

STATE OF VERMONT  
AGENCY OF EDUCATION

Special Education

Due Process Hearing

Case DP # 21-01 (E.P.)

**ORDER**

**INTRODUCTION**

A special education due process hearing request was filed by the Parents in this matter on August 10, 2020. The Parents were represented by Attorney, Ed Adrian. The District was represented by Attorney, Dina Atwood. An initial conference call was held on August 15, 2020. A Motion to Compel, a Motion to Amend, and a Motion to Extend Time (the Motions) were submitted by the Parents' legal counsel on September 14, 2020. The District filed a response to the motions on September 17, 2020. The Hearing Officer ruled in favor of the Parents' Motion to Amend on September 27, 2020. Thereafter, an amended due process complaint was filed in this matter on September 30, 2020. A hearing was held on November 3, 4, and 5, 2020 and November 10, 2020. The hearing was held remotely via Zoom, due to the COVID-19 pandemic.

**ISSUES**

As determined in the Prehearing Conference, held on October 30, 2020, the issues in this case are:

- A. Eligibility and Evaluation – Whether Student was appropriately evaluated and made eligible for special education services during the 2018-2019, 2019-2020, and 2020-2021 school years.
- B. Free Appropriate Public Education (FAPE) – Whether the Student received a FAPE from the District from September 30, 2018 through the fall of 2020.
- C. Least Restrictive Environment (LRE) – Whether a residential school setting is appropriate for the Student based on information obtained in the Independent Education Evaluation (IEE) or are the Student's needs met by the District in a local environment.

**FINDINGS OF FACT**

- 1) The Student is in the care of her grandparents (the Parent or Parents)<sup>1</sup>. They reside in the District.
- 2) Student is currently in the eighth grade at the Elementary School (the School) located in the District (District or District A) but is taking courses virtually, due to the COVID-19 pandemic.

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<sup>1</sup> The IDEA's definition of a "parent" is expansive and includes grandparents. See 34 CFR § 300.30(a).

- 3) The District is a member school District of the Supervisory Union (the Supervisory Union).
- 4) Student attended the school in District B from fifth-grade until the end of her seventh-grade year. District B is in the same Supervisory Union as District A. (LEA FOF 20 and 21).
- 5) Student is a qualified student with a disability who is eligible for an Individualized Education Plan ("IEP") and special education services. The Student has received special education services since kindergarten, and she previously resided in Massachusetts and attended Massachusetts' public schools.
- 6) The documents submitted by both the Parents and District indicate that the Student had a significant history of trauma from her infancy and early childhood and in utero exposure to alcohol and controlled substances, and that as a result, she has experienced many issues with attention, attachment, various behaviors, speech language development, and social skills.
- 7) As noted above, the original Due Process complaint in this matter was filed on August 10, 2020 and an amended Due Process complaint was filed on September 30, 2020.
- 8) The Parents submitted allegations related to failure to appropriately evaluate and identify the Student for special education services, failure to provide a free appropriate public education (FAPE), and a placement dispute in both the August and September 2020 complaint. As relief, the Parents requested: full boarding tuition at the Charlton School for Girls in Burnt Hills, New York and that Student be placed in an interim setting that adequately addresses her unique learning profile.
- 9) The evaluation materials submitted by the District, as the Student's education record with the District, show that the Student's the first evaluation on file was conducted in 2012 (when the Student was age 5) as a three-year reevaluation for IDEA eligibility and services. This report noted that the evaluator found that the Student was a "pleasant and engaging child...with average receptive and expressive language skills." (LEA000004).
- 10) The first Individual Education Program (IEP) on file for the Student, in the District's record, is from the 2011-2012 school year (the 2011-2012 IEP) and came from a Massachusetts school. This IEP notes that the Student had social /emotional and communication needs. (LEA 000015). The 2011-2012 IEP provided the Student with communication services 4 times per week, 150 minutes weekly; social / emotional services 3 times weekly, 150 minutes per week; and speech language services two times per week, 60 minutes weekly. The 2011-2012 IEP included goals in social skills and noted that the Student had not yet developed cooperative play and empathy and had issues with peer relationships. (LEA 000008). The IEP also included speech language goals. (LEA 000009).
- 11) The Student was next evaluated by Learning Solutions, LLC in Massachusetts when she was 7 (2014) and was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Autism Spectrum Disorder (high functioning), dysthymia, and/or anxiety.

- 12) Student and Parents moved to Vermont in 2014 and the Student enrolled in the Vermont Schools, in school district C (District C). (District FOF 15 and 16).
- 13) In November of 2014, the Student was evaluated by School District C<sup>2</sup> and the evaluator stated that the Student displayed characteristics of Nonverbal Learning Disorder, mild to moderate Depression, Oppositional Defiant Disorder (ODD), and ADHD. Additionally, the Student was found to be a child with an Emotional Disturbance (ED). At this time, the Student was in the 2<sup>nd</sup> grade. The report stated that the Student showed significant deficits in social skills across environments (LEA 000042).
- 14) When the Student was eight and in the third grade, she was evaluated by the Vermont Department of Health's Child Development clinic, and this report was in her educational record that was submitted in the responsive materials of the District<sup>3</sup>. (LEA 000069). The report listed the final diagnostic impressions as ADHD and mood disorder /anxiety disorder. (District FOF 18).
- 15) The Student was evaluated again when she was 9 and in the 4<sup>th</sup> grade, by the Maple Leaf Clinic. Their report was dated August 10, 2016 and was also in the Student's educational record. The report noted that she was receiving special education services for ED and a nonverbal learning disorder (SLD). (LEA 000089) The diagnostic impressions for this report were for ADHD, a provisional tic disorder, and educational problems related to difficulties with math and written expression. (LEA 000091).
- 16) The Student moved to the District B and enrolled in the District's schools at the start of the 2017-2018 school year, her 5<sup>th</sup> grade year. (District's FOF 20).
- 17) The Student was due for the three-year IDEA revaluation during her 5<sup>th</sup> grade year, so the District commenced the revaluation process. (District FOF 24).
- 18) The Student had a speech-language evaluation conducted by the District B's Community Education Center when she was in the 5<sup>th</sup> grade. This assessment showed the Student was in the average range for most areas, but that she was in the first percentile for Pragmatics Subtests, which indicated that she may have difficulty with establishing peer and adult relationships. (LEA 000099). The classroom teacher in this report stated that she is, "[M]ost concerned about [the Student's] ability to socialize with peers. She tends to wait for students her own age to lead the conversation. She may join peers in the classroom or on the playground but does not contribute much to conversation." (LEA 000100). The evaluator also found deficits with expressive language and issues with expressing frustration or disagreement with adults. (LEA 000103).

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<sup>2</sup> As these evaluations occurred before the 2-year statute of limitations, they were reviewed and are noted as background information only.

<sup>3</sup> The even numbered pages appear to be missing from the report, as only the odd numbered pages appeared in the materials that were submitted in the District's responsive materials.

- 19) On November 27, 2017, the Student was evaluated<sup>4</sup> by a psychologist from the Northeastern Family Institute, which contracts with the school District for some special education evaluations. This evaluation was also conducted in relation to the Student's three-year IDEA reevaluation for the District. The psychologist who conducted the evaluation (the psychologist) had significant experience working with special education evaluations and specifically with children with various traumatic histories and associated attachment and trauma disorders. (Trans. November 3, 2020). In the evaluative report, the psychologist stated that the Student had issues with peers and tended to "walk around alone on the playground" because "...she does not appear to have the skills to initiate and sustain connections." (LEA 109). The report stated that, "Her team expressed concerns about this behavior given the middle school climate. Her teacher expressed concern about her level of vulnerability and immaturity which leaves her unable to tell the difference between mean behavior and bullying vs. attempts at connecting with her." (LEA 000109). The report further noted that the SLP reported that the Student tried to escape or avoid sessions with social communication practice, and that Student had even resorted to locking the teacher out of the classroom. (LEA 000110). The report also stated that the Student told the psychologist that she had more significant behavior issues at home than she did at school, and that the Student reported issues with sleep at home. The evaluation report showed that the Student had significant issues with areas of the Emotional Disturbance Decision Tree evaluation, as reported by both the Parent and the school, particularly with respect to the Student's fears and the ability to build and maintain relationships. The report goes on to note that, "the development gap between the Student and her peers is growing steadily as opposed to closing, and social skills development continues to be an area of extreme need for the Student." (LEA 000123). Notably, the psychologist did find and report to the District that the Student did exhibit an emotional disturbance (ED). (LEA 125). The psychologist also testified during the hearing that the Student met the criteria for an ED diagnosis but that she identified Other Health Impairment (OHI): ADHD, as the primary disability for the Student (Trans. November 3, 2020, pgs. 48 and 52). The psychologist's testimony highlighted that the severity of the ED's impact on the Student's performance at school was mild but that the impact of the ADHD was severe. (Trans. November 3, 2020, pgs. 52-53). The psychologist further stated there are high levels of social skills problems with children with ADHD and there can often be comorbidity with ED. (Trans. November 3, 2020, pgs. 53-54).
- 20) During testimony at the hearing, the psychologist stated that the Student may meet the criteria for an educational diagnosis for an Emotional Disturbance (ED), but that does not automatically mean the Student would qualify under ED [eligibility for IDEA services]." (Trans. November 3, 2020 pg. 19, at 2-23; pg. 20, at 1-16). The psychologist also stated that had she identified ED as the Student's primary disability type, that her recommendations for the Student would not have changed. (Trans. November 3, 2020, pg. 64, at 9-11).
- 21) The psychologist's testimony illustrated that the Student would have needed social goals in her IEP at this time, to address her issues with initiating and sustaining relationships. (Trans. November 3, 2020). The psychologist stated that these goals could be measured using an assessment or other tools and brought to the IEP team for review and progress monitoring. (Trans. November 3, 2020 pg. 25). The psychologist recommended a Behavior Plan to help the Student

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<sup>4</sup> While this evaluation falls outside of the two-year statute of limitation for IDEA Due Process claims the information was considered and is presented as background information. Additionally, this evaluation was the most recent 3-year evaluation of the Student that was used by the 2018 and 2019 IEP teams when they drafted the 2018-2019 and 2019-2020 IEPs.



consistently understand how to “settle into learning”, and she stated that academic success could be one way to demonstrate that the Student has settled into learning. (Trans. November 3, 2020, pg. 62). The psychologist also stated that as part of her evaluation, she observed the Student in the school environment and that she did not observe any behavioral concerns or issues for the Student that the school could not attend to. She further testified that the teachers in the school were skilled at scaffolding instruction for Students with special needs and that the Student and her educators had “good rapport.” (Trans. November 3, 2020, pgs. 58-59). The psychologist further stated that the Student was not dysregulated to the point that she could not interact with peers or needed to be removed from the classroom. The psychologist stated that the Student was “functioning reasonably well in the educational environment.” (Trans. November 3, 2020, pg. 82, 18-20). She also stated that many children with similar disability presentations to this Student are “highly supported” in public schools. (Trans. November 3, 2020 pg. 61). The psychologist noted that art therapy could be very beneficial for the Student. (Trans. November 3, 2020, pg. 76). In the evaluation, the psychologist noted that the Student would require a “highly supervised and attuned home and school environment...and she will need to rely upon 1:2 adults to reinforce appropriate skills, keep her on track and scaffold her social experiences.” (LEA 126). The psychologist also recommended a behavior plan for the Student, occupational therapy, lots of positive reinforcement from adults, adult assistance in peer interactions, counseling and peer mentoring, visual cues in the classroom, assistance with executive skills, coordination with home and communication with Parent and outside professionals, family therapy, outside social activities, and Stern Center social coaching outside of school.

