

**IN THE WEST VIRGINIA DEPARTMENT OF EDUCATION
DUE PROCESS HEARING CASE NO.: D19-007**

Person Requesting Hearing (Petitioner)
Parent of the Student

[REDACTED]

Student

[REDACTED]

Counsel for Student and Parent

[REDACTED]

and

[REDACTED]

Local Educational Authority (LEA)
(Respondent)

[REDACTED] County Schools

Counsel for Educational Authority

[REDACTED]

Hearing Location

[REDACTED]

Hearing Dates

November 28, 29, 30, 2018

Type of Hearing

Closed to the Public

Method of Transcription

Court Reporter

Student Present

Yes, for approximately one hour the 1st day

Hearing Officer

Janet A. Sheehan, Esq.
41 15th Street
Wheeling, WV 26003

Witnesses
(In order of
appearance)

[REDACTED]
Special Education Director
[REDACTED] County Schools

[REDACTED]
Board Certified Behavior Analyst
and school psychologist

[REDACTED]
Psychologist
[REDACTED] Mental Health, Inc.
(testified telephonically from
[REDACTED])

[REDACTED]
Behavior Support Specialist
and Service Coordinator
[REDACTED]

[REDACTED]
Specialist in Autism
and emotional/behavioral disorders
[REDACTED] County Schools

[REDACTED]
Attendance Director
[REDACTED] County Schools

[REDACTED]
OSE teacher for student
[REDACTED] County Schools

[REDACTED]
Special Education Teacher (Autism)
[REDACTED] High School

[REDACTED]
School Psychologist
[REDACTED] County Schools

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I.	PROCEDURAL HISTORY	1
II.	ISSUES PRESENTED	4
III.	FINDINGS OF FACT	7
IV.	CONCLUSIONS OF LAW	20
V.	DISCUSSION.....	28
A.	OVERVIEW OF THE CASE	28
B.	ISSUES PRESENTED.....	40
Issue 1		40
Issue 2		45
Issue 3		49
Issue 4		50
Issues 5 and 6.....		57
Issue 7		64
Issue 8		65
Issue 9		69
Issue 10		69
VI.	DIRECTIVES FOR IMPLEMENTATION	70
VII.	APPEAL RIGHTS	76

I. PROCEDURAL HISTORY

This case was initiated on October 2, 2018, by the filing of the parent's complaint with the West Virginia Department of Education and was assigned to this hearing officer the same day. An initial status and scheduling conference was held by telephone conference call on October 16, 2018. Both parties were represented by their counsel. The results of that conference included the decisions that the hearing would be closed to the public and that the student wished to attend at least part of the proceedings. The Hearing Officer ordered that the petitioners should clarify their hearing issues and identify the relief/remedies they sought, and file that by October 24, 2018. The hearing was set for November 12-14, 2018. The parties' counsel indicated during the conference that they would be engaging in a mediation session prior to the hearing date. The petitioner filed a "Supplement to Original Complaint" on October 24, 2018, containing the ordered statement of clarified issues and the relief sought.

On October 29, 2018, a letter was received from Anne Lambright, mediator, that she had conducted a mediation session with the parties, but that the case had not been settled. Subsequently, on October 30, 2018, an e-mail was received from the LEA's counsel that November 12 was the day the schools would observe the Veteran's Day holiday, and that the hearing start date would have to be moved back to November 13, 2018. An order was entered reflecting this change.

On November 6, 2018, the deadline for exchange of evidence and witness identification by the parties, those items were exchanged between counsel. The parent's counsel also filed that day, a "Motion for Default Judgment," predicated upon the failure of the LEA's counsel to file an answer to the original complaint.

A full and complete answer to the original complaint was filed by the LEA on November 7, 2018, together with a list of affirmative defenses which it expected to assert at hearing, and on November 8, 2018, the LEA filed a response opposing the parent's Motion for Default Judgment."

A telephone conference was held on November 9, 2018, with all counsel participating. The parent's "Motion for Default Judgment" was denied and an Order entered setting out the reasons therefore on October 9, 2018. Due to the tardy issuance of an answer by the LEA, the parent was given the option to move for a continuance of the hearing, which would permit her counsel more time to review the LEA's contentions and legal positions on the issues. That option was accepted by the parent's counsel, and after receiving that continuance request in writing, an Order of Continuance was entered on November 15, 2018, resetting the hearing dates to November 28-30, 2018, and the decision due date on January 31, 2019. Cross requests by the parties to admit witness testimony out of the usual order, and also by telephone were all granted on November 20, 2018. Both parties also timely filed additional evidentiary disclosures identifying their witnesses and anticipated documents for hearing.

The hearing was held on November 28-30, 2018, as scheduled, with a court reporter present to create a verbatim record. The testimony of 10 witnesses was heard and both parties submitted multiple documents into evidence; 65 separate exhibits for the LEA, and 30 separate exhibits for the student. The student and her mother were both present for approximately one hour on the first day of hearing. Neither of them testified.

The parties were given until December 21, 2018, to submit post-hearing briefs in support of their positions. Due to delays in the provision of the hearing transcript, on

December 21, 2018, the parties jointly filed a motion to extend the filing deadline for the post hearing briefs. The parties were granted an extension to January 3, 2019 in which to file those arguments. Both parties timely did so. Those briefs were considered in the formulation of this opinion. The deadline for this decision remained at January 31, 2019.

II. ISSUES PRESENTED

1. Whether ██████ County schools violated the IDEA, Section 504 and/or WV Policy 2419 by failing to provide the accommodations contained in the Petitioner's IEP, including:

- i. special education services,
- ii. extended School Year Services,
- iii. transportation services, and
- iv. related Services?

2. Whether ██████ County Schools violated the IDEA, Section 504 and/or WV Policy 2419 by failing to develop an IEP reasonably calculated to provide FAPE, based on the Petitioner's individualized need, containing essential components, including:

- a. Petitioner's present levels of academic achievement and functional performance;
- b. a statement of measurable annual goals, including academic and functional goals; and
- c. consideration and development of positive behavior interventions, supports, and strategies?

3. Whether ██████ County Schools violated the IDEA, Section 504 and/or WV policy 2419 by making unilateral placement decisions?

4. Whether ██████ County Schools failed to provide services in the Least Restrictive Environment (LRE) in violation of the IDEA, Section 504, and/or WV Policy?

5. Whether ██████ County Schools Violated the IDEA and/or WV Policy 2419 by failing to conduct procedural evaluations and assessments, including:

- i. requested Independent Evaluation,
 - ii. assessments prior to significant change in placement,
 - iii. triennial, and
 - iv. functional behavior assessments?
6. Whether ██████ County Schools violated the IDEA, Section 504 and/or WV

Policy by failing to follow procedures, including:

- i. conduct manifestation determination reviews (MDRs) where required,
 - ii. failure to conduct IEP meetings where required,
 - iii. failure to allow parent/guardian participation in placement decisions,
 - iv. and failure to develop a behavior intervention plan (BIP)?
7. Whether ██████ County Schools violated the IDEA, Section 504 and/or WV

Policy by failing to allow student to re-enroll?

8. Whether ██████ County Schools has intentionally, purposefully and with deliberate indifference violated Petitioner's rights as secured by Section 504 by:
- a. denying her, because of the nature and severity of her disabilities, the opportunity to participate in and benefit from appropriate federally assisted education services, programs and activities;
 - b. subjecting her to discrimination on the basis of the nature and severity of her disabilities;
 - c. refusing to accommodate her disability and then disciplining her because of her disability;
 - d. limiting her enjoyment of the right and opportunity to receive a public education in the least restrictive environment?

9. Whether, as a proximate result of the Respondent's violation of the Petitioner's rights as secured by Section 504 the Petitioner has sustained past and future mental anguish and/or emotional distress?

10. Whether, as a proximate result of the Respondent's violation of the Petitioner's rights as secured by Section 504 the Petitioner has sustained past and future loss of enjoyment of life?

