is not a FAPE circumstance. When viewed as a whole the Parents' strategy would not have provided the Student with equal access to the honors level curriculum.

The Parents confuse the IDEA requirement that the IEP is reasonably calculated to achieve meaningful benefit with a guarantee of mastery in all classes. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180 (3d Cir. 1988) (IDEA promise of meaningful progress is not tantamount to a requirement that the child actually shows educational improvement as a result of the educational program). An IEP is not judged by an after-the-fact review of a child's performance, augmented with the benefit of hindsight. An IEP must be viewed through the lens of what was known at the time it was created. "[A]n

individualized education program ("IEP") is a snapshot, not a retrospective. In striving for “appropriateness” an IEP must “take into account what was, and was not objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” *Fuhrmann on Behalf of Fuhrmann v. E. Hanover Bd. Of Educ.*, 993 F .2d 1031, 1041 (3d Cir. 1993) (citations omitted).

While it is true that an IEP must be formulated with the expectation that it will confer meaningful benefit, an IEP is not a guarantee. *Polk*, 853 F .2d at 180. Contrary to the Parents’ understanding of *Rowley*, *Endrew*, *Polk* and *Fuhrmann*, not passing Honors Chemistry, under these facts, is not a denial of FAPE.

To remediate the Student’s growing regular education problems, the IEP team offered and the Parents refused to move the Student to the college level classes and, at the same time, provide the Student with a special education study skills class (S-5 pp.1-3). Despite the actual knowledge that that the Student was failing, the Parents flat-out rejected the IEP team’s proposal (S-5 pp.49-53). It was after reaching that impasse, in December 2015, that the District proposed, and the Parents agreed, to the terms of the “Agreement and Release.”

Therefore, the evidence is preponderant that the IEPs offered and implemented, despite the “Settlement Agreement and Release” were appropriate when offered and implemented. The Parents’ argument that not passing Honors Chemistry is a denial of FAPE is rejected. The Parents’ request for reimbursement is denied.<sup>10</sup>

### **Despite the Multiple Settlement Agreements the Student received a FAPE**

Despite the multiple “Agreements,” the Parents’ denial of FAPE claim in the regular education honors classroom is denied. In the Spring of 9<sup>th</sup> grade, like all other 9<sup>th</sup> grade students, the Student met with the guidance counselor to set up the 10<sup>th</sup> grade class schedule. During the meeting, they reviewed the 9<sup>th</sup> grade teachers’ suggestion for 10<sup>th</sup> grade classes. The 9<sup>th</sup> grade science teacher recommended the Student take Honors Chemistry, while the 9<sup>th</sup> grade English teacher recommended College Level English (S-16 p.14, N.T. 545). When the Parents reviewed the proposed 10<sup>th</sup> grade schedule of classes, they rejected the English teacher’s

---

<sup>10</sup> The IDEA mandates an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). An appropriate program is one that is “reasonably calculated” to provide the child with “significant learning and meaningful benefit.” *Ridgewood Board of Education. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

recommendations. Consistent with District's regular education policy, when parents disagree with the staff they can ask for and receive a regular education "Course Waiver Agreement."

A "Course Waiver Agreement" allows parents to override the teachers' course recommendations and permits the parents to select alternative classes unilaterally. The "Course Waiver Agreement" in pertinent part provides that the parents have "carefully consider[ed]" the suggested class with the full understanding that [their] child did not meet the criteria for the particular class" (S-10 p. 10 and p.14). Then the "Course Waiver Agreement," in pertinent part provides, that "the parents understand and accept full responsibility to provide [their] child with any support or remediation that may be needed to ensure his/her success in this course." (S-16 p.10 and p.14).