- 22) District B also conducted an Occupational Therapy (OT) evaluation for the Student during her 5th grade reevaluation, in December of 2017. This report stated that the Student was receiving services for OHI: ADHD and stated that, “...the team reported difficulty with social relationships, organizing her work, and completing tasks independently.” (LEA 000129). The evaluator found some problems for the Student with social participation, vision, balance and motion, and planning and ideas. (LEA 000131). The evaluator found that OT services were not recommended, based on the Student’s overall performance. (LEA 000133). The evaluator made recommendations for seating, fidgets, teacher check-ins, clutter free environment, graphic organizers for writing, posting steps for routines, and for teachers to schedule class clean-up /declutter times. (LEA 000133-134).
- 23) District B sent a Disability Determination dated December 18, 2017 to the Parent. This document notes that, “...although she has troubling relationships with peers, [Student] does not have an emotional disturbance” and “does not qualify for an Emotional Disturbance at this time.” Notably, the document does not give any explanation as to why ED was ruled out by the team, but other disability types such as Specific Learning Disability (SLD) do have lengthy discussion related to how the results were obtained and what measures were used to determine the Student did not have that eligibility type. (LEA 00382-385). This document does note that the Student has a deficit and adverse effect in oral expression and issues with expressing herself with peers and an adverse effect on social / emotional areas. The document shows the expressive language deficit impacts the Student’s ability to advocate for herself in class and to socialize with peers, which was reflected in the review of her schoolwork. (LEA 00387). The Student was also found to have adverse impact in the skill area of listening comprehension. The notes states that the Student has difficulty interpreting social communication which impacts her ability to form relationships with

others. (LEA 00388). The document further states that, [Student's] difficulties with listening comprehension not only impact her ability to stay focused and follow through with tasks and activities in the classroom, but that it also gives her an adverse effect in social circumstances. (LEA 00389). The document showed that she was above average in most reading skill areas, except turning in her homework consistently, and above average in the math areas. The motor skills basic skill page was left blank. (LEA 00394). Notably, the document states that the EPT team determined that the Student met the adverse effect requirement in 3 of the 6 skill areas. (LEA 00394).

- 24) A teacher from the Student's 2017 school year testified that, "...the classroom is highly structured, and expectations are very clear. Within this structure, [Student] does not demonstrate defiance, regression, or tantrums." (LEA 000109).
- 25) District B did not qualify the Student with an ED for either her primary or secondary disability after the reevaluation was completed. The Parents contend that the Student should have been made eligible under the ED category at this time, for a primary or secondary disability, and that the Student should have received associated ED types of services under the new IEP.
- 26) During the hearing, the District's Director of Student Support Services (Director) stated that an identification of a disability category is separate and distinct from finding a Student eligible for an IEP or proscribing services. (Trans. Weaver, November 10, 2020) and that disability determinations are made by the requisite parties outside of the IEP team itself. (Trans. November 10, 2020, pg. 285-288).
- 27) During her testimony, the Director stated that Vermont has different and additional eligibility standards adopted for its IDEA implementation. She said that one of these differences is the state's requirement for an Evaluation Planning Team (EPT). (Trans. November 10, 2020, pg. 274-75). The EPT team is comprised of the same individuals on the IEP team and in Vermont, an EPT must meet before a referral or a reevaluation. In Vermont, at EPT must look at three "gates" to determine eligibility: I) is there a disability; II) is there an adverse effect; III) is there a need for specialized instruction, for the Student to be supported in the classroom. The Director further explained that the specialized instruction must be based on the adverse effect and delivered by a special education services provider. (Trans. November 10, 2020, pg. 278, at 16-25).
- 28) The Director stated that for the adverse effect determination that teams must look at the State's required skill areas to determine in what area a child may have a need(s). (Trans. November 10, 2020, pg. 290, 4-10). These statements were supported by documentation in the record.
- 29) During her testimony, the Director also stated the IEP teams in her District will make determinations for what Students need to be successful, based on the individual needs of each child, not their disability type or eligibility. (Trans. November 10, 2020 pg. 288, at 20-25).
- 30) The Student's IEP dated January 22, 2018 (the 2018 IEP) shows that both Parents attended the IEP meeting. The Disability / Impact on Student Learning statement states that: "[...the Student has trouble making friends and creating relationships. With peers, the Student appears to enter the relationship with the same needs she has of adults, but peers cannot be so flexible and

accommodating. The Student tends to gravitate toward younger peers, or she will walk around on her own on the playground. She does not appear to have the skills to initiate and sustain connections. Although she appears to have trouble connecting with peers, the Student does not meet the criteria for Emotional Disturbance.” (LEA 000398). It goes on to say that “[F]indings from emotional / behavioral measures indicate that the Student exhibits symptoms of restlessness, social deficits, and profound executive skill deficits indicative of ADHD, for which she has previously been diagnosed...” This 2018 IEP includes goals in communication and social language skills. The IEP notes that the Student demonstrates adverse effect in the areas of oral expression and listening comprehension.

- 31) The IEP progress note from April 2018 state that the Student was working on social language skills (“super skills”) via direct instruction and activities with peers. The note states that, “[S]he has shown small gains with increased flexibility and compromise skills, although she still continues to try to negotiate with adults.” (LEA 000401). The IEP progress note from the SLP dated October 2018 states that, “I have been working with Student since October 15<sup>th</sup>, and since then we have had individual session and lunch groups to get to know each other, and to target her IEP social communication goals. She needs assistance with [nonverbal cues]...in relation to others, including seeing when others want to have a turn to speak, and maintaining a conversational topic - this is a skill we will target...” (LEA 000401). An IEP progress note from the SLP dated December 2018 states that “being flexible with others continues to be a concern...” and indicates that the Student is still having difficulty with successful peer communication. (LEA 000400). The sheet shows that she was making sufficient progress on most of the goals that had been introduced, but that she only had emerging progress that she needed to continue to work on, for objective 3- improved flexibility, compromising with others, and when / how to negotiate appropriately.
- 32) The 2018 IEP shows the following special education and related services from 2/8/2018 to 6/20/2018: social skills 1 time weekly (30 minutes) with the school counselor; art therapy 1 time weekly (30 minutes) with the school counselor; speech/language with a SLP 1 time weekly (15 minutes); speech/language with a SLP and in a small group 2 times weekly (30 minutes).
- 33) The 2018 IEP shows the following services from 9/3/2018 to 2/7/2019: social skills with school counselor 1 time weekly (30 minutes); art therapy with school counselor 1 time weekly (30 minutes); speech/language with SLP 1 time weekly (15 minutes); and speech/language with a small group 2 times weekly (30 minutes). There appear to be no revisions or reviews of the 2018-2019 IEP.
- 34) The principal of a school in District A stated that when the Student transferred into the school (starting her 6<sup>th</sup> grade year), that the Parent initially met with the principal over the summer of 2018 and shared that the Student had been bullied by peers in District B, at the previous school of attendance. The bullying described by the Parent at this time consisted of other students playing a game similar to “cooties” (the Student no-touch game), where the other children in the class would say “[Student] touched” various items and then no one else could touch the items. The

principal stated in her affidavit that she explained her bullying policy and practices for the school and District A to the Parent at this time. (Aff. of Principal, pg. 2<sup>5</sup>).

- 35) The District's Prevention of Hazing, Harassment, and Bullying (HHB) of Students policy states that all oral reports of HHB should be reduced to writing and put on a Student incident form- this includes reports from Parents, Students, and staff. No incident forms for HHB or otherwise, were submitted as part of this Student's educational record. The policy also states that any school employee who witnesses instances that may be HHB are required to complete a Student Conduct Form. The HHB policy states that all allegations of HHB will be fully investigated by an administrator within 5 days, and that written documentation of the outcome will be provided to the Parent of a minor Student. (HHB policy, District's email, 11/9/2020).
- 36) On November 4, 2018, the Parent sent an email to the Student's principal and said that they had met over the summer and that "...the bullying has gotten worse." (Parent Exhibit 12). In this email, the Parent stated that the Student has been crying and refusing to go to school because of the bullying. She wrote that foul language is used around the Student and that the Student is excluded from most groups. The Parent wrote that the Student was told that one female Student in particular and "four girls hate her." The Parent wrote that the Student "is starting to isolate more and more" and "I know that she will gravitate toward one adult at recess or lunch." The Parent provided the names of four girls who were alleged to bully the Student.
- 38) The principal did not appear to respond to the Parent, so the Parent sent another email message dated November 9, 2018. The Parent asked if the initial message was received and inquired if she should check in with anyone else.
- 39) On November 10, 2018, the principal responded to the Parent and wrote that, "your email was the first I have heard of this..." and "I will get on this on Monday<sup>6</sup>."
- 40) On December 10, 2018, the Parent wrote to the principal and again stated the Student was being bullied and ostracized. The Parent wrote that the Student had not received IEP services since June and requested an IEP meeting. The principal responded on December 11, 2018 and stated that the Student was receiving IEP services. She also wrote that she met with the Student to discuss the bullying, but that the Student could not provide any specifics. The principal asked the Parent to share any specific bullying concerns that she had. (Parent exhibit 14).
- 41) The Parent responded to the principal's message on December 11, 2018 and wrote that the Student was not receiving her IEP services. The parent wrote that it was "no surprise" that the Student could not recall any bullying specifics as "it has been over a month..." The Parent wrote that the Student is afraid to call attention to the bullying and that the Student was trying to befriend the aggressor. The Parent wrote that she could make herself available for an IEP meeting. The principal responded to this message on December 12, 2018 and wrote, "I think we should meet face to face. The Student is receiving IEP services. [The SLP] is here today if you would like to meet him." (Parent Exhibit 14).

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<sup>5</sup> Note, these documents were sent separately by District's legal counsel after the hearing commenced, and do not include Bates numbering.

<sup>6</sup> November 10, 2018 was a Saturday.