III. FINDINGS OF FACT¹

1. Student resides with her mother, and her younger sister. She was 15 years, 10 months old at the time of the hearing. Student attends the LEA's High School where she receives special education services through an Individualized Education Plan (IEP). (LEA Admission)

2. Student resides within the boundaries of the LEA, which is responsible for providing Student with a free and appropriate education (FAPE). (LEA Admission)

3. Student is diagnosed with Autism Spectrum Disorder, Oppositional Defiant Disorder (ODD), Attention Deficit/Hyperactivity Disorder (ADHD), and Bipolar Disorder. (LEA Admission) She was also found to have a disruptive mood dysregulation disorder and mental impairment. Petitioner 22, p 4.

4. Student was deemed eligible for special education and provided with her first IEP in her kindergarten year. She was determined eligible for services under the primary area of exceptionality of Other Health Impairment (OHI). (LEA Admission)

5. In the 2011-2012 school year, Student was attending one of the LEA's elementary schools. (LEA Admission)

6. During her 2011-2012 school year, Respondent performed a Functional Behavior Assessment (FBA) for Student. Following the FBA, in May 2012, a Positive Behavior Intervention Plan (BIP) and Student Crisis Plan was developed to act as a guide

¹ References will be cited in the following forms:
Admissions made by the Local Educational Authority – LEA Admissions;
Petitioner's Exhibits – Petitioner ____
LEA Exhibits – LEA ____
Transcript Volume and page – TR ____, p ____.

in responding to Student's disability related behaviors. Petitioner 4, 6, and 7.
(LEA admission)

7. In July 2012, a psychological evaluation was performed by Respondent, with recommendations for the Eligibility Committee to use to determine continued need for Special Education Services. (LEA Admission) Student was found to have continued eligibility.

8. From October of 2012 to January of 2014, Student attended The [REDACTED]
[REDACTED] The school had services focused on behavior reeducation and teaching/performing relaxation skills. (LEA Admission) Also see LEA 1.

9. After returning from Florida, in January 2014, Student was placed on out-of-school environment (OSE). In her notes dated December 9, 2013, the LEA's autism and emotional/behavioral disorders specialist indicated, prior to re-enrollment, and before an IEP team convened, that "Based on the report findings and significant concerns of past behaviors at school, [student] will need out of school environment services until her behaviors are safely under control." LEA 2. Thus, the placement decision was made before the IEP team even met.

10. Also, after Student returned from her time in Florida, on December 13, 2013, it was noted that student needed no re-evaluations because she was deemed "eligible for all services 7/31/12 – does not need new re-eval as current [diagnosis] is the same." Thus, it appears the LEA personnel believed that determination of eligibility for Special Education Services was the only reason to re-evaluate a student. LEA 2.

11. An IEP was completed on May 28, 2014 which again placed Student in an out of school environment setting (OSE). She was to receive 150 minutes per week of special education services.

12. According to an IEP dated June 11, 2015, an IEP team meeting was held to discuss Student's "transition back into school" after a letter recommending Student be transitioned back into a less restrictive setting was sent to Respondent from Student's psychologist. (LEA Admission) Also see LEA 4 and Petitioner 3. At the June 11, 2015 IEP meeting, the IEP team determined that Student would begin her transition back into school during extended school year (ESY). The IEP ESY determination stated that "no data" had been collected on Student. Petitioner 3.

13. The June 11, 2015 IEP team determined that Student was to receive 450 minutes a week of education services in an Out-of-School Environment (OSE) setting and 450 minutes in a Special Education Environment (SEE) a week. (LEA Admission) Also see Petitioner 3.

14. On August 13, 2015, Student began attending school for the 2015-2016 school year as per her June 11, 2015 IEP. Student started out at two hours a day in an autism classroom setting. (LEA Admission)

15. On the morning of August 20, 2015, Student was restrained by staff members and given two days of out-of-school suspension (OSS). Later the same day, while waiting for her mother to pick her up, Student was restrained on the south lawn for non-compliance with teacher instructions. (LEA Admission)

16. On August 25, 2015, an IEP meeting was held to modify the IEP to reflect the placement change following Student's disciplinary incidents and she was placed on

OSE. Student was to receive 150 minutes of OSE (homebound) a week and 10 minutes of receptive and expressive language therapy. (LEA Admission) See also Petitioner 5.

17. This placement was continued for the remainder of the 2015-2016 regular school year by repeated amendments to the IEP without holding a meeting. Petitioner 5, 8, 9, and 11.

18. Student only received OSE (homebound) services sporadically during her 2015-2016 school year.

19. On May 16, 2016, at the end of the 2015-2016 school year an IEP team meeting was held. Student was to begin receiving 150 minutes of Special Education Environment Services (SEE) starting the 2016-2017 school year. The IEP also added that Student would receive ESY services in a SEE setting for 300 minutes per week. (LEA Admission) Also see Petitioner 12.

20. In June of 2016, Student began attending ESY at the LEA's High School, Monday-Wednesday for 2 hours each day. (LEA Admission)

21. On June 28, 2016, Student had an episode on the bus at the High School where she tried to flee. In the process of fleeing, Student was in an altercation with the school employees. (LEA Admission)

22. On July 12, 2016, Student had a behavioral incident in the lunchroom. Student's mother was called to pick up Student but did not have an immediate ride to the school. The administration called the police on Student and Student was restrained until the police arrived. The administration advised Student not to return to school the next day. (LEA Admission)

23. On August 18, 2016, an IEP meeting was held. Starting October 1, 2016, she was to receive OSE services in an after-school program at the LEA's Middle School, twice a week from 3:30 p.m. to 4:45 p.m. (LEA Admission) Petitioner 13 pp 5 and 13. This was justified by the two violent episodes in ESY over the summer. Petitioner 13, p5, LEA 15, 16. No manifestation hearing was held nor was an FBA ordered. Student continued to receive no education services partly due to the student's mother refusing the services of a male teacher. Petitioner 20, p 11.

24. On October 24, 2016, an IEP meeting was held and Student was officially placed back into OSE (homebound). This placement was chosen due to the same two violent episodes which occurred on June 28 and July 12, 2016, during the prior summer at ESY services. The purpose of the IEP meeting was to review OSE services, Petitioner 14 at pp 7-8. However, the LEA still had not found a volunteer OSE teacher for Student. The LEA personnel testified they could not compel any teacher to teach a student in OSE.

25. On October 24, 2016, an IEP meeting was held and student was placed on OSE (out-of-school environment due to her "severe deficits" in behavior control). Petitioner 14, p.13. This decision to place her out of school in excess of 10 days, for reasons related to her behavior (see Petitioner 20, p 7) constitutes a disciplinary removal.

26. The LEA did not have an OSE teacher or transportation available when this decision to keep her in OSE was made. (Petitioner 31; TR III, p 778; LEA 86, p2; LEA 87, p1, LEA Post Hearing Brief)

27. Student's mother is mentally impaired and does not have a driver's license. Therefore, she was unable to drive Student to OSE at the LEA's Middle School. Respondent determined a bus would be unable to pick Student up for OSE. For Student to

attend OSE, she would have to walk approximately 1.5 miles to catch a city bus, transfer downtown, and walk an additional distance to the LEA's Middle School. After Student attended an OSE session, she had to catch the last bus at 5 p.m. and repeat all previous steps to return home. (LEA Admission)

28. Student often received no education services for several weeks at a time during the 2016-2017 school year. (LEA Admission)

29. On January 3, 2017, a special education teacher for the LEA, said she would be willing to provide OSE (homebound) services for Student on Mondays, Wednesdays, and Fridays, from 3:30-4:45 PM at the LEA's Middle School. The OSE (homebound) services provided by this teacher were set to begin on January 4, 2017. (LEA Admission)

30. On January 23, 2017, student's mother called the police to their home because of a domestic incident involving Student. The police took Student to an inpatient psychiatric hospital. (LEA Admission)

31. On July 26, 2017, Student's mother, requested a sensory evaluation to try and find alternate therapies for Student. No written reply to this request was provided by Respondent. (LEA Admission) However, an occupational therapy evaluation was performed on May 17, 2018, which included a sensory behavior evaluation. Petitioner 88.