On or about April 17, 2014, believing that the Student could handle the work, the Parents executed a "Course Waiver Agreement." Without any input from the IEP team, the Parents unilaterally placed the Student for 10<sup>th</sup> grade in Western World Honors History, Honors Chemistry, Honors Geometry, Honors English and [Foreign Language]. In executing the "Course Waiver Agreement," the Parents made a knowing, voluntary and intelligent decision, contrary to the teachers' recommendations when they selected the classes and executed the regular education "Course Waiver Agreement." When the Parents voluntarily executed the "Course Waiver Agreement," as a matter of law, they relieved the District from any further duty to provide prospective supplemental aids, SDIs or modifications in Honors classes beyond the four corners of the "Course Waiver Agreement."

The Parents' unilateral selection of the honors classes eventually created a host of IEP disputes. When the progress monitoring identified problems in the honors classes, the Parents wanted a series of SDI updates that would have modified the honors classes grading rubric such that the Student would no longer be taking honors classes. The District, on the other hand, wanted to revise the SDIs and place the Student in college level academic classes and provide a targeted study skills class with the special education teacher.

To resolve the stalemate over the Parents' refusal to modify the pendent IEP, the Parties entered into a "Settlement and Release Agreement" which among other things allowed the Student to stay in the honors classes with the existing SDIs; which in turn, when the Student did not get passing grades, fostered further IEP disputes. Curiously, the Parents never explained why, although they contend they were forced into entering into the "Settlement and Release Agreement," they

repeated the same waiver process on multiple occasions in the 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> grade years. The Parents never explained why, when the Student was failing the honors classes, they waited so long to file the due process complaints. And the Parents never persuasively explained why, absent the requested SDI changes, how the Student's difficulty in honors classes was related to the Student's disability, or a denial of FAPE. The Parents never connected the pacing, grading or scope of the curriculum problems, in the honors classes, to the Student's needs, disability or individual circumstances. But for the failing grade, the Student passed all of the other classes and made steady gains on the IEP goals. Even though the Student did not pass the honors class the progress monitoring on the goals showed steady upward progress. As stated above, an IEP is not a guarantee. When the Parents flat out rejected the IEP team's offer to rethink the Student's schedule, they predetermined the outcome; that position is inconsistent with IEP development practices. IEP teams first write goals, develop SDIs and then make a placement. The Parents inverted the practice when they insisted on the honors class placement first. Even though the Student did not pass, that fact in and of itself is not a *per se* violation of the IDEA. When viewed as a whole, in light of the Parents' unilateral placement decision, the IEP when offered was reasonably calculated to provide a FAPE. For all of the reasons stated above, despite the Agreement and the failing grade, the Student received a FAPE. Accordingly, despite the failing grade and the "Settlement and Release Agreement" the District was not required by law to make any other arrangements,

### **The Terms of the "Agreement and Release"**

Rather than continue to work on modifying the pendent IEP, the Parties entered into a "Settlement and Release" agreement. This second agreement, in pertinent part, provided as follows: the Parents agreed to waive all retrospective and prospective special education and regular education claims against the District for failing to implement and or revise the pendent program, SDIs and IEP goals (S-5 p.2). The "Agreement and Release" did, however, permit the Parents to file a claim to enforce the "Settlement and Release" or file a claim if the District did not implement the last agreed upon pendent IEP (S-5 p.2 paragraph 3). Following the four corners of the "Course Waiver Agreement," and the "Settlement and Release" agreement the Parents were on their own to support the Student; however, the "Settlement and Release" agreement provided that the Parents could at any time, walk away from the agreement and place the Student in the college level course and study skills class recommended by the IEP team.

After the “Settlement and Release” went into effect, the regular and special education teachers continued to implement all of the SDIs, and provide updated progress monitoring on all of the pendent IEP goals. For example, two to three times a week, the special education teacher and the chemistry teacher would meet with the Student during the day and even after school. Regrettably, on several occasions, although the chemistry teacher and the special education teacher stayed after school, the Student was a no show. When the 10<sup>th</sup> grade year ended, the Student failed Honors Chemistry with a 62 and with the extra support of the special education teacher, beyond that provided for in the IEP, passed Honors English with a 70. The evidence is preponderant that the District implemented the last agreed upon IEP and then some. It is black letter law that while an IEP is not a guarantee of progress, it is a guarantee that the District will implement the last agreed upon IEP. The District did just that and more. After hearing all of the testimony, the evidence is preponderant: the teachers wanted the Student to succeed, however, their best efforts were constrained.