- 42) On January 16, 2019, the Student's IEP team met for the annual IEP review. The cover sheet for this IEP shows that both Parents attended the meeting. In this IEP, the Disability / Impact on Student Learning statement is exactly the same as in the 2018 IEP, with the only exception being that three sentences with her IQ information and lack of eligibility in SLD was removed. The Student's strengths section notes that the Student "is pretty much on target academic-wise (B in social studies, B- math, C+ in science, B in ELA)." All of the other text in the Student strengths section is identical to that in the 2018 IEP. The Student needs text differs from that of the 2018 IEP, and reads that, "She needs assistance negotiating with peers, using respectful communication with peers, and compromising when she doesn't get her way (or when someone else doesn't get his or her way). Being flexible with others continues to be a concern, and she seems to have an 'I don't care attitude' which is preventing her from appropriately using flexibility and negotiation skills."
- 43) The 2019 IEP includes a goal titled "Social C" (*sic*) which appears to be a social communication goal for active listening with peers, and then expressing her own feelings while refraining from negative behaviors. (LEA 000410). This goal had active listening and verbal disagreement objectives. (LEA 000410-411).
- 44) The 2019 IEP included the followed special education and related services from both 2/8/2019 to 6/13/2019 and 9/1/2019 to 2/7/2020: social skills with a paraprofessional in a small group 1 time weekly (30 minutes); social skills with a SLP 2 times weekly (30 minutes), and case management for a case manager (15 minutes weekly).
- 45) The Progress notes on the 2019 IEP indicate that the Student only made "sufficient progress" on one goal and that for all of the other goals / measures the Student was making "emerging progress / continuing to work toward goal." This is the lowest measure of performance available for the IEP goals.
- 46) On January 18, 2019, during the Student's 6<sup>th</sup> grade year, the Home to School Coordinator (the coordinator) wrote an email to the principal and stated the Parent had shared information with the coordinated service plan team that "she characterized [some incidents] as bullying [of the Student]" in a meeting that day. The principal responded to his message and wrote that, "I have already looked into everything that has been reported. I need more specifics and Students each time..." The coordinator responded with another email in this string and wrote, "[ Parent] has said things have improved, to be sure, but it might make sense to touch base to make sure something hasn't happened or been missed since you touched base in addition to what you have already looked into..." (LEA 00733).
- 47) On January 28, 2019, the Parent wrote to the principal again, stating that one girl in particular was bullying the Student. The Parent wrote that she believed that this bullying was why the Student no longer wanted to attend school and she asked the principal for help in dealing with the situation. The principal responded that she would look into it "first thing in the morning." (Parent Ex. 15).

- 48) On January 29, 2019, the principal sent the Parent a letter regarding the “Announcement of Commencement of HHB Investigation.” (1/29/2019 letter<sup>77</sup>), this letter states that the District had commenced an investigation under its policy for the prevention of Harassment, Hazing, and Bullying (HHB). The letter indicated that an investigation would be confidential and that the Parent would receive a written notification that would indicate if the allegations were sustained. The letter indicated that copies of relevant policies and procedures were also sent at this time.
- 49) In her affidavit, the principal wrote that the Student approached her in January of 2019 and stated that some girls were unkind. During the hearing, the principal wrote that “she could not recall but the [Parent] may have called me...” The principal wrote that she interviewed the Student and the other girls involved, but the conduct “did not rise to the level of bullying.” The principal wrote that in response to this complaint and other 6<sup>th</sup> grade complaints, that she spoke to the entire class about the need for kindness, appropriate behavior, and the use of appropriate words when interacting with peers. (Aff. of Principal, pg. 2, at 8-10).
- 50) On February 6, 2019, the principal sent a letter to the Parent that stated that an HHB investigation had concluded and that inappropriate conduct was found but no HHB violation was sustained. This letter stated that on January 29, 2020 that the principal had notified the Parent of a report of alleged bullying and commenced an investigation at that time. The letter stated that “appropriate actions” were taken against the alleged perpetrator(s).
- 51) The principal wrote that three weeks later, the Student came to her after science class and reported that a Student had started the “no touch” game with her. The principal reported that she investigated this incident, substantiated that one Student was involved, and gave consequences to the Student. (Aff. of Principal, pg.2, 11-12).
- 52) On February 21, 2019, the principal sent an Announcement of Commencement of HHB investigation letter to the Parent. This letter was similar to the letter sent in January of 2019 and indicated that an HHB investigation had commenced.
- 53) On February 25, 2019, the principal sent the Parent a letter announcing the end of an HHB investigation that found that bullying or retaliation had occurred. The letter stated that it was in response to the February 21<sup>st</sup> incident which was investigated on February 21<sup>st</sup>. The letter stated that the investigation did substantiate a violation of the HHB policy, and that “reasonable steps” would be taken to prevent the further occurrence of such behaviors against the Student.
- 54) There is no indication that the IEP team was ever made aware of any of these incidents or that the principal communicated with the IEP team about the bullying.
- 55) The principal reported that to her knowledge, after this incident, there were no more altercations between the Student and peers until she left the school 1.5 years later. (Aff. of Principal)

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<sup>77</sup> Note, these documents were not submitted with the previous District record or the 5 Day materials. They were sent by the District’s attorney, upon the request of the hearing officer, via email on November 9, 2020 and do not include the original Bates numbering.

- 56) The Home to School Coordinator confirmed the incidents with the “no touch” game and the principal’s investigation, during his testimony. (Trans. November 4, 2020, pg. 106, at 8-25). The Home to School Coordinator stated that later that school year (the Student’s 6<sup>th</sup> grade year), that the school was given an image of the Student saying she was bullied that was related to the “no touch” incident and the previous aggressor. He stated that he believed the principal handled it, but he could not recall the exact details. (Trans. November 4, 2020, pg. 107, at 8-20). The Home to School Coordinator stated that he was not aware of any other incidents of bullying after this, and he said that he knew the Student was working with counselors on her social skills and that she worked on social skills in small groups of peers at lunch. (Trans. November 4, 2020, pg. 107-108, at 20-2). The Home to School Coordinator stated that while he did not observe any more bullying of the Student at the school, that he was involved with the family later in the 6<sup>th</sup> grade or early 7<sup>th</sup> grade year, because the Student wrote an assignment that described a fantasy that she had of wanting to kill her Parents. He said that he met with the Parents at this time, because he wanted them to be aware of any potential safety concerns. (Trans. November 4, 2020, pg. 127-128).
- 57) From May 20-24, 2019 a series of email messages were exchanged between the Parent and principal about alleged bullying incidents between the Student and the other same aggressor and other students from the previous incidents. In the first message, the Parent wrote that the aggressor Student would disparage the Student to a group of other Students when the Student was within earshot. (LEA 00657). The Parent reported that the aggressor said the Student would not do well at camp and should not even go. The principal wrote that she had “looked into the incidents” and stated that the Student was gravitating toward the other student / aggressor and also infringing on her rights. The Parent responded that the Student was not the bully and that she was going to stop making reports to the Principal, because “it feels futile.”
- 58) On or about September 17, 2019, the Parent requested that the District A’s Director of Student Support Services authorize an Independent Education Evaluation (IEE), pursuant to Vermont’s Special Education Rules. (Parent Ex. 3).
- 59) The Parent sent an email to the Director on September 30, 2020 to follow up on her request for an IEE at the Stern Center. In the message, the Parent asked when authorization for the IEE would be granted. The Parent attached a copy of the letter that she had sent on September 17<sup>th</sup>, which had requested a reply by September 29, 2019. In the email, the Parent indicated that she had not received a response to her request for an IEE at that time.
- 60) On October 7, 2019, the Parent’s attorney emailed the Director and requested that the IEE be scheduled with the Stern Center (Parents Ex. 5). The Parent’s attorney sent a follow-up email that day which indicated that the Director had agreed to the IEE over the phone that day, and that the Director would begin scheduling the IEE.
- 61) The Stern Center conducted a Multidisciplinary Evaluation Report for the Student’s IEE, which states that the date of the evaluation was January 15, 2020. The header on the IEE report includes the date of September 5, 2019 (LEA 00136-175). It is unclear why this date is noted on the report or why there was a delay from the time of the Parent’s request for the IEE in September of 2019 to the actual date of the evaluation in January of 2020. The evaluation was conducted by a psychologist with many years of experience and advanced training (IEE psychologist). The report



stated that the Student has ADHD and symptoms of fetal alcohol syndrome and attachment disorder. The evaluative report detailed all of the previous evaluative findings. Twenty-two new tests and measures were used for the IEE from the Stern Center, which was very comprehensive. At the time of the IEE, the Student was 12 years old and in the 7<sup>th</sup> grade. (LEA 00135).

- 62) The school observation portion of the IEE evaluation was completed by a school District employee on February 12, 2020. This portion of the report state that, "...at times, [Student] has required extra adult supervision / support, reminders, prompts to appropriately work towards task completion / academic requests. At times, [Student] struggles to navigate peer relationships successfully. [Student] seeks out adults for engagement and reinforcement more frequently than same age peers. [Student] does not appear to have a strongly connected peer group." It was also indicated that in [Student's] file there were 'multiple reports from interdisciplinary teams and professionals commenting on Student's lack of social pragmatics, planning, insight, effective problem solving, and lack of reciprocity with others.' It was also noted that at that time she was doing well and accessed support as needed. During the observation of [Student] across diverse classroom experiences, many positive behaviors were noted: Student was not engaged in off-task behaviors, peer conflict, or unrelated activities. She used fidget stimuli appropriately, responded to directions well and did not engage in avoidance or escape behaviors. There was not a lot of social interaction occurring, but what was there seemed appropriate, with the exception of recess, where she tended to seek out adult interaction rather than peers. She was described as having "social deficits" that are further noted to be, 'difficult, odd or absent.' A potential increase in her intervention with the speech language therapist, was suggested as a possible assistance for [Student's] social relating, confidence building, and keep her from being at risk in unstructured social situations." There was no behavioral issue noted that presented a larger chronic concern. (LEA 00141).
- 63) The IEE report showed that the Student has below average verbal comprehension, working memory / immediate recall, and processing speed / symbol search skills. The IEE psychologist noted that the Student's cognitive profile is likely to be variable depending on her ability to maintain attention and her mood / motivation; therefore, these findings present an inconsistent measure of her underlying abilities and would better be estimated by a confidence interval and through a progress monitoring or response to instruction perspective of her academic performance and other state testing (e.g., SMARTER Balance) findings across several settings. (LEA 00145).
- 64) The IEE confirmed the Student's issues with communication and clarified that the Student is in the extremely low range for making inferences and that she is below average for oral expression. (LEA 00147).
- 65) The IEE found that the Student has below average writing skills and that she is well below average for written expression. Although, the IEE psychologist indicated that the Student's lack of attention and mood dysregulation could have impacted her scores in this area of assessment. (LEA 000149).
- 66) The Student scored below average for motor coordination in the IEE and well below average in several measures related to memory. (LEA 00150-152).