32. School opened for the LEA's 2017-18 school year on August 14, 2017. Just 15 days after that, on August 29, 2017, an altercation took place in student's home, where she was alleged to have attacked and injured her mother. As a result of this event, student was arrested and removed from her home county. She did not return to the LEA county and re-enroll in school until February 21, 2018. (Petitioner 20, p5, LEA 45, 47, 48, 52, 56, 59)

33. In a Comprehensive Diagnostic Evaluation conducted on September 29, 2017, as a consequence of student's August 29, 2017 assault on her mother, the evaluating psychiatrist diagnosed student with Disruptive mood dysregulation disorder, autism, and mild mental retardation. She further found student "unable to understand the character and consequences of the [criminal] proceedings against her." (LEA 49, pp 4-5 (clarification added))

34. Student's evaluating psychiatrist noted that in a number of instances student's aggressive behaviors appeared to be both deliberate and manipulative of other people. LEA 49, p. 3.

35. On August 29, 2017, Student was admitted to the Lorrie Yeager Juvenile Center following another domestic incident in the home. (LEA Admission)

36. On September 4, 2017, Student was transferred to [REDACTED] [REDACTED] for diagnostics. (LEA Admission)

37. As of October 30, 2017, Student was in the care of her home county [REDACTED]. (LEA Admission)

38. On January 31, 2018, a circuit court judge issued a court order that Student would return to the custody of her mother the following day. (LEA Admission)

39. Student was hospitalized or incarcerated outside the LEA's district from August 29, 2017 to February 19, 2018. She was transferred back to her home county on February 21, 2018. Petitioner 24, p 1.

40. From January to February 5, 2018, Student was in [REDACTED] County, at the [REDACTED] Shelter. Student did not receive any educational services, although an IEP

matching services from her home county IEP was developed by [REDACTED] County Schools. Petitioner 17.

41. In an email dated March 7, 2018, the LEA's Special Education Department Specialist for Autism and E/BD, stated that an OSE teacher and location had been secured for Student. (LEA Admission)

42. In an e-mail on March 20, 2018, the LEA's Director of Special Education, said that the only "hold up" for Student's education was the transportation. (LEA Admission)

43. An IEP meeting was not held for Student until April 19, 2018. Student was scheduled to attend OSE 4 hours per week at the LEA's Middle School from April 24, 2018 to May 9, 2018. OSE was scheduled for after-school hours. Additionally, the school agreed to provide transportation through a taxi service. (LEA Admission) This was the first time the LEA provided transportation within the two-year period of examination, prior to October 2, 2018, when the Petitioner's Complaint was filed.

44. By April 2018, the LEA had received numerous reports generated by the student's time in hospitalization and the juvenile justice system. Student also had counsel from [REDACTED]. The IEP team convening on April 19, 2018, had several members representing Student's interest including two members of [REDACTED] [REDACTED] an advocate from the [REDACTED] worker. Petitioner 20, p1.

45. On April 24, 2018, Respondent began financing the taxi service to take Student to and from OSE. Student's mother was required to ride in the taxi to and from

OSE with Student since Student required supervision and the LEA had no one to provide it.

46. During the summer of 2018, Student attended ESY at the LEA's High School on Tuesdays, Wednesdays and Thursdays from 9am-10am. Her classroom setting was with one teacher and another student. Student was transported by taxi with her mom riding with her. (LEA Admission)

47. Student was scheduled to attend OSE at ESY services at LEA's high school from May 10, 2018 to June 7, 2018 (last day of school). Student's mother was required to stay in the building while Student received OSE services.

48. Student was evaluated by Respondent in January 2011, and had a BIP and crisis plan drawn up in May 2012. Petitioner 4, 6, 7. However, the BIP was not used after student went to Florida in 2012. She was not evaluated again until after the IEP meeting on April 19, 2018. Petitioner 20. Respondent did not provide another functional behavior assessment until June 1, 2018. LEA 96.

49. In 2018, Student attended 9 out of 16 days of scheduled ESY without incident at the school. Any cancellations were for a variety of reasons provided by Student's mother. (LEA Admission)

50. Prior to assessments performed by request of counsel, completed and reviewed on June 11, 2018, the LEA had not evaluated Student since 2012, when she received a general psychological assessment.

51. In an August 10, 2018 email from the LEA's Autism and E/BD specialist, it was the Respondent's recommendation that Student attend the LEA's High School with the same days and times as she did for ESY. (LEA Admission)

52. Student began school at the regular start date for the 2018-2019 school year and is to continue attending school on the same days and times as her ESY (Monday, Wednesday, Thursday 9am-10am) a total of three hours per week. (LEA Admission)

53. Since October 2, 2016, the dates when the student was residing within the LEA's county were from October 2, 2016 to August 29, 2017, and also from February 21, 2018 to the dates of hearing which concluded November 30, 2018. Petitioner 20, 21.

54. Student's Special Education teacher assigned to her for this 2018-19 school year, reported that student was receiving her education in a special education classroom, and with the exception of an incident on November 1, 2018, student's behavior were generally manageable with close supervision and the use of de-escalation techniques. TR III, p 720, line 23 – p724, line 6; p722, line 24 – p724, line 20.

55. Student's attendance at her OSE classes, and also at the special education classroom, where she was placed this school year (2018-2019) has been poor, with many absences, both excused and unexcused. LEA 87, 112.

56. Between August 28, 2018 and October 23, 2018, student had 17 unexcused absences from school. It was later reported by student that she had been sexually assaulted in her home by her mother's boyfriend, in September, and that she was afraid to attend school because she might meet the perpetrator. LEA 112. The DHHR sent a "Handle with Care notice" to the LEA on September 28, 2018, ostensibly because of this circumstance. LEA 104, 108, 110. The LEA's Autism Specialist admitted much of student's absenteeism this year may have been because of this assault. TR II, p489, lines 14-21.

57. On November 1, 2018, the student had a behavioral incident in the special education classroom where she attacked multiple staff members. It required four adults to

restrain her. Due to the violence and persistence of her actions, they held her down for 20 minutes, at which time her mother arrived. Her mother asked her if she wanted to go home, and student hissed at her once and then immediately discontinued her aggressive behaviors. LEA 111, p. 4. This incident appears to support a conclusion that student may be at least partially in control of her actions, and that they may not always be solely the result of her disability. Other students in the special education classroom had to be removed from the room for their safety. LEA 111, p. 2. Student had a Behavioral Intervention Plan in effect, the elements of which were apparently used in this case without success. LEA 111 p.4 at top, LEA 96. Student was suspended for three days for this incident.

58. On October 30, 2018, two days prior to this behavioral incident, student had reported to her special education classroom teacher that [REDACTED] [REDACTED] The teacher reported this to child protective services that day. LEA 101.

59. In the short period of time between when school began for the 2018-2019 year and when student [REDACTED] there were 17 days of school, and she attended 12 of them (approximately 70% attendance). During this period she had a special education teacher, an aide, an FBA, a BIP, and personalized transportation available to her. LEA 104, TR III, p 728.

60. Student's achievement levels as stated in her IEP of June 11, 2018, for Reading Comprehension are at an approximate kindergarten/first grade level, and her instruction for comprehension is structured around the K-1 reading series. Pictures in her books help her understand the pages. She was working at the time on recognition of high

frequency sight words. Her written communication skills are very weak. She has trouble creating a simple sentence independently. The teacher notes some regression due to lack of school attendance. Petitioner 24, p. 13.

61. Achievement levels in mathematics are also generally at the kindergarten/first grade level. She practices, yet struggles with single digit addition. She uses visual aids, touch math, or manipulatives. She can add up to 9+9 with aids, but cannot add without them. Petition 24, p. 14.

62. Achievement levels on a variety of reading and math subtests in an evaluation on May 2018, revealed that student was in the extremely low range (below 40). Petitioner 25, pp 12-13.