Despite the agreements, the April 2014 and the December 2014 IEPs, prior to and after the “Settlement Agreement” in conjunction with the “Course Waiver Agreement” offered the Student FAPE. I reach this conclusion based upon the analysis described above that the implemented IEP provided a FAPE. While the District could have requested a due process hearing to press the FAPE issue, in December, as a matter of law, once the Parents executed the “Settlement Agreement and Waiver,” the District was not legally required to act. Substantial and preponderant evidence supports this finding.

As required by law, the District appropriately prepared and offered an IEP. The offered and implemented IEPs included measurable goals, along with an objective means of measuring progress in the special education and regular education classroom. 34 C.F.R. § 300.320(a)(3). Contrary to the Parents’ argument, the IDEA does not require that a school district maximize a student's potential or provide the best possible education. Rather, the statutory obligation is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203 (1982). The agreed upon IEPs provided the Student with "meaningful" access to a FAPE. *Id.* at 192, 200, 207-208.

But for the testimony in this matter that was reviewed by the Commonwealth Court, the Parents did not offer any additional evidence that they were coerced into signing either agreement. Therefore, after hearing all of the testimony and after

reviewing all of the exhibits, applying a fine-grained factual analysis, I find the Parents were not coerced or pressured into entering into either of the agreements.

Accordingly, I find, that despite the “Settlement and Release” and the “Course Waiver Agreement” the District provided the Student a FAPE when it continued to implement the last agreed upon IEP. The Parents’ claim for reimbursement is denied.

### **The 11<sup>th</sup> grade IEP is Appropriate**

As in 10<sup>th</sup> grade, the Parents executed a “Course Placement Waiver Agreement” which resulted in the Student taking the following classes in 11<sup>th</sup> grade: Sports Physical Education, Honors [Foreign Language], Honors English, Honors Earth Space Science, Honors American History, Honors Algebra 2, Concert Band and Choir. Also, as in 10<sup>th</sup> grade, the Parents repeat the bullying, anxiety and general denial of FAPE contentions for 11<sup>th</sup> grade, however, expanding the claims to cover the Student’s failure to pass Honors Earth Space Science, Honors English and Honors Algebra 2. Each argument is rejected.

The 11<sup>th</sup> grade IEP is 49 pages long and contains 2 measurable goals. The goals target social skills and/or pragmatic language skills and executive functioning/organizational skills (S-6 pp.30-36). Each of the goals is linked to measurable present levels of performance. The present levels include teacher input, detail the then current school year grades, results of the quarterly progress monitoring, benchmarks, statewide test results, achievement testing, updated speech and language data, social skills data, executive functioning data, and the Parents’ Hospital data (S-6 pp.10-23). The present levels note the Student’s strengths and weaknesses (S-6 p.22-24).

The IEP includes a post-secondary goal, along with 16 suggested services/activities to support the Student in reaching the transition goal. The transition goal calls for the Student to attend college (S-6 pp.26-28). The IEP contains 37 different individualized forms of specially-designed instruction (S-6 pp.39-44). The IEP includes a clear and concise description of the Student’s participation in regular and special education throughout the school day.

The IEP included a clear schedule for measuring and reporting progress to the Parents. The goals, related services, supports and the SDI’s were linked to the RR findings and were appropriate to the Student’s then known needs and FAPE related circumstances (N.T.2010-2015). The speech therapist cogently explained how she

began working with the Student and how she recorded the Student's progress over time (N.T. pp.1918-1927). The speech therapist explained how she would observe the Student during speech therapy and at various times throughout the day in structured and unstructured settings (N.T. 1920-1926). The speech therapist discussed how she and the special education teacher would share data about how the Student used various speech strategies in social situations. The speech therapist gave specific examples of how the Student would effectively use the strategies in social situations. The speech therapist had a specific recollection of the Student discussing two or three negative peer interactions (N.T. 1926-1928). All in all, she explained that the negative interactions provided the Student, with a "teachable" moment to apply the skills in real time. At no time did she think the negative peer interactions were interfering with the Student's FAPE.