- 67) The IEE showed mixed results for the Student's executive functioning skills, with extremely low completion time and the IEE psychologist noted the attention variability during the assessment. (LEA 000152).
- 68) As part of the IEE, the Parent and two teachers were asked to fill out a questionnaire related to the Student's social skills. The Parents' responses indicated severe social challenges across all subscales. The two teachers' responses were comparable overall in the moderate level of severity for social communication (e.g., has difficulty with turn taking in conversations). One teacher indicated that the Student's social relatedness challenges were of a moderately severe level across: social awareness (e.g., does not mind being out of step with what other people are thinking or doing), social motivation (e.g., not self-confident in social situations, reluctant to join in group activities), and restricted behavior (e.g., thinks / talks about the same things over and over, when under stress, shows rigid patterns of behavior). Average range levels of social cognition (e.g., does not get the real meaning of a conversation) and social communication (e.g., has difficulty with turn taking in conversations) were indicated. The other teacher's responses indicated that the Student was seen as having moderately severe levels of difficulty across all scales except social cognition, which was considered Average. (LEA 153-154).
- 69) As part of the IEE, the Parents reported that: "[Student] struggles with several areas of nonverbal communication. She does not understand the boundaries of personal space. Her tone of voice often does not match the situation and she does not modulate the volume of her voice when needed (e.g., library, movies). Her facial expression is hard to read and does not match the situation. [Student] does not attend to personal hygiene and clothing expected for her age or setting. She has more challenge with applying social rules and etiquette when engaging others in conversation, lacking tact and common sense, and does not perceive or attend to the hidden rules of social relating. She misreads others' intents, does not know when to stop pushing an idea at others, has a lack of awareness of others trying to give her cues to stop or the need / desire to change topics, and does not see how others view her. [Student] blurts out when others are speaking, cannot read social cues in others that suggest others are not interested, speaks too fast and without organization for others to follow, and does not listen to her communication partners."
- 70) As part of the IEE, the teaching team reported that: "[S]he had begun, recently, to bring friends to social lunches. She initially did not want to do that, but this has begun to change. Student's SLP, expressed not having seen the immaturity that this evaluator did during the IEE evaluation. Instead, she has seen more typical interactions when Student has been 1:1 with peers. However, the SLP had witnessed that the Student was overpowering to her peers in terms of getting in their space or intruding on their time. The SLP reported that the Student follows students around and annoys them, as she does not pick up on social cues. The Student can fixate on particular students and on her grandmother. The Student can also be demanding with the nurse in the nurse's office."
- 71) The IEE report stated that, "... [A]t school, there have not been any referrals made to the behavioral team, as she has not stood out as someone who needs it. They have seen a peer sticking up for Emma because the other peers were not being nice. However, the Student mistook this as the peer being mean. [Student] required redirection to help her understand that this peer was trying to help and stand up for [Student]."

- 72) For the IEE, the psychologist administered the Conners' 3 Questionnaires. This questionnaire was used to differentiate the presence of attention and hyperactivity symptoms from anxiety, oppositional behaviors, and mood. The Student's grandparents and two teachers completed the questions. The Student's Science teacher completed a Teacher Form of this questionnaire to better understand a school-based observation of the Student's attention and level of activity, in relation to mood symptoms. His responses indicated he feels the Student has very (clinically) poor social skills impacting her peer relationships (Content Scales) and issues with emotional lability on the Conners Global Index. The Content Scales were also mildly elevated around inattentiveness. On the DSM-5 Symptom Scales, responses were all average. The IEE psychologist reported that his responses did not meet criteria for any diagnosis measured. (LEA 000157). The math teacher also completed this questionnaire. His responses on Content Scales were clinically elevated for inattention and peer relations. Other elevations not in the clinical range included executive functioning and defiance / aggression. On the DSM-Oriented scales, his responses were clinically elevated for ADHD Inattentive type and Oppositional Defiance. However, it was also noted that none of the symptom counts met criteria for a disorder of attention or behavior. (LEA 000157).
- 73) The IEE also found that school staff reported that the Student met criteria for "at-risk" designations in the categories of depression, hyperactivity, withdrawal, and behavior symptoms index. (LEA 000161).
- 74) In the IEE, the IEE psychologist found that both the Parent and school employees reported that Student met the clinical range for symptoms related to anger control, and that the school reported clinical ranges of symptoms for negative emotionality, while the Parent reported at-risk symptoms for bullying. (LEA 000162).
- 75) The IEE psychologist also used the Emotional Disturbance Decision Tree assessment and scored the Student as mild severity and mild educational impact for an emotional disturbance. (LEA 000164).
- 76) For the Student's educational environment, the IEE psychologist recommended that: "[T]he Student's variable and immature social emotional and impulsive nature supports the need for a small classroom size and structured routine, a supportive and knowledgeable school counselor, and strong and open communication between the teaching team and her Parents and outside providers." The IEE psychologist stressed the need for communication and consistency between home and school. The IEE psychologist also recommended a point person at the school, for the Student to check in with when she is dysregulated, this person should be in touch with the outside counselor if possible. The evaluative report also recommended the following for the Student's executive functioning needs: ensuring she is focused prior to giving her directions and asking her to integrate multiple sources of information will be a key to her progress. She should be asked to reword directions and give her own examples of applying new information or concepts as this will let others know how attentive she is or if she needs a break or a cue before moving forward. Cueing and structure will be important across academic and social realms within the school environment."
- 77) The IEE recommended a number of accommodations in different areas, including the following salient accommodations: extra time for reading or testing, quiet work space, ask her to highlight

directions before beginning, continued 1:1 counseling and small group counseling, cognitive behavioral therapy (CBT) and de-escalation technique training, break assignments into smaller chunks, use positive reinforcement often, adult supports for building positive relationships with peers, using verbal story tools for processing, and small group social interaction work. The report noted that small group social interaction and social communication skills are also available through the Stern Center for Language and Learning. These types of groups with peers (e.g., 4 others with similar attention and social pragmatic differences) are strongly advised for the Student to build her skills in perspective taking, making inferences, learning to use a social behavioral map to guide her own interactions, and integrating nonverbal and verbal stimuli that occur in social interactions. The IEE also recommended fluency and decoding help for reading and increased comprehension strategies and supports, as reading workloads increase in high school. The IEE recommended additional use of graphic organizers and assistance with writing instruction. (LEA 000172). The report noted that work on memory strategies, executive functioning and goal setting is also important for the Student. (LEA 000173-174).

- 78) During the hearing, the IEE psychologist stated that she observed significant social and emotional needs in the Student- more than what were reported by the school or Parent. (Trans. November 3, 2020, pg. 204, at 7-14). The IEE psychologist also stated that if structures were put into place that the Student could manage her emotions and work through things at school. (Trans. November 3, 2020 pg. 203, at 7-14). The IEE psychologist also noted that for the school to successfully ameliorate the Student's adverse conditions there would need to be good communication between home and school, and monitoring of the Student's progress and the measures used for the Student. (Trans. November 3, 2020 pg. 206, at 1-12). Finally, the IEE psychologist testified that direct coaching from an adult with peers in a small group would help the Student to build social skills and develop peer relationships. (Trans. November 3, 2020, pg. 207-208, at 15-8).
- 79) On February 14, 2020, District B completed a Behavioral Evaluation and Review of Needs for the Student. The report was requested to assist with the IEE for the Stern Center. The Parent was interviewed as part of the assessment, and a concern that she shared with the District at this time, was could the school keep the Student from being bullied. (LEA 000179). The evaluator observed the Student eat lunch with peers one day and also saw her interact with reciprocity with classmates. One teacher reported that the Student tends to stay with her at recess to talk and engage as she does not have any peer relationships or friendships (LEA 000180). The observer noted that while during her limited window of time, she was unable to observe any bullying behaviors<sup>8</sup> but she did not rule out their existence. The Student's teachers reported her peer interactions as "difficult, odd, or absent." (LEA 000180). The evaluator did recommend that the IEP look to see if more SLP time would be beneficial for the Student as the current allotment of SLP services may be "too lean". (LEA 000181). The report concluded by stating that the Student needed more time and assistance to develop her social skills. (LEA 000181-182).
- 80) On March 18, 2020 Vermont schools were in a "dismissal" status due to the COVID-19 pandemic. The Director stated that IEP services were still delivered to all eligible Students in the District during this time. (Trans. November 10, 2020, pg. 282).

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<sup>8</sup> These behaviors are often covert in nature, as acknowledged by the evaluator.

- 81) Remote learning commenced for all Vermont schools in April of 2020. (Trans. November 4, 2020, pg. 284, at 4-12).
- 82) The current school principal stated that the Student had moved and changed her enrollment in March of 2020, right when the District went fully remote due to the COVID-19 pandemic. The principal stated that due to the pandemic, they had agreed that the Student would be served by the previous school and district during the end of the spring semester for her remote learning. The principal stated that the District arranged a meeting in May so that the two schools and Parent could talk about the Student along with the IEE psychologist, to plan for the Student's transition to the new school. (Trans. November 3, 2020, pg. 221).
- 83) The 2020 IEP was revised on April 29, 2020. The IEP cover sheet for the revision indicates that the Parents were not present for this meeting. (LEA 001267). The progress report that was added for April-June 2020 states that, "Student has made great gains this school year. She was able to talk through many difficulties she was having and come up with appropriate solutions to these problems. [Student] did well using words to talk about the problems and brainstorming solutions. She was able to come up with at least two solutions to the problems she was facing during the school dismissal, and which one worked best for her." (LEA 001272). The IEP goals sheet shows that the Student made sufficient progress on the IEP goals and objectives. (LEA 001273). The revision shows that Academic support in language arts, math, science, and social studies was added for remote instruction 40-minute sessions, 5 days per week; direct instruction in written expression with a special educator was added - 30 minutes in duration 2 times weekly for both remote and in-person instruction; and case management time was increased to 30 minutes weekly. (LEA 001275).
- 84) During the hearing, the Parent stated that she received a copy of the IEE report in April of 2020 (Trans. November 10, 2020, pg. 78, at 8-12). The actual IEE report states that the Parent was to be CC'ed and that a copy was sent to the District. (LEA 000175).
- 85) An IEP team meeting was held on July 31, 2020. The meeting was held online via Google Meetings, due to the COVID-19 pandemic. The meeting was attended by the District's attorney, the District's special education director, the SLP, the Student's IEP case manager, classroom teachers, the Parent, and the Parent's attorney. (LEA 0001250). The notes from the meeting indicate that the team agreed that the Student needed more assistance with "reading body language and reminders to have a positive attitude." The notes indicate that the Parent referred to the Stern Center IEE recommendations and asked to address each one<sup>9</sup>. The notes show that the District began discussing each item with the Parent but thought they would run out of time. The District said the largest class size the Student would have would be 7 Students maximum for the hybrid instructional model. The meeting notes reflect that the attorneys agreed to respond to each accommodation from the IEE in writing, per the Parent's request, and to have the IEE Psychologist attend an IEP team meeting with the Parent to discuss the findings. (LEA 001253).

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<sup>9</sup> The District's IEP meeting notes erroneously state that the Stern Center made over 8 pages of recommendations. The recommendations pages are actually just barely over 7 pages, and one half of the seventh page is recommendations for resources for Parent and District not recommended accommodations or services.