63. Intelligence testing with the Woodcock-Johnson test of Cognitive Abilities in May 2018, yielded a full scale IQ of less than 40, in the extremely low range. (Petitioner 24, p.11). Previous IQ testing with the WISC IV and V suggested her full scale IQ was somewhat higher (55 in 2009, 56 in 2011, 57 in 2012, and 47 in 2017). Persons who receive IQ scores of 69 and lower are in the “Very Low” range (Petitioner 24, pp 2, 4).

64. The LEA’s Special Education Director indicated that a student on OSE is required to have their status reviewed every 45 days. TR 1, p. 162 lines 10-16.

65. The LEA concedes it owes compensatory education for the period of February 19, 2018 to April 23, 2018, in addition to the entirety of the 2016-17 school year. LEA’s Post Hearing Brief at pp. 12, 15.

66. An IEP team did not convene following Student’s return to the LEA on February 21, 2018, until April 19, 2018. Petitioner 20. During that period of just under two months Student was not receiving any educational services.

67. It was acknowledged by the LEA's Special Education Director that the school was aware that student's mother is cognitively impaired. Tr. 1 at pg 19. The nature and/or severity of the impairment were not disclosed.

IV. CONCLUSIONS OF LAW

1. “The IDEA was enacted ‘to throw open the doors of Public Education and heed the needs’ of students with disabilities who had for too long been ‘either completely ignored or improperly serviced by American public schools’ In re Conklin, 946 F.2d. 306, 307 (4th Cir. 1991).” Cited by T.B. Jr. v. Prince George’s County Board of Education, Case No. 17-1877, ___ F. 3d. ___, (4th Cir., July 26, 2018).

2. Where an evidentiary record established that a student will not go to school, “regardless of the school, the teachers, the courses, the programs, the placement, the accommodations, the class size, or the compensatory services offered,” a court may fairly conclude that a student was not deprived of a FAPE by any procedural failing by the LEA. See, T.B. Jr. v. Prince George’s County Board of Education, supra.

3. A plaintiff in a Due Process Hearing must demonstrate a violation of the LEA’s responsibilities under IDEA occurred and that the violation actually interfered with the provision of FAPE, to the student. See, DiBuo v. Board of Ed. of Worchester County, 309 F. 3d., 184, 190 (4th Cir. 2002).

4. The IDEA cannot and does not promise “any particular [educational] outcome.” Endrew F. v. Douglas County School District, Case No. 15-827, 580 US ___, 137 S. Ct 988, 197 L.Ed.2d 335 (March 22, 2017); Citing: Board of Education of Hendrick Hudson Central School District v. Rowley, 458, US 176. However, “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Endrew F., at 580 US ____ 137 S. Ct. 988, at 999.

5. “An IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth. Endrew F., Id., at 508 US ____; and see 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv).

6. A child’s educational program must be appropriately ambitious in light of [her] circumstances,...every child should have the chance to meet challenging objectives.” Endrew F., 580 US at ____, 137 S. Ct. 988, at 1000.

7. If a student requires a service in order to attend school, and without it, cannot benefit from special education, then it is a required related service for that child. See, Irving Independent School Dist. v. Trato, 468 US 883, 104 S.Ct. 3371, 555 IDER 511 (1984). This student requires transportation to and from school in order to get there and benefit from her special education program. Therefore, transportation is a necessary related service to her.

8. Supplementary aids and services means aids, services, and other supports that are provided in general education classes or other education-related settings to enable students in need of special education services to be educated with students without exceptionalities to the maximum extent appropriate in accordance with LRE requirements. WV Policy 2419, Chap 5, § 2, G, 1.

9. When a student’s IEP fails to address behavior problems that interfere with the student’s ability to benefit from their educational program, the LEA may be found to have denied the student a FAPE. See, A.W. & N.W. ex rel B.W. v. Board of Ed. Of Walkill Central School Dist., 68 IDELR 164 (NDNY 2016), also see generally; E.H. ex rel M.K. v. N.Y.C. Dept. of Ed., 67 IDELR 61 (S.D.N.Y. 2016), and Paris S.D. v. A.H. by Harter,

69 IDELR 243 (W.D. ARK 2017). Here the LEA had no Behavior Plan in place between October 2, 2016, and June 11, 2018, and thereby failed to address her behavior problems appropriately.

10. The definition of Special Education Out of School Environment expressly states that it is to be temporary only. See W.V. CSR § 126-16-3.1, West Virginia Regulations for the Education of Students with Exceptionalities, Policy 2419, Chapter 5 § 2.J. at p. 28. [Hereinafter in the form of W.V. Policy 2419, Chapter 5, §§ 2, J, at pg. 28.] No specific time limitations for OSE are provided in the law. Also, it is a more restrictive environment than either a Special Education – Separate classroom, or Special Education – Special [Day] Schools. The LEA here used OSE for multiple 45-day periods between December 2013 and June 2018.

11. A student's LRE placement is to be determined based upon the child's IEP. 20 U.S.C. §1412(A)(5), 34 C.F.R. §300.116(b)(2). "Placement decisions are made after all sections of the IEP, except the educational environment section, have been completed." W.Va. Policy 2419, Chap 5, §2, J, 3, a. (emphasis added).

12. "A due process complaint must be initiated within two years of the date of the parent... knew or should have known of the disputed decision or alleged action that forms the basis for the Complaint." WV Policy 2419, Chap 11, §4.A. In the instant case the complaint was filed with the West Virginia Dept. of Education on October 2, 2018. Therefore, actions/decisions dating back as far as October 2, 2016, may be at issue.

13. The burden of proof in a West Virginia due process hearing is on the party seeking relief, in this case, student's mother. WV Policy 2419, Chap II. §4A. citing Schaffer v. Weast, 546 US 49, 126 S.Ct. 528, 163 L.Ed. 2d 387 (2005).

14. Whenever a child is removed from their current educational placement for a period of more than 10 days, due to disciplinary action, that removal constitutes a change of placement. See 34 C.F.R. §300.356(a)(1). The Student herein continued to be placed in OSE under the IEP of October 24, 2016, because of two disciplinary events that occurred in the summer of 2016, and remained there until the IEP of June 11, 2018.

15. A "change of placement" based on disciplinary removals is defined as:

- (1) removal for more than 10 consecutive school days; or
- (2) a series of removals during the same school year that constitutes a "pattern." 34 C.F.R. 300.536.

16. When a disciplinary change of placement occurs, the LEA, the parent and relevant members of the IEP team must make a manifestation determination within 10 days of the decision to change the child's placement (34 C.F.R. § 300.530(e). This inquiry is to determine whether the objectionable conduct was a manifestation of the child's disability, or a direct result of a failure to implement the student's IEP. 34 C.F.R. § 300.530(e)(i) and (ii).

If either condition is met, then the behavior is determined to be a manifestation of the child's disability, and the LEA must conduct a Functional Behavioral assessment and develop a Behavioral Intervention Plan. 34 C.F.R. §300.530(f)(1)(i-ii).

Even if the misbehavior is determined to be unrelated to the child's disability, the LEA is still to "Receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur." 34 C.F.R. §300.350(d)(ii).

In student's case, no manifestation determination ever took place, in spite of her near permanent out of school placement due to recurrent behavioral issues. TR 2, p 478. Neither was an FBA performed in response to problem behaviors she exhibited at school, until June 11, 2018, after she had been in OSE for most of the past 4 ½ years. (LEA 96)

17. Staff shortage is not an excuse for a district's failure to implement an IEP. School districts must provide each eligible student FAPE consisting of special education and related services in conformity with the student's IEP. Fridley Pub. Sch. Dist. (Indep. Sch. Dist. 0014-01), 72 IDELR 139 (SEA MN 2018).

18. To the extent that violations of IDEA are procedural violations, they are actionable as a denial of FAPE only when they affected the student's substantive rights. TB v. Prince George's County BOE, (4th Cir. 2018) 72 IDELR 171, ___, citing Leggett v. Dist. of Columbia, 447 F.3d 59, 67 (DC Cir 2015). The procedural fault must cause educational harm to the student or seriously impede the parent's right to participate in the IEP process. A.L., 194 Fed. Appx. at 180 see also Deal, 392 F.3d at 854; DiBuo, 309 F.3d at 190; MM, 303 F.3d at 533; Attleboro, 2013 U.S. Dist, LEXIS 35427 at *19.