Based on a review of the existing speech/language data, I now find the transition goal and the other IEP goals were ambitious, challenging and reasonably calculated when presented to the Parents. I also find the IEP when implemented enabled the Student to make meaningful progress. On their face, the IEP, the NOREP and the procedural safeguards complied with the applicable IDEA regulations. The ambitious goals were measurable, the present levels were clear and the SDIs addressed the Student's unique needs and circumstances.

Therefore, applying the IDEA, *Rowley*, *Endrew* and *Fuhrmann* I find the IEP when offered provided the Student with a FAPE. As for the contentions that the failing honors class grades are a denial of FAPE, despite the "Waiver Agreement and Release" the team implemented the IEP as drafted; therefore, as I found for 10<sup>th</sup> grade, I find as a matter of law the District was not required to do anything more to provide a FAPE in 11<sup>th</sup> grade.

### **FAPE and the Waiver and Release Agreement**

As in 10<sup>th</sup> grade, I find the Parties in 11<sup>th</sup> grade reached an enforceable "Waiver and Release Agreement." After reaching a settlement in November 2015, about the Student's grades and placement in the multiple 11<sup>th</sup> grade honors classes, the Parties once again executed a "Waiver Agreement and Release" agreement (S-6). But for a change in the title of the agreement the terms, conditions, promises, opt out provision and enforcement provisions are essentially identical to those of the previous year. The Parents could terminate the Agreement at any time, after which the Student would transfer from honors classes to college level classes (S-6 p.1). The 11<sup>th</sup> grade agreement added the additional support of allowing the Student to

have a check-in period with the special education teacher 3 days per 5 day cycle (S-6 p.1). This provision is evidence that the terms and conditions were bargained and are the opposite of coercion.

The Parents did not put on any convincing testimony that they were coerced into signing the 11<sup>th</sup> grade “Waiver Agreement.” Therefore, absent preponderant evidence, the “Waiver Agreement” is an enforceable contract in a court of competent jurisdiction. As discussed above, the 11<sup>th</sup> grade IEP before and after the Parties executed the “Waiver Agreement” was appropriate, therefore, consistent with *Rowley and Endrew* for all of the reasons above, despite the “Waiver Agreement” the District offered the Student a FAPE. The Parents’ FAPE and reimbursement claims are denied.

### **The 2017 Reevaluation Report is Appropriate**

An IDEA reevaluation provides the Parents, the Student and the IEP team the opportunity to review the existing data and complete standardized testing to determine if the Student is still IDEA eligible. The testing also figures into a determination of the Student’s needs, progress and individual circumstances. The District’s 2017 RR team reviewed, prioritized and included new up to date data from a variety of “valid” standardized tests and the data from the Hospital evaluation. The 2017 RR incorporated the information about the Student’s anxiety, autism, social, speech/language and communication skills deficits. The 2017 RR included new ability testing, achievement testing, speech/language testing and an assessment of the Student’s executive functioning and social skills deficits.

The RR includes an easy to read table that lays out the Student’s grades, number of credits needed to graduate, anecdotal teacher reports, progress monitoring updates on the goals, and Parent input, along with a direct observation of the Student in the classroom.

The WAIS IV ability testing notes a Full Scale IQ of 101. The evaluator notes that due to variances in the indices that combined to formulate the Full Scale IQ, the testing may well be an understatement of the Student’s ability. The Student’s Reading, Math, Written Language and Academic Skills Battery achievement SS ranged from 96 to 105. All the scores are in the solid “Average” range. The Student’s ability testing is higher than the previous testing. Like the previous achievement and ability testing, in 2014, the Student’s scores fall in the consistently “Average” range; these two facts when coupled together indicate the Student is making meaningful progress.