- 86) At the July 31<sup>st</sup> meeting, the District agreed to provide the Parent with two documents for the August meeting: a draft IEP document and an explanation of which accommodations would be provided from the Stern Center IEE. (LEA 001254).
- 87) A prior written notice (PWN) dated July 31, 2020 which stated that “the team met at the request of the Parent to review and discuss the Student as a whole learner...” The purpose of the meeting was also noted as to help the Student be successful with her transition to the new school in the District. The PWN states that the District proposed for the District team to meet internally to discuss which of the IEE accommodations would be provided, and then that the entire IEP team would meet again on August 10, 2020 with a draft IEP and offer of FAPE for the Student.
- 88) A meeting notice dated August 6, 2020 was sent to the Parent’s attorney, for an IEP meeting which was scheduled on August 11, 2020. The meeting was to be held online. The purpose selected for the meeting is to review or revise the IEP. (LEA 001264).
- 89) The District’s responsive documents included a document that appeared to be notes for the August 6<sup>th</sup> meeting titled “[Student’s] Accommodations – School Collaboration meeting.” The notes show accommodations for the Student based on the IEE in the following areas: environment, emotional health and coping, social relating, and writing. (LEA 001265).
- 90) The District submitted a PWN dated August 10, 2020 which stated that the team met to collaborate and propose a list of accommodations, modifications, and supports for the Student to receive a FAPE. The PWN states “the LEA proposes that the supports be added to the IEP” but does not appear to list the new accommodations that were added to the Student’s IEP on the PWN itself. (LEA 001266).
- 91) The District submitted an IEP that showed an annual review date of January 14, 2020 with initiation and duration dates of 2/7/2020 to 6/15/2020 and 9/08/2020 and 2/05/2021. A footer on the IEP shows that the document was updated in August of 2020. The document also has a notation that the effective revision date is 4/29/2020. The IEP team members listed portion shows that the Parent was not in attendance for this IEP team meeting, but an LEA representative, special education teacher, general education teacher, individual who can interpret diagnostic results, and individual who can conduct diagnostic examinations were all present. The present levels section of the IEP uses some of the language from the IEE about the Student’s social and relational issues. Specifically, it states that, “the Student has trouble making friends and creating relationships...she struggles with initiating and sustaining peer connections.” Notably, the present levels section again notes that, “...she does not meet the criteria for Emotional Disturbance.” The document also notes that the Student demonstrates adverse effect in the areas of oral expression and listening comprehension. (LEA 001269). The Student needs that are listed include assistance in understanding appropriate interactions with peers and personal space, assistance with reading body language, and reminders to have a positive attitude. The IEP notes that the Student “has made great gains this school year. She was able to talk through many of the difficulties she was having and come up with appropriate solutions to these problems. [The Student] did well using words to talk about the problems and brainstorm solutions...” (LEA 001272). This IEP listed goals for social cognition and written expression. The progress monitoring on the document indicates that the Student made sufficient progress on her objectives for the social cognition goal.



(LEA 001272). The IEP notes that the Student is doing well academically with grades of B, C, and B+ in her core classes.

- 92) This IEP includes the following special education services from the period of 2/7/2020 to 6/15/2020: direct instruction in written expression / 2 times weekly for 30 minutes; social skills/ 1 time weekly (30 minutes) with a paraprofessional; social skills / 2 times weekly (20 minutes) with a speech therapist; a case manager / 30 minutes weekly. All services were listed as small group, except for case management.
- 93) This IEP also includes the following special education services from 9/8/2020 to 2/5/2021 for the teleservice environment: academic support in Language Arts, team meeting math, social studies and science / (40 minutes) 5 times weekly with a paraprofessional; direct instruction in written expression / (30 minutes) 2 times weekly; social skills / with a paraprofessional 1 time weekly (30 minutes); social skills with a SLP / (20 minutes) 2 times weekly; social cognition with a SLP / 1 time weekly (60 minutes); and case management / 1 time weekly (30 minutes). All of these services were listed as small group instruction, except for case management.
- 94) Finally, the IEP included a contingency services section<sup>10</sup> that includes the following services: direct instruction in written expression / 2 times weekly (30 minutes); social skills with a paraprofessional / 1 time weekly (30 minutes); social skills with a SLP / 2 times weekly (20 minutes); social cognition with a SLP / weekly (60 minutes); and team meeting with a special educator monthly (30 minutes). The Student's contingency plan was based on her election to attend fully virtual school, with a contingency plan of returning to the school environment.
- 95) The IEP shows that the Student will receive the following accommodations: break assignments into chunks; provide graphic organizers for writing; provide writing frames and sentence organizers; provide multiple ways of following directions (verbal, written, visuals); pre-teach / review vocabulary with Student restating and rephrasing; organization skills accommodations including supports with executive functioning (organizing / planning) checking, cues, and structure; and preferential seating. (LEA 001278). The IEP also included timing accommodations: extra time to complete work, extra time for testing, Student allowed to use timer, breaks when needed and check in with school counselor, check-in and check-out system. (LEA 001200).
- 96) The IEP shows the following communication services for the Student: daily communication with guardians and once a month meeting with outside agencies. (LEA 001278).
- 97) The educators who were present at the hearing, both from the Student's current school and from her previous school, stated that she is making progress academically and toward her IEP goals.
- 98) The Student's current principal testified that there were fifteen 8<sup>th</sup> graders enrolled in the school, and 7 total Students in the Student's hybrid online program. (Trans. November 3, 2020, pg. 219). The principal stated that the Student is currently in the fully remote program, by choice of the Parent. (Trans. November 3, 2020, pg. 220).

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<sup>10</sup> The District explained that this section was made on all IEPs in effect during the 2020-2021 school year, based on the state education agency (SEA) guidance for the COVID-19 pandemic and remote instruction / hybrid / in-person methods of instruction for Students with disabilities.



- 99) The Student's current principal stated that after reviewing the IEE and meeting with the IEE psychologist and IEP team that she believed that the Student's current school could meet the Student's educational placement needs. (Trans. November 3, 2020, pgs. 228-229, at 6-4). The principal reported that she was asked to create a document for the Parent that responded to each of the items that were recommended by the IEE and that she did so. (Trans. November 3, 2020, pgs. 230-232). She explained that the school has a multitiered system of support for all Students, which includes extensive communication with Parents and Student supports. (Trans. Day 1, pg. 232). The current principal testified that communication needs of all students will be made individually based on student needs and there could be communication between the counselor, family, and outside providers if needed. The current principal also shared that the school has a variety of seating options for students including bean bag chairs, rocking t-stools, and various ways for all students to receive sensory feedback and the school is familiar with working with students with varied needs. (Trans. November 3, 2020, pg. 245, at 4-10). The current principal said that the school allows all students to have movement breaks throughout the day as needed. (Trans. Day 1, pgs. 246-47). She also stated that the teachers at the school are skilled with working with students who have experienced trauma and are flexible with Students' needs. (Trans. November 3, 2020 pg. 247, at 14-21). The principal stated that she felt comfortable with serving the Student at her school, because based on her review, the Student was making grade level progress, the Student's behavior was manageable, and everything that she had seen indicated that the Student was doing well. (Trans. November 3, 2020, pg. 249, 1-5).
- 100) The District submitted a Notice of Meeting dated September 15, 2020 for an IEP meeting to be held on September 16, 2020 via Google Hangout. The letter was addressed to the Parents and stated the purpose of the meeting was to review / revise the IEP. Information is provided for the Parent to contact the District if the meeting time or date is not amendable. (LEA 001281).
- 101) During her testimony for the hearing, the Parent stated that she did not attend this meeting and that she was unaware that this IEP was finalized (Trans. November 10, 2020, pg. 32, 6-12).
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- 102) The IEP Amendment sheet is dated 9/16/2020 (the September 2020 IEP) and shows that the Parent was not in attendance for the meeting. The sheet shows that the Student's services were amended at the meeting. (LEA 001282). The notes for the meeting state the IEP was amended to reflect services due to COVID-19. (LEA 001283). The notes state that, "[O]ur purpose is to amend the IEP to prepare for other models of education, either 100% in school, or a fully remote model." The notes also say: "Direct instruction with [staff] 30 minutes twice a week in writing." The notes state the Student will receive paraeducator support twice daily for /30 minutes or sixty minutes once a day for remote learning and that if they return to in-person that the Student will not receive full paraeducator support, because the document does not support that need at this time. The Director suggested that the Student receive social cognition support from the Stern Center, in a small group, once a week. The Director also suggested that the team continue to meet once a month to support the Student and monitor her progress. (LEA 001284).
- 103) The District wrote a PWN dated 9/17/2020 for a proposal to change the placement or provision of FAPE for the Student. The notes on the PWN state that, "The team held an IEP amendment meeting on 9/16/2020 to reflect the supports and services [Student] will need during her remote

learning and generated a contingency plan in the event the school needs to educate fully remotely. [Student] begins to attend school in the hybrid model or resume full time education in person. [The Parents] despite being invited, did not participate in the meeting. Their legal counsel indicated to the District's legal counsel that the Parents would not be participating in the IEP meeting. Due to the modified schedule of hybrid or remote only programming, the LEA has modified the IEP to reflect the Parent's choice of remote only learning." The effective date of the proposal is listed as October 8, 2020.

104) During the Due Process hearing, the Parents and their legal counsel stated that they had never received a copy of the most recent IEP. (Trans. November 10, 2020, pg. 11).

105) The District said that the IEP and related documents were mailed to the Parents around the first week of October. (Trans. Day 4, pg. 10, 7-10). The Parent stated that they did not receive this document.

106) During her testimony, the Director stated that the Student had not started the September 2020 IEP's Stern Center small group social communication services as of the date of the hearing.

## CONCLUSIONS OF LAW

### **I. Eligibility and Evaluation – Whether Student was appropriately evaluated and made eligible for special education services during the 2018-2019, 2019-2020, and 2020-2021 school years.**

#### **A. Eligibility**

Much of the hearing focused on if the Student was appropriately made eligible for IDEA services, specifically, the Parent contended that the District failed to make the Student eligible for an emotional disturbance (ED), and as result, that the District failed to appropriately serve the Student and provide the Student with a free appropriate public education (FAPE).

The state of Vermont's State Board of Education's Special Education Rules (hereafter "VSBER") address eligibility determination requirements in Section 2362. VSBER 2362 states that a child shall be eligible for special education if: he or she [or they] have one or more of the disabilities described in rule 2362.1; the disability results in an adverse effect on the child's educational performance in one or more of the basic skill areas...; and the student needs special education services to benefit from his or her educational program and this support cannot be provided through the educational support system, standard instructional conditions or supplementary aids and services provided in the school. The rule also states that criteria shall be applied at the time a student receives a re-evaluation for IDEA eligibility. VSBER 2362(b).

Pursuant to VSBER 2362(d), to conclude that a student has an Adverse Effect, an Evaluation Planning Team shall determine and document that, as a result of a student's disability, the Student

is functioning significantly below grade level norms compared to grade level peers in one or more of the state's basic skill areas, which are defined in VSBER 2362(g).

If a child has a disability that results in an adverse effect on their educational performance in one or more of the basic skills, the EPT is required to consider interventions, services, or accommodations the student may need; and, determine and provide justification that the Student requires specially designed instruction (SDI) that cannot be provided through the school's standard procedures. VSBER 2362(f). The basic skill areas defined by the State are oral expression; listening comprehension; written expression; basic reading skills; reading comprehension; mathematical calculation; mathematical reasoning; and motor skills. VSBER 2362(g).

The adverse effect determination and use of an additional Evaluation Planning Team (EPT) are unique to Vermont's Special Education Rules. VSBER 2362 (d) and (g) and 2362.2.5. However, these components are a central feature in the state's special education eligibility process and have been upheld by the 2<sup>nd</sup> Circuit. *J.D. EX REL J.D. v. Pawlet School Dist.*, 224 F. 3d 60 (2d Cir. 2000).