19. An evaluation under the IDEA serves two purposes: identifying students who need specialized instruction and related services because of an IDEA-eligible disability; and helping IEP teams identify the special education and related services the student requires. 34 C.F.R. 300.301 and 300.304(b)(I)(i) and (ii).

20. To establish a violation of Section 504 and its implementing regulations, plaintiffs must show that they were discriminated against solely based on disability. Sellers ex. rel. Sellers v. School Board of Manassas Virginia, 141 F.3d 524, 529 (4th Cir. 1998), cert. denied, 525 U.S. 871 (1998). In Sellers, the Court held that in the context of a claim

that a school system has not provided FAPE to a child with a disability requires finding of either bad faith or gross misjudgment by the school system. Id. at 529.

21. Section 504 of the Federal Rehabilitation Act of 1973 states, “No otherwise qualified individual with a disability shall, solely by reason of his disability, be excluded from the participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 34 C.F.R. §104.4(a).

22. As parsed out in Fry v. Napoleon Community Schools, with regard to exhaustion requirements, equality of access to education can be the gravamen of a Section 504 complaint regarding special education, rather than the denial of FAPE. Fry v. Napoleon Community Schools, 580 U.S. (2017).

23. Parents of disabled students have a right to refuse Extended School Year services. (W.Va. Policy 2419, Chap 5, §2H, final paragraph.

24. Students with disabilities, eligible for special education under the IDEA, are to be educated with non-disabled children to the maximum extent appropriate, and they are to be removed to separate classes and separate schooling only if the nature or severity of the disability “is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. §300.114(a)(2). (emphasis added) See also, W.Va. Policy 2419, Chap 5 §2, G, requiring IEPs to contain special education, related services, supplementary aids and services to allow a student to be educated with other students.

25. “If a student’s behavior, regardless of the disability, impedes his/her learning or the learning of others, the IEP team must consider the use of strategies,

including behavioral interventions and supports, to address the behavior” (emphasis added). W.Va. Policy 2419, Chap 7 introductory paragraph, citing W.Va. Code § 18A-5-1.

26. Special Education Out-of-School Environment (OSE) is a more restrictive placement than either special education – full time, or Special Education special school. It is intended to be temporary, but has no explicit time restrictions. Policy 2419, Chap 5, § 2, J.

There is no 45-day time limitation for OSE placements.

There is a 45-day time limitation on disciplinary removals to Interim Alternative Educational Settings, which are also, generically speaking, out of school placements. Policy 2419, Chap 7, § 2, C.

27. An Interim Alternative Education Setting placement is only authorized “for not more than 45 days” total duration and only if the student’s behavior involved:

- The carrying or possession of a weapon at school, on school grounds or at a school function;
- The knowing possession, use or carrying of illegal drugs at school, on school grounds, or at a school function

Or

- Infliction of serious bodily injury to someone at school, on school premises or at a school function.

To rise to the level of serious bodily harm, the injury must pose:

- a) serious risk of death
- b) extreme physical pain
- c) protracted / obvious disfigurement or

d) protracted loss or impairment to a body part, organ or mental faculty.

See W. Va. Policy 2419, Chap. 7, §2, C. None of the behaviors manifested by this Student satisfy these conditions.

28. Hearing Officers have broad authority to award appropriate relief for violations of I.D.E.A. See, Forrest Grove School District v. T.A., 557 US 230, 129, S. Ct. 2484, 52 IDELR 152 (June 22, 2009). However, compensatory money damages and punitive damages are not available under IDEA. Sellers by Sellers v. School Board of Manasses Virginia, 141 F.3d 524, 528 (4th Cir. 1998), cert. denied, 525 U.S. 871 (1998). Lewis by Lewis v. Scott County Public Schools Board of Education, 67 IDELR 211(W.D.Va. April 21, 2016).

V. DISCUSSION

A. OVERVIEW OF THE CASE

The student is a girl, 15 years, 10 months old at the time of hearing. She has been a student enrolled with this county, with interruptions to be noted below, since at least January, 2011. (See Petitioners 4, 6, 7.) Student is identified as eligible for special education as a child with Autism Spectrum disorder. Petitioner 20, p1. She has also been diagnosed with Bipolar disorder and oppositional defiant disorder. LEA 1, p.1, and disruptive mood dysregulation disorder. LEA 49, p 4-5. In May 2018, she was administered the Woodcock Johnson Test of Cognitive Abilities IV. She earned a general ability below 40, in the extremely low range. Petitioner 24, p. 12. Previously, IQ testing obtained a full scale score of 56. Her academic achievement tested at the same time also yielded scores in the “less than 40, extremely low” range. Petitioner 24, p. 12-13. It appears quite certain that she suffers from significant mental impairment in addition to her other diagnoses.

Student has had numerous episodes of explosive behaviors over the years. They have occurred at home, at school, and on school buses. Consequently, she had a Positive Behavioral Intervention plan and a student crisis plan created in May, 2012, when she was 9 years old and still in elementary school. Petitioner 6, 7.

Behaviors Targeted by the 2012 Positive Behavior Intervention Plan (PBIP) included “defiance and noncompliance when asked to do activities; hitting, kicking, pinching, scratching, biting, [and] spitting at teachers and staff; throwing objects and/or furniture at teachers and sometimes students; screaming, hissing and snarling; yelling obscenities at teachers; running from teachers and staff; crawling on the floor and under

tables; and climbing furniture.” Petitioner 6, p.1. She has exhibited those behaviors as recently as November 1, 2018. LEA 111.

On October 24, 2012, student was admitted to the [REDACTED] a residential therapeutic and educational facility for disabled children, where, it was hoped, she could learn to manage her problem behaviors including physical and verbal aggression, property destruction, self injury, and elopement (ie running away). LEA 1, p.5. She has there for approximately 14 months, and was discharged on or about December 9, 2013. LEA 1, p. 16., 2. Student’s 2012 PBIP was not used again after the [REDACTED] admission.

Out-of-School Environment Services (OSE) for Student

2013-14 School Year

In December 2013, when the LEA received notice that student would be returning from Florida to re-enroll in their elementary school, the LEA’s specialist for autism and behaviors disorders, noted that student was discharged from the residence school against advise. The discharge report stated student’s “aggression toward others put her and the community at risk. Discharge is not recommended at this time.” LEA 1, p. 14 referenced at LEA 2. The autism specialists’ conclusion was that:

“[b]ased on the report [from the [REDACTED] findings and significant concerns of past behaviors at school, [student] will need Out-of-School Environment (OSE) services until her behaviors are safely under control...At this point it is not safe for [Student] to return to a public school setting. A new IEP will need to be developed to address needs and to determine extent of services. Parent will need to re-enroll her at [her home] elementary [school] to receive special education services.”

LEA 2.

This note makes clear that the LEA determined her placement in OSE before an IEP was developed, or her services determined. In fact, her placement in OSE was determined before she was even officially re-enrolled in school at the LEA in January 2014. Petitioner 20, p. 12, and LEA 2.

2014-2015 School Year

On January 9, 2015, Student had again been in an OSE placement for at least 45 days, and at that time, was placed there for 45 days more. Petitioner 1.

On June 11, 2015, an IEP meeting was held with the stated intention of “transition[ing] [Student] back into school” Petitioner 3, p.1. Clearly, it would not be necessary to transition her back to school unless she was still out of school as of June 2015. No evaluations had been performed for over 4 years, and none were ordered. Petitioner 4. No Manifestation Hearing was held. No Functional Behavioral Analysis (FBA) was done this year, nor was a Behavioral Intervention Plan (BIP) put in place.