The evaluator used the BASC-3 and the Beck Youth Inventories to assess the Student's emotional and behavioral control, along with the Student's level of depression, anxiety, anger, disruptive behavior and self-concept. On the BASC-3, the Student's scores on the School Problems examines the Student's attention problems and learning problems. Both teachers rated the Student's attention and learning problems as "At-Risk." The Student's Attitude Towards School T Score of 45 indicates the Student enjoys school about as much as the Student's peers. The Student's Attitudes Towards Teachers T Score is similar to the Student's peers'. Contrary to the Parents' contention, the BASC T Scores do not indicate that negative peer interactions are affecting the Student's progress or FAPE. While the Beck Inventory scores and some of the BASC 3 scores indicate continuing social skills need, the scores are not so low as to conclude the Student is not making progress in the targeted areas.

The speech/language evaluator used multiple tests to assess the Student's speech/language skills. A review of the SS indicates the Student is scoring in the "Average" range. The Parents never introduced any testimony challenging the selection of the test protocols, the scoring of the test protocols, or that the testing failed to determine the Student's disabilities or the Student's need for specially designed instruction.

A parent "cannot simply argue that the evaluation is inappropriate because they disagree with its findings. The key is whether the evaluation is a comprehensive evaluation in all areas of unique need. The reevaluation team's conclusions, or lack thereof, cannot be inadequate unless the overall assessment fails to assess a suspected disability, needs and FAPE related circumstance. *See, L.S. ex rel. K.S. v. Abington Sch. Dist.*, No. 06-5172, 2007 WL 2851268, at \*12 (E.D. Pa. Sept. 28, 2007).

Multiple teachers, the Student and the Parents provided input into the development of the RR. The RR included observations in both the classroom and the speech therapy settings. Consistent with the applicable regulations the District utilized a variety of "valid" "technically sound" assessment tools. The assessments were administered by three or more well-qualified and knowledgeable professionals holding advanced degrees and years of practical experience over the course of several days.

The Student's ability, achievement, knowledge base, executive functioning skills, communication skills, social, behavioral and emotional skills and circumstances

were thoroughly assessed. The Parents did not present any evidence challenging the testing, the data or the conclusions. Consequently, I find the 2017 RR was a comprehensive and appropriate assessment of the Student's unique needs, disability and FAPE related circumstances. Of note, the increase in the SS from a WISC full scale IQ of 78, in 2006, in the Borderline range of functioning (S-1 p.3) to the current WAIS IV Average range score of 101 is a significant upward trend (S-1 vs. S-20). Accordingly, I find the District met its burden of proof in clearly establishing that the 2017 RR is a comprehensive assessment in all areas of unique needs and circumstances. Therefore, for all of the reasons set forth herein, the Parents' request for an IEE is denied.

### **The Negative Peer Interactions and the Bullying Allegations**

Although each year the Student experienced some form of peer conflicts, after reviewing the grades, the progress monitoring, the RRs and the discipline logs, the Parents did not establish that the conflicts interfered with the Student's FAPE. Furthermore, the Parents never established that the conflicts were severe, pervasive or ongoing. On several occasions, the Student instigated the conflicts. When questioned, the Student, contrary to the Parents' testimony, down-played the severity, frequency and intensity of the negative peer conflicts. The Parents never explained the discrepancy between the Student's testimony and their testimony about the frequency, intensity and nature of the conflicts. Even assuming *arguendo*, bullying did occur, the results of the 2014 and 2017 RR contradict the Parents' contentions regarding denial of FAPE. Across the board the Student's academic, language and social SS improved.

The RR testing does not establish any linkage between the Student's failing grades, the IEP progress monitoring and the peer conflicts. When the District was made aware of the conflicts, the assistant principal investigated the complaints, and talked to the Student and the staff. While the staff monitored the Student's interactions, the speech therapist, the special education teacher and the regular education staff worked with the Student to develop, practice and apply pragmatic language skills to better understand the peer and adult interactions. Accordingly, I find to the extent that the negative peer interactions occurred the District responded appropriately. The IEP team met and adjusted the Student's language/social skills goals. Although conflicts occurred, the Student's progress monitoring indicated steady speech and language gains. Therefore, the Parents' bullying claims are rejected.