In the instant case, the Student has received special education services since she was enrolled in early childhood programs. The Vermont District that she attended prior to enrolling in the District, District C, did provide her with services for a dual eligibility of other health impairment (OHI): ADHD and also an Emotional Disturbance (ED) eligibility. The Student enrolled in District B's school at the beginning of the 2017-2018 school year, with an IEP from the District C School District. However, the Student was due for a triennial IDEA reevaluation in 2017, so District B contracted with a psychologist, to move forward with the Student's reevaluation process. This psychologist found that the Student experienced significant trauma in her early formative years which has impacted her in many social and emotional ways and the psychologist provided a detailed evaluation report with her findings to District B for the Student's IEP and EPT teams to review.

Next, the Parents asked for an Independent Education Evaluation (IEE) from District A's school, where the Student was enrolled from March of 2020<sup>11</sup> to the filing of this Due Process complaint. The IEE psychologist also noted that the Student had experienced significant trauma, and she found that the Student suffers from depression, anxiety, ADHD, fetal alcohol spectrum, and that she has many social and emotional regulation issues.

It is worth noting that both of the psychologists, from the 2017 reevaluation and the 2020 IEE, found that the Student's disability manifestation is quite complex and that over the years she has been diagnosed with many conditions including fetal alcohol spectrum, Oppositional Defiance Disorder (ODD), Autism Spectrum, Attention Deficit Hyperactivity Disorder (ADHD), Attachment Disorder, some developmental delays, and a Developmental Trauma disorder. As reported by both psychologists, who were expert witnesses during the hearing, the symptoms and effects of these disorders may often overlap and appear with some comorbidity.

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<sup>11</sup> Note that Student received online instruction only in the fall of 2020 due to the COVID 19 pandemic.

Both the District's psychologist who conducted the reevaluation in 2017 and the IEE psychologist who conducted exams in 2020 noted that the Student had emotional disabilities and that she was eligible for a diagnosis of Emotional Disturbance (ED) using the operative educational definition.

District B's forms from the 2017 reevaluation show that the EPT team determined the Student did have an adverse impact on the areas of oral expression / expressive language, listening comprehension, and social / emotional behavior. Therefore, the EPT team found that the Student met the required minimum of adverse effect in three of the six requisite skill areas. The EPT team determined that the Student needed special education services in Speech and Communication to be delivered by a Speech Language Pathologist. The notes in this document also reflect that the EPT determined that the Student had many areas of social and emotional need to be addressed. The team members believed that based upon their review, the primary areas of need were related to her attentional issues and that the Student's ED was mild in the school environment. While it is unclear what exactly led them to find a lack of adverse impact in the basic skill areas for ED, based on the testimony and submitted records, the EPT team concluded that the Student was no longer eligible for an ED eligibility. The Student continued to be served with an IEP for her eligibility of OHI: ADHD.

The District staff who testified about the Student stressed that she did not have any disciplinary issues and that she was not removed from class for disruptions, which are both common for Students with an ED eligibility. It is notable that the psychological assessments revealed that this Student had high levels of anxiety and internalizing behaviors, so her emotional disturbances do not appear to manifest in a way that would necessarily look like classroom disruptions or disciplinary referrals, and which may not be apparent to educators in the traditional ED manner.

While, the Student may well have needed a dual eligibility with a secondary disability of ED due to the interrelated and often interchangeable manifestations of her particular disabilities, the question itself becomes moot, based on the state special education rules and the content of the Student's IEP. Regardless of which IDEA eligibility(-ies) the Student had or has, her services should be driven by her individual needs. This is discussed further in the FAPE section of the analysis below.

The Parents, through their attorney, were not able to demonstrate, at the Due Process Hearing, that the Student would have received any additional or different services if she had qualified as a Student with an emotional disability. To the contrary, the testimony and record illustrates that the Student would have been served in the same manner, regardless of her disability type or classification. While the state special education rules do provide one additional item for ED Students that the other IDEA eligible Students do not receive, "...upon determination of the existence of an ED disability, the Parent shall be informed of the availability of interagency coordination of services..." in VSBER 2362.1(c)(4), the Parents did not argue that the Student needed this particular support or service.

Additionally, the question of the ED eligibility itself is largely moot based on the state law and the requirements of the IDEA. The IDEA, its implementing state and federal regulations, and its body of case law have long held that a student's FAPE must be tailored to the unique needs of a child, regardless of their disability type or eligibility. 34 C.F.R. 300.320-300.324; 20 U.S.C.

1414(d)(1)(A)(i)(VIII); *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 553 IDELR 656 ( U.S. 1982); and *Endrew F. v. Douglas County Sch. Dist.* RE-1,69 IDELR 174 ( U.S.

2017). As this issue is moot, it is not necessary for this Hearing Officer to rule on the student's ED eligibility.

## **B. Independent Education Evaluation**

The Parents allege that the District failed to properly consider the findings of the independent education evaluation that was conducted in January of 2020. The Parents also alleged procedural irregularities with the IEE.

Parents have the right to an Independent Education Evaluation (IEE) at public expense if they disagree with an evaluation obtained by the district, unless: [T]he district demonstrates in a due process hearing that its own evaluation of the child was appropriate; or the district demonstrates in a due process hearing that the evaluation obtained by the parents did not meet district criteria. See 34 CFR 300.502 (b)(1) through 34 CFR 300.502 (b)(2).

Per the IDEA, if a parent requests an IEE at public expense, the district must, without unnecessary delay: request a due process hearing to show that its evaluation of the child was appropriate; or provide the IEE at public expense (unless it demonstrates in a due process hearing that the IEE did not meet district criteria). 34 CFR 300.502 (b)(2). The IDEA regulations do not set a specific time limit for responding to a Parent's request for an IEE. Instead, they state that the district must act "without unreasonable delay." 34 CFR 300.502 (b)(2). Whether a delay is unreasonable will turn on the facts of the case. Regardless of whether a district's response to a request for a publicly funded IEE is timely, the Parent must show that the alleged delay caused substantive harm. *Fullmore v. District of Columbia*, 67 IDELR 144 (D.D.C. 2016). Additionally, Parents have been awarded compensatory education when districts fail to provide educational records requested under the IDEA, when the denial significantly impedes the parent's ability to participate in the decision-making process. *In re District of Columbia*, 119 LRP 22163 (D.C. SEA 2019).

As for the matter of the IEE, if a Parent obtains an IEE at public expense or shares an evaluation obtained at private expense, the District must consider the results of that evaluation when making decisions involving the provision of FAPE to the child (provided that the IEE meets District criteria). 34 CFR 300.502 (c)(1). While a district must consider the results of an IEE, it has no obligation to adopt the evaluator's recommendations or conclusions. *See, e.g., T.S. v. Board of Educ. of the Town of Ridgefield*, 20 IDELR 889 (2d Cir. 1993).

The implementing state rule for IEEs, SBER 2362.2.8, also does not have a set time frame as to when an IEE must be completed. It does state that a district "...shall without unnecessary delay, either: initiate a hearing to show that its evaluation is appropriate or ensure that an independent educational evaluation is provided at no cost to the parent." For comparative purposes, the state rules do provide timelines for initial evaluations. Initial evaluations shall be commenced within 15 calendar days after a parent's request and completed within 60 days from the date that either parent consent is obtained, or a notice is sent to the parent to indicate that the District will only be reviewing existing data. SBER 2362.2.1(b) and (c). One may assume that these are reasonable timeframes for special education evaluations and procedures given that initial evaluations are conducted on many students yearly and may be reviewed for comparative purposes.



In the instant case, the Parent originally requested the IEE on September 17, 2019. She did not receive a response from the District, so she followed up by email on September 30, 2019 and asked when the IEE would be approved. It was not until the Parent retained an attorney, and he contacted the Director, that the Parent received a response for her requested IEE. The Director told the Parent's attorney that the IEE was approved and would be scheduled after his phone call with her on October 7, 2019. The Stern Center was scheduled for the IEE, and the IEE was completed in January of 2020. The District did not provide any reasons as to why the September email messages from the Parent were unanswered or why it took from October-January to schedule and provide the IEE. The Parent and District did not appear to be having conversations about the IEE or issues with the scheduling during this time.

Next, after the assessments were completed, the Parent did not receive a copy of the IEE until May. Granted that the COVID-19 pandemic started and significantly impacted schools and business in Vermont in February and March of 2020, which could have accounted for some delays with the evaluation and report. However, the District provided no reason for the delay.

Finally, the IEE did provide substantive recommendations for the Student which were eventually updated by the IEP team after the IEE was completed, reviewed, and discussed as a team. It is important to note that the final IEP revisions after the IEE did not occur until September of 2020, so about one year after the request for an IEE was initially made. Additional services that the Student received as a result of the IEE, in the September 2020 IEP, included additional small group / social skills instruction from the Stern Center, additional SLP time to work on expressive language and nonverbal communication, and specially designed instruction in writing. As the Student was without these additional services for the duration of the delays with her IEE, the Parent was able to demonstrate that the Student was substantively harmed due to the delay with the Student's IEE and its review.

As such, compensatory education services are necessary for these areas for the duration of the delays and will be discussed and detailed below.

## **II. Free Appropriate Public Education (FAPE) – Whether the Student received a free appropriate public education (FAPE) from the District from September 30, 2018 through the fall of 2020.**

As a preliminary threshold matter, the Parent argued that they were not able to access some of the Student's educational records and that the Parent as a lay person does not know all of the legal requirements for the IDEA, so this order should not be limited in its scope or timeframe. However, the IDEA was written specifically so Parents could participate in a Student's educational process expediently. A district is required to provide parents with access to their child's educational records upon request and copies of informational booklets or materials with their Procedural Safeguard Rights ( or IDEA Parents' Rights) at least annually.

SBER 2365.2.2 states that, "...each agency shall permit Parents to inspect and review any education records relating to their children that are collected, maintained, or used by the LEA under the IDEA. The participating agency shall comply with a request to inspect and review without unnecessary delay and before any meeting regarding an IEP or any administrative

complaint, mediation, resolution session, due process hearing, or expedited hearing, and in no case more than 45 days after the request has been made.” SBER 2365.2.2.(a).

A procedural violation of the IDEA entitles a plaintiff to relief only if it: "(I) impeded the child's right to a [FAPE]; (II) significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of a [FAPE] to the Parents' child; or (III) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii); see *A.M. v. N.Y.C. Dep't of Educ.*, 845 F.3d 523, 535 (2d Cir. 2017). Existing case law in the region notes that, “[M]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not.” *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 190 (2d Cir. 2012).

In this case, there were a number of issues with record production. The hearing commenced with the Parent’s attorney alleging that the District was not producing the educational records needed for the hearing, and subsequently filing Motions to Produce and Amend the Due Process Complaint and a Motion to Extend the Hearing Timeline. The Parents also did not have access to all of the relevant educational records before the resolution session, IEP meetings, and Due Process Hearing. In fact, the most recent IEP that was developed for the Student in September of 2020, and which incorporated a number of the IEE’s recommendations, was only provided to the Parent and Hearing Officer after the first few days of the hearing had already been completed. This delayed production is unusual and opposed to the spirit and letter of the IDEA’s Parent Participation rules and safeguards. (Trans. Day 4, pgs. 6-7, 10-9). The Director of Student Services also stated in the hearing that the Student was not currently receiving some of the new small group social and communication services from the Stern Center, that were given to her in this September 2020 IEP, and there is a possibility that the reason(s) for this, is that the Parent was not made aware of these services due to the fact that they never received the most September 2020 IEP.