2015-2016 School Year

The efforts to bring Student back inside a school building were short lived. On August 25, 2015, another IEP team meeting was held to transition Student back to an Out of School environment. Student had exhibited violent and disruptive behaviors repeatedly over 4 days that she attended summer classes. Petitioner 5, p.5. She was again assigned to an OSE and was to receive Special Education instruction for only 150 minutes (2.5 hours) per week. It is clear this OSE placement was to continue for a full academic year until June 2016. (Petitioner 4, p.11). No Manifestation Hearing was held. No FBA was done, and no BIP created. The LEA then went through the motions of extending the OSE placements for additional 45-day periods by amendments to her IEP dated September 2,

2015 (Petitioner 8), October 9, 2015 (Petitioner 9), and November 19, 2015 (Petitioner 11). In May 2016, she was still out of school (Petitioner 12) and was to get 300 minutes (5 hours) weekly in Extended School Year (ESY) summer school instruction.

2016-2017 School Year

A new annual IEP was drafted on August 18, 2016 (Petitioner 13) and Student was again placed in Out of School environment until November 2016. (Petitioner 13, p.2) She was still designated to receive special education services in OSE only 150 minutes (2.5 hours) per week (Petitioner 13, p. 12) There was still no FBA done, nor BIP created.

The OSE placement was again chosen in her IEP as of October 24, 2016, because of two violent episodes during the summer of 2016. Petitioner 14, pp5-7. This document notes that the IEP needs to be reviewed every 45 days. (Petitioner 14, p 15). The next review was apparently on March 28, 2017, when Student's OSE placement was continued until April 3, 2017, because of "lack of student attendance." Petitioner 15, p1. It was admitted by LEA's counsel at hearing that Student was given no transportation to her OSE services for the entirety of the 2016-2017 school year (August 2016-June 2017). TR I at p.11, lines 2-10. So, as of March 2017, the LEA was justifying the continuation of the OSE placement upon their own inability or refusal to transport the student to the meager services they were offering in the OSE environment.

On May 23, 2017, OSE placement was again extended through to the start of the new 2017-2018 school year. Petition 15, p.1. No rationale is given except the conclusion that "Student continues to require OSE services." Petitioner 15, p1. Since Student's mother refused ESY services, Student did not receive any services over the summer of 2017.

2017-2018 School Year

In the 2017-2018 school year, the student began the year assigned to OSE pursuant to the IEP of October 24, 2016 (Petitioner 14), and amendments dated March 20, 2017, and May 23, 2017 (Petitioner 15 and 16)). The school year began on August 14 and just over two weeks later, student was arrested due to a violent assault she committed against her mother. Petitioner 20, p 5. Student was in the custody of the State from August 29, 2017, until February 1, 2018. LEA 59, Petitioner 20, p 5. During that time, she was variously at the [REDACTED] detention center, [REDACTED] and the [REDACTED] Center, all of which are outside the LEA's county. LEA 45, 47, 48, 52, 56.

Student's next IEP was written on January 19, 2018, by [REDACTED] County Schools, because student was still residing at the [REDACTED] Center, within that county (LEA 58). The [REDACTED] County IEP document relies on old information from the October 24, 2016, IEP, by the LEA (Petitioner 14). Student never received services from [REDACTED] County Schools because of her return to her mother's custody on February 1, 2018. LEA 59.

The LEA was notified of Student's return to their county on February 14, 2018 (LEA 61). Student did not receive any services from the LEA until April 24, 2018. (LEA 78, p 1) because a new IEP was not developed by the LEA until April 19, 2018. (LEA 84). She was again put in an OSE placement "due to her behavior. She will not participate in the general environment due to significant safety concerns for all parties involved." (LEA 84, p 22). No FBA was requested. No BIP was created.

The April 19, 2018, IEP document is 24 pages in length yet it provides for only four hours of direct education services per week to Student (LEA 84, p 20) and it still provides for an OSE placement (LEA 84, p 22 and LEA 87). Student's LEA-provided transportation

also became available for the first time on April 24, 2018, so on that day she resumed her attendance at OSE classes which continued to the LEA's summer break in June 2018 (LEA 87).

2018 – 2019 School Year and Student's Return to School

Finally, on June 11, 2018, an IEP was written which placed Student back in a special education environment within a school building (although it erroneously notes the placement as general education environment) (LEA 95, pp 22-23). This IEP covered both ESY services for summer 2018, and the regular 2018-19 school year in grade 10. (LEA 95, pp 24-25).

Thus, from Student's return to the LEA's county in December 2013 until June 11, 2018, she was not permitted to attend school with other students during the school year. ESY services in the summers of 2015 (Petitioner 5, 8, 9) and 2016 (Petitioner 13, p 5) were provided in a school building, but both years, behavioral problems or outbursts caused Student to be placed back in OSE in short order. (Petitioner 5, p 5; 13, p 5, 13, 15; and 14, p 7).

At no time between December 2103 and June 2018, did the LEA conduct a manifestation determination, nor did they have a functional behavioral assessment (F.B.A.) performed. No Behavioral Intervention Plan was implemented. Student was effectively removed from any in-school environment for a period of approximately four and one half years without any efforts by the LEA to get to the root of the discipline / behavioral problems, or to address them in a school setting.

The two-year Statute of Limitations applicable in the instant case limits the period of scrutiny from the October 2, 2018 filing of this complaint back to October 2, 2016.

Consequently, relief can be granted only for violations which occurred after October 2, 2016, but the history of how the student came to be excluded from the school environment is critical to an understanding of what has occurred from that date to the present.

Access to Educational Instruction

Instructional Times

2016 – 2017

The IEP documents in effect from October 2, 2016 to the present all provide for very limited hours of instruction. Pursuant to IEP's dated May 16, 2016, (Petitioner 12), August 18, 2016 (Petitioner 13), October 24, 2016 (Petitioner 14), March 20, 2017 (Petitioner 15), and May 23, 2017 (Petitioner 16), Student was to receive a total of 150 minutes per week (or 2.5 hours) spread over three days per week. This translates to 50 minutes per school day. It should be emphasized that this is not 50 minutes of special education services or related services in the context of a longer school day. This is 50 minutes of education in total. This pattern continued until August 29, 2017, when Student was no longer in the LEA's county. Upon Student's return to the LEA's county in February 2018, she had an IEP created by ██████ County Schools which provided for four hours of direct instruction weekly. (Petitioner 17). This instruction level was carried forward into the LEA's IEP of April 19, 2018 (Petitioner 20). In the most recent IEP provided at hearing, dated June 11, 2018, Student is to receive three hours per week of direct instruction including two hours a month of speech therapy.

At the 150 minutes per week level, Student could potentially receive 90 hours of instruction per year, or the equivalent of about 3 weeks of full-time general education per year (based on 30 hours / week for regular education students). At the four hours per week

level, Student could receive a maximum of 144 hours of instruction per year which translates to just less than five weeks per year of full-time attendance (four weeks plus four days based on a 30-hour per week regular education model). When you consider that Student must take off her coat and get settled in, and also get her things together, put on her coat and leave within her one hour of daily instruction, it is clear that actual learning time is substantially less than even the numbers above. It is not surprising that Student has made little academic progress under this starkly abbreviated teaching schedule.

Availability of Transportation

2016-2017 School Year – No Transportation Provided

In the Opening Statement by LEA's counsel at hearing, the LEA admitted that they did not provide transportation to the student during the 2016-2017 school year. TR I, p 11, lines 2-10. It was also stated by the LEA's counsel that they agreed and consented to provide Student with compensatory education for that school year. They did not, however, specify how much, or what type of compensatory plan they felt was appropriate. TR I, p 11, lines 11-15.

2017-2018 Year – Transportation in the Form of Private Taxi Service

The evidence further indicates that transportation was not available until April 24, 2018. (LEA 89, p 8, OSE attendance log). Once Student had a means to get to her class, she attended 19 days out of 25 that were offered. The LEA's attendance log indicates sick calls or doctor visits on the missed days. (LEA 89, p 8-9 and Petitioner 24, p 9).