## Conclusions of Law

In making fine-grained credibility determinations, factual findings and conclusions of law I have applied the specialized knowledge, factors and experiences necessary to resolve the persistent and difficult questions about the District's offer of FAPE, the District's provision of FAPE and whether the specially-designed instruction was reasonably calculated to provide the Student with meaningful benefit as described and expected of an independent hearing officer charged with rendering an Order as set forth at 20 U.S.C. §1439(a)(1) and the applicable case law.

1. The phrase "Settlement and Release" or "Waiver Agreement and Release" (collectively referred to as "Agreements") as used here interchangeably, is a specific reference to a meeting of the minds wherein the Parties contractually agreed to the content of the Student's then current IEP(s), specially-designed instruction, placement and extent of the Student's participation in regular education, for each school year they entered into an "Agreement."
2. In executing the "Settlement and Release" or "Waiver Agreement and Release" documents, each year at issue, the Parents rejected the District's offer of a FAPE and instead elected to maintain the Student's enrollment in a series of regular education honors classes, with specially-designed instruction, different from the IEP specifically-designed instruction the had District suggested at the time they entered into each "Settlement and Release."
3. In each of the three school years at issue, as stated herein I now find the Parties entered into a series of otherwise enforceable "Agreements." I further find the Parents were not coerced at any time when they entered into the "Settlement and Release Agreements" or the "Waiver Agreement and Releases." The terms, conditions and the relevant promises are plainly described in each "Agreement."
4. The term "Course Placement Waiver Agreement" connotes another series of otherwise enforceable "Agreements" between the Parties wherein the Parents rejected the recommendations of the regular education teachers and the regular education guidance counselor about the selection of what regular education classes the Student would take each year.

5. In executing the “Course Waiver Agreements,” the Parents also accepted full responsibility to provide whatever support(s) the Student needed to participate in the regular education honors classes.
6. At various times during the course of the Student’s high school years, the Parties also participated in IDEA sponsored mediation sessions, which resulted in several “Mediation Agreements.” The Mediation agreements were not part of this case record.
7. Each time the Parents executed a NOREP, IEP, Permission to Evaluate, or entered into a “Settlement and Release Agreement” or “Course Placement Waiver Agreement” they did so knowing full well the consequences of accepting or rejecting the teachers’, the guidance counselor’s and IEP team members’ recommendations about the Student’s needs, circumstances and participation in the regular education curriculum.
8. The District investigated, responded to and revised the Student’s IEP, as needed, each school year to address the Student’s episodic negative peer interactions.
9. Each school year, to the extent the student was involved in negative peer interactions, those episodic peer-on-peer flare-ups did not interfere with the Student’s FAPE.
10. In 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> grades, the District offered and provided the Student with a FAPE.
11. The evaluation team and the IEP team gave due weight and consideration to the Parents’ input and the Hospital reports.
12. The Student’s 2014 and 2017 reevaluations are a complete and comprehensive evaluation of the Student in all areas of suspected disability, needs and circumstances.

While the Parents have genuine concerns about the Student’s education, behavioral health and future, each time they approached the administrative staff, the IEP team and/or the District evaluators they steadfastly predetermined the outcome of each encounter. Despite the Parents’ predetermination, and at times arguable

interference in the IDEA FAPE-IEP process, the District provided the Student with a FAPE.

### **Order**

And now this July 31, 2018, the Parents' denial of FAPE claims spanning from 8th to 11th grades are denied. The Parents' two requests for an IEE are denied. The Notice of Appeal Rights is attached to this Decision.

Charles W. Jelley, Esq. LL.M  
Charles W. Jelley, Esq. LL.M  
Hearing Officer

Date July 30, 2018