It is worth noting that the Parents, District, and legal professionals involved in this case are all living and working under very difficult and unique circumstances, due to the COVID-19 global pandemic and its associated remote work and school situations. Working remotely and not having the ability for in-person meetings or documents can make individuals rely on technology in new and absolute ways that can pose many novel challenges and barriers. However, the record in this case does show that it is more likely than not, that the Parents and Student sustained substantive losses with respect to the Student’s free appropriate public education (FAPE) due to these procedural pitfalls. These losses should be addressed in compensatory education which is detailed below.

As for the general statute of limitations issue argued by the Parent for purposes of this case, the IDEA requires that Parents be provided a Procedural Safeguards Notice, which is the IDEA’s term of art for a Parents’ rights booklet, at least once annually; after initial referral for special education or after a Parental request for evaluation; upon request by a Parent; and in accordance with the IDEA’s discipline procedures. 34 CFR §300.504. These requirements are adopted in Vermont State Rule at VSBER 2365.1.2. The Procedural Safeguards include information about a Parent’s right to: an IEE, prior written notice, Parental consent, access to educational records, and the IDEA’s dispute resolution mechanisms which include the right to file due process hearing requests for applicable disputes.



The state's due process complaint procedures can be found in VSBER 2365.1.6.1. Notably for this matter, Parents are allowed to file a complaint within two years of the date that the Parent knew or should have known about the alleged action that forms the basis of the due process complaint. VSBER 2365.1.6.1(a)(1).

There is no evidence in this case, nor did the Parent argue, that they did not receive their Procedural Safeguards notice annually or otherwise. As such, they were on notice of their right to file for a due process hearing for any concerns prior to their filing of the instant complaint. As such, the appropriate timeline for their concerns should be limited to the two-year window for due process hearings that is outlined in the IDEA and the applicable state regulation and the FAPE review and analysis for this hearing will be limited to the two years preceding the filing of the amended complaint.

### **A. Content of the 2018-2019 IEP**

While the Parent wrote an email to the principal in the fall of 2018 that stated that the Student was not receiving IEP services, the principal refuted this statement in a reply. During the hearing, the Parent did not argue that the IEPs were not implemented or that the Student did not receive the services as outlined in her IEPs. The Parents did argue that the Student did not receive a FAPE and did not have appropriate IEP services, based on the District's refusal of the ED eligibility. As such, the analysis turns to the composition of the Student's IEPs.

The IDEA requires states to ensure that a free appropriate public education (FAPE) is available to all children with disabilities who require special education and related services, even if those children are advancing from grade to grade. 34 CFR § 300.101 (c)(1). A FAPE must provide "special education and related services" tailored to meet the unique needs of a particular child, 20 U.S.C. § 1401[9], and be "reasonably calculated to enable the child to receive educational benefits," [Bd. of Educ. v. Rowley, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)]." [Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 122 (2d Cir. 1998).] In order to provide FAPE, a district must ensure that eligible children have an IEP which must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. An IEP should be reasonable but does not need to be ideal. *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017). The District's legal counsel correctly argued that the Federal Circuit courts have long differed on what exactly constitutes "progress" for children who are already advancing from grade-to-grade and that 2<sup>nd</sup> Circuit opinions have consistently provided a heightened FAPE standard for student progress. Measures of this FAPE progress include that, "... the IDEA is satisfied if the school district 'provides an IEP that is likely to produce progress, not regression,' and if the IEP affords the Student with an opportunity greater than mere 'trivial advancement.'" [A.S. v. Trumbull Bd. of Educ., 414 F.Supp.2d 152, 173 (D. Conn. 2006)]. Additionally, social, emotional, and behavioral progress and a student's grades, are all valid components for measuring progress in some students with disabilities. [ *Mr. P v. West Harford BD. of EDUC.*, 885 F.3d 735 (2018)]. In IDEA Due Process hearings where FAPE is in dispute, the burden of proof resides with the parent or the moving party.

For this Student, the 2018 IEP addressed the Student's adverse effect in the areas of oral expression and listening and included goals in communication and social language skills. The IEP was drafted at an annual meeting held on January 22, 2018. From February 2, 2018 through February 2, 2019 the Student received 30 minutes of social skills services with the school counselor and one hour of SLP services weekly.

The IEP does not show that any special education or related services were ever changed, reviewed, or increased throughout the school year, despite the fact that the Student seemed to be making minimal progress on one of the objectives related to her social communication goal and the fact that the Parent had communicated with school from November 2018 - February 2019 about multiple peer interaction issues and alleged bullying incidents. Notably, these incidents often stemmed from issues related to social skills and peer communication.

Additionally, the IEP does not seem to address many of the areas of concern and suggested accommodations provided by the District's contracted psychologist for the Student's reevaluation that was conducted in 2017. While it is clear that the District does not believe that the Student met the ED gate for eligibility under state law, it is not clear why the District failed to serve the Student in all areas of her suspected disability in the 2018 IEP, as many of her areas of need are applicable for Students with ADHD.

Specifically, in the 2017 psychological evaluation, the psychologist noted that the Student would require a "highly supervised and attuned home and school environment...and she will need to rely upon 1:2 adults to reinforce appropriate skills, keep her on track and scaffold her social experiences." (LEA 126). The psychologist also recommended a behavior plan for the Student, occupational therapy, lots of positive reinforcement from adults, adult assistance in peer interactions, counseling and peer mentoring, visual cues in the classroom, assistance with executive skills, coordination with home and communication with Parent and outside professionals, family therapy, outside social activities, and Stern Center social coaching outside of school. This psychological assessment was the operative tool used by the EPT and IEP team for the 2018-2019 IEP. It was also substantially similar to the 2020 IEE evaluation in its findings, and the psychologist who was used for this assessment actually appears to have had more training and expertise in developmental trauma disorders than the psychologist who was commissioned for the IEE. Yet, the IEP team did not follow many of her recommendations for the 2018-2019 IEP with no indication as to why these accommodations and supports were not needed.

The 2018-2019 IEP does state that the Student was reevaluated by an Occupational Therapist (OT) and that it was determined that the Student no longer needed Occupational Therapy. However, the plan does not state why the IEP did not include other items that were suggested by the psychologist such as a communication plan between home-to-school and outside providers. While the school principal stated that the school crafts communication plans based on individual student need, there does not appear to be such a plan in place for this Student from the 2018-2019 school year. To the contrary, the record demonstrates that the District was not consistently communicating with the Parent or outside providers for the Student, and that the Parent was required to send multiple emails to the principal, some of which went unanswered, to the detriment of the Student. Based on all of the psychological and medical reports that were provided for the Student to date, consistency between home to school and regular home to school communicate seem to be an integral part of her individual disability related needs. The IEP is also silent with respect to the Student's needs for assistance with peer mentoring, executive skills

deficits, and positive reinforcement from adults / adult check-in point person. While the IEP team is not required to adopt all of the recommendations of an evaluator, in this case, it appears that the 2018 IEP does not address many of the Student's identified areas of disability, in order to allow her to progress meaningfully, in light of her circumstances.

The District argued that the Student did not require an ED eligibility in order to receive all of the services that she needed in order to receive a FAPE, yet the 2018-2019 IEP does not address all of the social / emotional areas of the Student's disability related needs or document why such services were unnecessary in order for the Student to have a meaningful educational program that was reasonably calculated to enable her to make progress appropriate in light of her circumstances. While Student was making progress on most of her IEP goals and in her classes, there is no evidence that she made any meaningful social or emotional progress with peers. The record materials indicated that, in fact, the Student seemed to have more social conflict, isolation, and struggles with peers as the year progressed. Additionally, the record showed that for this Student, progress appropriate in light of her circumstances and the components of her disability, would need to include services or supports to address her anxiety, and some services or supports for her social and emotional needs which were not included in the 2018 IEP, but which were later addressed in the 2020 IEP, after the IEE.

As such, compensatory education for Student's social and emotional needs that were not addressed in the 2018-2019 IEP and school year is appropriate.

## **B. Content of the 2019-2020 IEP**

Courts have held that using the same IEP services from previous years, that did not produce meaningful gains for a student, cannot meet the FAPE standard. *R.N. v. Board of Educ. of the Iroquois Cent. Sch. Dist.*, 116 LRP 48440 ( W.D.N.Y. 2019).

The 2019 IEP, which was written on January 16, 2019, was crafted to address the same eligibility and adverse effect areas related to social communication. It added a goal for active listening. While the 2019 IEP was substantially similar to the 2018 IEP, the 2019 IEP actually reduced services for the Student, despite the fact that her conflicts with peers were escalating at school at this time and there was evidence to the school staff that the Student was not making progress with her social communication skills in the school environment. Notably, the 2019 IEP removed the Student's Art Therapy and time to work on social skills with the school counselor. These two services were supported by the Student's 2017 evaluative data, and the 2019 IEP team did not provide new data or rationales for removing the supports. Additionally, the 2019 IEP removed the Student's 15 minutes of 1:1 time with the SLP, which again would have been supported by the 2017 evaluation. The 2019 IEP did provide the Student with 30 minutes of small group social skills work with a paraprofessional, which appears to replace the previous 30 minutes of social skills work with a small group and the school counselor. Given the Student's extensive history with social and emotional issues and her evaluative data, there appears to be no reason for a paraprofessional to provide these services instead of the school counselor. The 2019 IEP did not add any new services.

The 2019 IEP has no indication that the Student progressed meaningfully in her social and emotional areas and goals, that are central to her making progress in light of her circumstances.

The IEP did note that the Student was meeting grade level standards academically. However, at the time the IEP was crafted and for months after the meeting date the Parent continued to contact the school with social concerns related to the Student and alleged bullying and isolation by her peers. Additionally, school staff reported seeing the Student alone or attempting to speak to adults instead of peers at this time and noted that she was “awkward” socially. The teachers who testified were unsure if the Student had friends or consistent peer group relations, despite the fact that the school, grades, and class sizes are small and reported that she was often alone or tried to initiate conversations with adults during social times. The Student’s IEP was not revised or reviewed to address these areas, despite the fact that she has demonstrated needs in social communication and in emotional areas.

Therefore, compensatory education is appropriate for the 2019-2020 school year.

### **C. Content of the 2020-2021 IEP**

The January 2020 IEP does include more detail and reflects that progress was being made for the Student socially and academically. The original 2020 IEP appeared to have reduced the Student’s Social Skills with the speech therapist by 10 minutes (LEA 000425) and did not document why the reduction in this service was warranted. The 2020 IEP notes that sufficient progress was made on all of the IEP goals. This IEP was modified several times, in light of the COVID-19 pandemic and the IEE review and subsequent revisions.

The 2020 IEP was revised in April of 2020 and additional special education for written instruction was added in addition to more paraprofessional support for remote learning and extra time was given for social skills instruction and case management. As explained in the testimony, the case management could include phone calls between the school and outside service providers or family.