Availability of Teaching Staff

2016-2017 School Year

The provision of a teacher to deliver services is another area where the LEA fell short. In spite of the fact that the LEA drafted an IEP on August 18, 2016, which purported to locate Student in an OSE placement for the upcoming academic year (Petitioner 13), the LEA did not have a teacher available to instruct the student. The decision to put Student in a placement without a teacher was repeated on October 24, 2016. Petitioner 14. As late as November 29, 2016, the LEA had no teacher for Student and the LEA's autism specialist indicated she "had no idea where to go with this situation." (Petitioner 31, p 2). So when the LEA finalized IEP's in August 18, 2016, (Petitioner 13) and October 24, 2016 (Petitioner 14), they were authorizing that Student be given services by no one and without transportation to get there. It is hard to imagine how any trained educational professional could view this as an appropriate course of instruction for any student. It is only an illusion of an educational placement. It is also clear that both of these OSE placement determinations were made in response to behavioral issues (Petitioner 13, 14).

As if this were not bad enough, the LEA took this travesty one step further by using Student's previous lack of attendance as justification for continuing the OSE placements in its IEP of March 28, 2017 (Petitioner 15, p 1). On May 23, 2017, the LEA continued the OSE placement without a stated reason except "student needs" (Petitioner 16, p 1). Consequently, the LEA failed to provide Student any meaningful education in the 2016-2017 school year.

Transportation and Teaching Staff

2018-2019

The evidence indicates that Student had transportation in the form of private taxi service, available to her as of the first day of school on August 15, 2018. LEA Rebuttal Ex 1, p 3. She also has a teacher available to her and is attending school at one of LEA's high schools.

Student's Behavior

Although Student has expressed a desire to attend school for more hours per day, her current teacher indicated it requires the teacher's undivided attention and frequent de-escalation activities to keep Student calm. Student is also upset by busy, noisy environments. The teacher recommended Student attend school [for her one hour per day] for a longer time period than five days, before the daily times were increased "so as not to set her up to fail." LEA Rebuttal Ex. 1, p 1). There was no evidence that Student's placement / program or services for the 2018-2019 year were inappropriate for her at this time.

There was an FBA performed and a BIP created for her on June 11, 2018. LEA 96. During an intense behavioral incident on November 1, 2018, (LEA 111, 101), it appears that efforts were made by the teacher to use work breaks, a therapy ball, redirection, presentation of activity options (multiple times), calming techniques, and the removal of other students who may have been noisy or distracting, as means to get Student's behavior back under control (LEA 111, p 4).

In spite of these efforts, Student launched an attack on multiple staff members that lasted more than a half hour (LEA 111, p 4). Student's teacher suffered numerous bruises

and multiple minor wounds (LEA 111, p 7). Four adults had to hold her down, and steps had to be taken to protect her from self-injury (LEA 111, p 4).

The personnel involved managed to avoid serious injury to themselves, other students, and to the student herself. However, there is no evidence that the BIP was reexamined, revised, or fine-tuned as a result of this event.

The behaviors exhibited in this recent incident are similar to, and consistent with, behavioral patterns she has exhibited throughout her school career. It was behavior of this sort that caused her to be sent to the [REDACTED] in 2012 (LEA 2) and this type of behavior has continued intermittently ever since.

There is no question that Student's behaviors can present a potential danger to herself and to others, including other special needs students in her classroom

Disciplinary Removal

For the time period beginning October 2, 2016 (the most distant past date within the two years statute of limitations) until the start of the 2018-2019 school year on August 15, 2018, Student was almost exclusively in an Out of School environment (See Petitioner 13, 14, 15, 16 and 20). In the IEP up for annual review on August 18, 2016 (the last IEP prior to October 2, 2016), it was clear that disciplinary events earlier in the summer were the reason supporting Student's removal from the in-school environment. (Petitioner 13, p 5 bottom). Indeed, in the prior written notice, it indicates the reason for Student's educational placement is that "[Student's] behaviors are severe and unpredictable. They pose a safety risk to herself and those around her." Petitioner 13, p 15.

The evidence at hearing is clear that no manifestation hearing was ever conducted as a consequence of any of Student's behaviors. She was simply kept in OSE.

A Positive Behavioral Intervention Plan and a Student Crisis Plan were formulated in May 2012, (Petitioner. 6, 7) but were never used after Student's return from the [REDACTED] in December 2013. (Petitioner 20).

From all of the above discussion, it is clear that Student has exhibited serious behavioral problems and that steps must be taken to protect her and others from her actions when her outbursts occur. At the same time, she is a child with a disability and that disabling condition is quite clearly a major factor, if not the sole cause, of the maladaptive behaviors seen. The challenge here is to protect her and all those around her who could be hurt by her violent aggressions while providing her with the educational opportunities guaranteed by the IDEA.

B. ISSUES PRESENTED

Issue 1 - Whether ██████ County schools violated the IDEA, Section 504 and/or WV Policy 2419 by failing to provide the accommodations contained in the Petitioner's IEP, including:

- i. special education services,**
- ii. extended School Year Services,**
- iii. transportation services, and**
- iv. related Services?**

a) 2016 – 2017 School Year – The LEA’s counsel made clear in both their opening and closing statements at hearing that the school district did not provide transportation services to Student, or to any other child in the county, who did not attend school for at least ½ a day, per day. As stated by LEA’s counsel, “The LEA at that time did not have a system in place to provide those transportation services. And as a result, the student did not receive IEP services for an extended period of time for the 2016-17 school year.” TR 1, - 11. Counsel for the school district went on to say that the LEA agrees Student is entitled to compensatory education for that time period. TR 1, p 11. Consistently, the LEA’s counsel repeated in closing arguments that “the Transportation Department [of the LEA], in 2016-2017 was not set up to provide transportation to students who were after [sic] school for less than half day. And so that didn’t get done and the special education department for lack of a better word, didn’t seem to know any better.” TR 3, p 778.

Based on this admission, it is my conclusion that the LEA did not provide any appropriate special education services to the student during this time period and that

compensatory education should be provided for the entirety of the school year. In light of this finding, it is not necessary to exhaustively examine the specific list of shortcomings alleged by the petitioners.

It should be noted that going forward, the LEA is on notice that this child requires transportation in order to attend school. Without transportation, she cannot benefit from her special education program or other services. Therefore, transportation is a required related service for Student, and it must be addressed and expressly provided for in her future IEP documents. See Irving Independent School District v Trato, 468 US 883, 104 S. Ct. 3371, 555 IDELR 511 (1984), W.Va. regulations also expressly indicate that transportation is a related service. WV Policy 2419, Chap 5, § 2, G, 3.

This finding necessitates a concurrent finding that Student did not receive special education services or related services during the 2016-17 academic year in violation of IDEA and WV Policy 2419.

b) 2017-2018 School year

i) Access.

During the 2017-18 school year, Student resided within the LEA's county between the first day of school on August 14, 2017, and August 29, 2017, a period of 15 days, or 2 school weeks, at which time she left the county. She was not returned to her home county and re-enrolled in school until February 21, 2018. (Petitioner 24, p 1). The 2017-2018 school year ended on June 7, 2018. (Petitioner 24, p 9), 15 weeks after Student's return. Therefore, Student was a resident in the county and available to attend school for 17 weeks during that school year.

As with the previous academic year, the LEA was without a clue as to how they might provide transportation to enable Student to get to school. As of March 7 and 8, 2018, LEA's special education director was attempting to get Student's Title 19 service provider to transport her, and asking Student's legal counsel who was responsible for transporting her. Petitioner 37, p 1. This reflects a basic lack of familiarity with the related service provisions of our state law, W. Va. Policy 2419, Chapter 5, § 2, G, 3 where the definition of related services is stated. "The term 'related services' refers to transportation and such developmental corrective and other supportive services required to assist an eligible student to benefit from special education as described in the IEP." Id. Notably, this provision is unchanged between the versions of Policy 2419 effective September 15, 2014 and August 14, 2017. For good measure, the provision again includes Transportation as the last item in the list of services includable as "related services."