The September 2020 IEP is the most comprehensive IEP for the Student that was reviewed in this case. It added, “[D]irect instruction with [staff] 30 minutes twice a week in writing.” The notes state the Student will receive paraeducator support /30 minutes twice daily or sixty minutes a day for remote learning and that if they return to in-person that the Student will not receive full paraeducator support, because the documentation does not support that need at this time.” Additionally, the IEP notes state that the Director suggested that the Student receive social cognition support from the Stern Center, in a small group, once a week. The Director also suggested that the team continue to meet once a month to support the Student and monitor her progress. (LEA 001284). These changes all appear to be made based on the recommendations in the IEE. The Parent did not illustrate that these services or the IEP itself was not sufficient for the Student.<sup>12</sup> The September 2020 IEP with the additional writing supports, Stern Center small group instruction and home to school communication plans / additional team meetings appears to be crafted to allow the Student to progress meaningfully, in light of her circumstances. Additionally, the testimony of the current educators indicated that the Student was progressing in light of her circumstances.

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<sup>12</sup> Bearing in mind that due to the document production issues noted above, the Parents did not have a copy of this IEP prior to the hearing.



While the procedural questions remain, particularly related to the Parent's ability to participate in the construction of this IEP and why they did not receive a copy of the IEP before the hearing, the Parent did not demonstrate that the September 2020 IEP itself fails to provide the Student with a FAPE, and as the District's closing brief correctly notes, the Parents through their attorney, focused instead on the eligibility questions during the four days of the hearing, and did not focus on the IEPs, or present arguments that they were insufficient in any way or that the Student was not making progress toward her IEP goals.<sup>13</sup> As such, the 2020 IEP was not proven to be insufficient to provide a FAPE, particularly after the September 2020 revisions.

The Parent was able to demonstrate that the Student was harmed by not receiving her IEP services, specifically the Stern Center small group counseling and work from the September 2020 IEP until the Due Process Hearing in November.

Compensatory education is appropriate for the period of time between the September 2020 IEP and the date of the Due Process Hearing when the Parent received a copy of the September 2020 IEP.

#### **D. Bullying and Peer Impact on the Student's FAPE**

Peer relations and social interaction are a crucial component of a traditional public-school experience, particularly for Middle School and High School Students. The importance of peer and social interaction for youth and children on both their mental health and educational performance has become all too apparent to educators and parents alike during the current pandemic that finds many students struggling and socially isolated.

The US Department of Education (ED) defines bullying as aggression used within a relationship where the aggressor has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated. Bullying is 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). Bullying can involve overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors. 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 her IEP. The school should, as part of its appropriate response to the bullying, convene the IEP team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide FAPE. *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013).

Additionally, courts across the country have supported the importance of peer relations and socialization at school and found that bullying that is not addressed promptly can deprive a student of a free appropriate public education (FAPE). The 2<sup>nd</sup> Circuit held that a district's failure to allow parents to discuss bullying with the IEP team impeded the parents' participation in the IEP process. In this case, the court noted that, "[D]enying [the] parents the opportunity to discuss bullying during the creation of [the student's] IEP not only potentially impaired the

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<sup>13</sup> The Hearing Officer was able to review the IEPs and documents provided for the hearing to make the relevant conclusions, based on the testimony of the hearing and the evidence presented in the record.

substance of the IEP but also prevented them [the parents] from assessing the adequacy of their child's IEP..." *T.K. and S.K. v. New York City Department of Education*, 67 IDELR 1 (2d Cir. 2016). While this case did not look at the substance of the IEP in light of the bullying, other courts have made such determinations. For example, the 3<sup>rd</sup> Circuit has found that an IEP and Placement were inappropriate when a school could not prevent a student from being bullied and harassed. *Shore Regional High School Board of Education v. P.S.*, 41 IDELR 234 (3d Cir. 2004).

IDEA Hearing Officers across the country have also looked at bullying cases and found that repeated bullying behaviors towards students with disabilities in school warrants a revelation, to ensure that FAPE is being provided to the student, based on their individual needs. *See, e.g., Southmoreland Sch. Dist.*, 111 LRP 50995 (SEA PA 06/18/11) (advising the IEP team to consider whether the student, who had perceived conflicts with certain peers and did not have many friends, had social and emotional needs warranting additional assessment and intervention); and *San Diego Unified Sch. Dist.*, 9 ECLPR 16 (SEA CA 2011) (finding that, although there was no evidence establishing that the student's peers bullied him, the student's social and emotional issues contributed to adverse attention by his peers); and, *Rose Tree Media Sch. Dist.*, 111 LRP 6194 (SEA PA 12/05/10) (determining that the district failed to evaluate the student although the student's behaviors appeared to be making him a target for bullies).

Additionally, as noted above, the U.S. Department of Education's Office of Special Education Programs (OSEP), the federal agency that oversees IDEA funding and compliance, has produced several guidance documents on the topic of bullying and harassment of students with disabilities (OSEP letters). While these administrative letters are not legally binding documents, OSEP letters have long been adopted as "best practices" by state education agencies (SEAs) and Local Education Agencies (LEAs) for delivering IDEA services and instruction. OSEP letters are therefore, often used to clarify and define aspects of the IDEA that are not explicitly addressed in statute or regulations.

The 2013 *Dear Colleague Letter* from OSEP stated that the bullying of a student with a disability that results in the student not receiving "meaningful educational benefit" constitutes a denial of FAPE. *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013). *See also Dear Colleague Letter*, 111 LRP 45106 (OSERS 07/25/00). Moreover, OSEP stated, the bully's motivation is irrelevant in terms of the victim's right to FAPE under the IDEA. "Whether or not the bullying is related to the student's disability, 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." [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 or her IEP. *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013).]

In this case, the record shows that the District was first notified of alleged bullying and social ostracization of the Student in early November of 2018, when the Parent wrote an email to the principal in District B and stated that the Student was being bullied. The Parent's initial email messages were not responded to, despite the District's Harassment Hazing and Bullying (HHB) policy that requires that reports of bullying should be documented, investigated, and responded to promptly. The Parent and Student both continued to report bullying to the principal and other educators in December of 2018, January of 2019, and February of 2019. On January 29, 2019, the principal finally responded to the bullying complaints with a formal investigation and letter to the

Parent. The investigation concludes with a letter to the Parent on February 6, 2019 that stated that “inappropriate behavior was found” but no violation of the HHB policy was substantiated. The principal sent the Parent another letter on February 25, 2019 that stated that a bullying complaint was being investigated. This time the complaint was substantiated, and it was found that the Student was being bullied. The Parent and Student continued to report bullying incidents to various school employees as late as May of 2019. Additionally, school staff continued to observe that the Student had no close friends and limited social interactions with peers. At no time was the IEP team or IEP coordinator notified of the bullying and harassment of the Student. The team did not convene to discuss the student’s FAPE needs in light of the bullying and social isolation, or the possible need for a reevaluation, to determine if an unserved disability was potentially why she was so often a target of her peers. The principal often seemed to imply that the bullying was the Student’s fault, when she said that the Student would not leave other students alone or could not provide “enough details” or “specifics” about the bullying, despite the Student’s documented disability related to poor social communication, expressive language, emotional regulation, and peer relationship skills. In light of the school’s failure to convene the IEP team or reevaluate the student based on the reports of bullying, the Parent was forced to request an IEE herself, to ensure that the Student would be evaluated again, and it was not until the Parent obtained an attorney that the IEE process actually commenced. While the record does show that the bullying finally subsided in this case, for much of the 2018-2019 school year it appears that the Student was bullied or socially isolated and that her FAPE, particularly her development of social communication skills, was negatively impacted as a result of the bullying during this timeframe.

### **III. Least Restrictive Environment (LRE) – Whether a residential school setting is appropriate for the Student based on information obtained in the Independent Education Evaluation (IEE) or are the Student’s needs met by the District in a local environment.**

The IDEA’s “least restrictive environment” (“LRE”) requirement mandates that children with disabilities be educated with children who are not disabled “[t]o the maximum extent appropriate.” 20 U.S.C. §1412(a)(5)(A). Only when the “nature and severity of a child’s disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily should the child be segregated from her peers”. *Walczak*, 142 F.3d at 122 (internal quotations omitted); VSBER 2364.1(a)(2). The school the child would attend if she were not disabled is the starting point on the continuum of least restrictive environments. *Gaston (OR) School District*, 24 IDELR 1052, 1058-1059 (H.O. 1996) (no need to look at more restrictive placements if program can be provided at the school the child would attend if not disabled).

While the Student’s therapist did recommend the Parent’s desired placement for the Student and both psychologists and all of the evaluative reports agreed that consistency between home and school and regular home to school communication are crucial for this Student to make progress, the Parent did not demonstrate that the Student needs a more restrictive placement for the Student. The Student is meeting grade level standards in her current placement, and while as noted previously, her 2018-2019 and 2019-2020 IEPs could have included more supports for her social communication and emotional needs and there should have been more communication between home to school for the Student at this time, there is no evidence that her needs cannot be met in the local school with nondisabled peers. A special residential school is the most restrictive of



placements on the continuum, and the evidence presented did not indicate that the Student needs such a restrictive setting for her FAPE.

### **ORDER**

Within 30 days of the date of this order, the District shall:

I. Convene the Student's IEP team, with the Parent in attendance, to review the Student's 2019-2020 and 2020 IEPs, the IEE, this final order, and all reports of bullying that the school received from 2018-2020. The team shall then determine the appropriate services and goals for the Student to receive a FAPE in her current placement, make any necessary revisions to the 2020 IEP in effect at this time, and award any necessary compensatory education.

II. The District shall contact the Vermont Agency of Education to arrange for a mediator or facilitator to lead and facilitate the IEP team meeting. The facilitator shall be provided with a copy of this Due Process Order and the relevant materials at least 10 business days prior to the meeting.

III. The IEP team shall award compensatory education to the student for the 2018-2019 and the 2019-2020 school years, which shall include, at a minimum: 1 hour weekly small group communication skills practice and services from the Stern Center; 30 minutes weekly of 1:1 SLP services in social communication; and 30 minutes weekly counseling services. The compensatory education shall be awarded for each calendar week of school time from the 2018-2020 school years. Additionally, the IEP team should review the reading recommendations in the IEE and address if services are necessary or appropriate for fluency, comprehension, and decoding. If services are not appropriate, the team should address and document this decision in light of the findings in the IEE.

IV. The IEP team shall make a home to school communication plan with the Parent, that shall be incorporated into the IEP, and which shall provide no less than one regular 30-minute weekly check-in with both parties via phone, in-person, or virtual means, based on the needs and preference of both Parent and District. The check-ins shall occur each week that the district is in session. Any outside therapists and/or relevant service providers shall also be consulted with regularly, by an assigned District point person who provides similar services to the Student, as deemed necessary by the IEP team.

Dated and Signed in Seattle, Washington this 11<sup>th</sup> day of December 2020.



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C. Rushing, Hearing Officer

Parties have a right to appeal the hearing decision by filing a civil action pursuant to 20 U.S.C. § 1415(g) and State Rule 2365.1.8 Such appeal must be commenced within 90 days of the notice of this decision.