The evidentiary record reflects that transportation services were first introduced and provided to Student in the form of private taxi cab services on April 24, 2018, and on that

date Student returned to school (Petitioner 89, pp 1-3). Between April 24 and June 7, 2018, Student was scheduled to attend school for 25 hours (25 days x 1 hour day) (Petitioner 89, p 8-9). Nine of those time slots were consumed by the administration of evaluative testing (Petitioner 89, pp 2-3). On only six days was the school time applied to academics. Student attended a total of 18 days.

June 7th was the last day Student attended school for the 2017-2018 year (Petitioner 89, pp 8-9). Consequently, Student could have received a maximum of 16 hours of instruction between February 21, 2018, and June 7, 2018, a period of over 4 months.² This is not a meaningful amount of instructional time, particularly for a student who has been out of any school-based educational environment for an extended period. While the LEA is not responsible for any deficits Student suffered while she was living outside the LEA's district, they are responsible for addressing her individual needs, including existing educational deficits, upon her return.

As a result of this failure to implement an IEP and *de minimus* provision of instructional time, it is unlikely that Student obtained any meaningful benefit during the 2017-2018 regular instructional year. Since the LEA was responsible for the provision of her education for 17 weeks of that academic year, they are liable to provide compensatory education for this time period as well.

² 25 hours of instruction per IEP, minus 9 hours of evaluations equals 16 possible hours.

c) Extended School Year (ESY) 2017 and 2018

During the period after the two-year statutory limitation period (i.e., October 2, 2016 to November 30, 2018), there were two summers during which ESY services could potentially have been provided, those being 2017 and 2018. The last IEP prepared prior to the summer of 2017 was dated October 24, 2016, (Petitioner 14). In that document, the decision concerning whether Student requires ESY is deferred until April 2017. (Petitioner 24, 4th pg, marked “2 of 15”). A review of documentation reveals that Student’s OSE placement was renewed on March 20, 2017, and again May 23, 2017 (Pet’s 15 and 16). In the May 23, 2017 review, it is reflected that the school district proposed ESY services sending Student to Special Education Environment for 600 minutes per week. (Petitioner 16 at p 2). This is four times the amount of instructional time per week they offered for the regular school year. (Petitioner 16, p 6, marked 13 of 16). Student’s mother rejected those services offered for the summer of 2017. (Petitioner 16, pp 1-2). The parent is within her rights to reject those services, but cannot reject them and complain afterward that Student didn’t receive them.

During the summer of 2018, Student was offered ESY services and transportation for a total of 16 days. (LEA 89, p 67). This was provided for under the last IEP previous to that time, dated June 11, 2018. (Petitioner 24, p 3, marked 2 of 27). The critical skills to be addressed over the summer are “behavior” and services are offered for one hour per day for three days per week, for a grand total of 16 hours over the course of the summer. Petitioners pointed to no evidence which indicates this ESY service was inappropriate in any way, nor do they identify any harm to Student on this account. Consequently, no violation of the law, nor deprivation to Student is found with respect to ESY services.

Issue 2 - Whether ██████ County Schools violated the IDEA, Section 504 and/or WV Policy 2419 by failing to develop an IEP reasonably calculated to provide FAPE, based on the Petitioner's individualized need, containing essential components, including:

Adequacy of Student's IEP documents

- a. **Petitioner's present levels of academic achievement and functional performance (PLOP);**
- b. **a statement of measurable annual goals, including academic and functional goals (G & O's); and**

In the testimony of the LEA's director of Special Education, it was admitted regarding Student's IEP of October 24, 2017, (Petitioner 14), that the goals and services in that IEP were essentially unchanged from prior IEPs dating back to October 2015 (Petitioner 9) and earlier. As of April 19, 2018, it was further admitted that Student had shown no notable academic progress in her present levels of performance (PLOP) over the past several years. TR 1, p 229 lines 1-12, referencing Petitioner 20, p 13 of 24. At that time, her math and reading levels continued to be in the kindergarten to first grade levels, in spite of her imminent matriculation to her 10th grade year. Petitioner 20, p 13.

Whether Student's lack of progress was caused by inadequacies in the IEP documents is not clear. It is, in my opinion, much more likely that the sparsity of instructional time Student has received, together with her disabling conditions, are more responsible for this poor achievement rate.

The lack of instructional time afforded her has already been exhaustively discussed. Student's limitations are severe across numerous areas necessary to learning.

Dr. [REDACTED] who evaluated Student on September 29, 2017, found her to have:

- A full scale IQ of 47:
- Reading skills – very limited
 - Phonemic Decoding and Word Recognition – severely impaired
 - Math – unable to perform basic addition
 - Able to count and identify numbers up to 10
 - Visual Motor Integration – severely impaired
 - Attention and Concentration – severely impaired
 - Cognitive Efficiency and Flexibility – severely impaired

(Petitioner 25 at p 2).

Additional testing by the LEA's school psychologist in May 2018, found numerous deficiencies in areas critical to learning:

- Attentional Skills and Hyperactivity – clinically significant
- Phonological (language) Processing – extremely low
- Fluid Reasoning (Problem Solving) – extremely low
- Crystalized Knowledge (Verbal Comprehension, General Knowledge and Vocabulary) – low to extremely low
- Visual Spatial Processing – extremely low
- Short-Term Memory – extremely low
- Long-Term Memory – low to extremely low

Her relative strength in memory was in the area of design recognition, recalling shapes in a multiple choice format at which she received a low average rating, indicating she may learn best with pictures to help her recall information.

- Processing Speed – extremely low
- Intelligence – full scale IQ below 40 on Woodcock Johnson Test of Cognitive Abilities – extremely low
- Academic Achievement tested numerous areas related to reading and mathematics receiving all scores in the extremely low range.
- Social-Emotional Functioning and Adaptive Behavior questionnaires reflected clinically significant scores for:
 - Hyperactivity
 - Atypicality (immature / odd behavior)
 - Attention Problems and
 - Leadership (skills associated with accomplishing goals)
- Executive Functioning – significant or at risk across all subtests
- Autism Spectrum Rating – many areas in the elevated or very elevated ranges
- Adaptive Behaviors – in the low to extremely low range

(Petitioner 25)

Clearly, this student has abilities and intrinsic capacities that are impaired as compared to nondisabled persons. Almost all the skills / activities necessary to learning (memory, attention and intelligence) are significantly impaired. From this information, it is not possible to determine whether Student's depressed achievement levels are the result

of diminished opportunity or limitations characteristic of her many disabilities. As noted by her neuropsychological evaluation in September 2017, “her academic achievement is generally below the first grade level but consistent with her intellectual ability” LEA 47, p 2. In addition, Student attended school for very few hours. It is just as likely that is the reason for her low achievement as that the IEP goals and objectives or present levels of performance were inappropriate. Petitioner’s counsel offered no evidence that the poor academic results achieved by Student were caused by the alleged deficiencies of the goals and objectives in her IEP.

It seems unlikely to me that more specifically crafted goals and objectives and present levels of performance, rather than the more general ones used, would have made any significant difference in the educational results experienced by Student.³ In addition, at no point did Student’s counsel indicate in what way the goals and objectives, or present levels of performance used were inappropriate. They merely pointed out that the goals and objectives and present levels of performance were effectively the same over time. It is my finding that the Petitioner has not met her burden of demonstrating that deficiencies in the goals and objectives and present levels of performance deprived Student of a Free Appropriate Education.

c. Positive Behavior Interventions and Supports

For the discussion of this topic, see the text concerning Issues 5 and 6 at Section C below.

³ In my opinion, the greatest deficiency of the IEP’s prepared for Student is the limited instructional time provided. Had Student been provided more instructional hours, she might have had a fighting chance to achieve the goals in her IEP documents.

Issue 3 - Whether [REDACTED] County Schools violated the IDEA, Section 504 and/or WV policy 2419 by making unilateral placement decisions?

This issue is discussed at Issues 5 and 6, Section A, at pp 57-58 below.

Issue 4 - Whether [REDACTED] County Schools failed to provide services in the Least Restrictive Environment (LRE) in violation of the IDEA, Section 504, and/or WV Policy?

Students with disabilities, eligible for special education under the IDEA, are to be educated with non-disabled children to the maximum extent appropriate, and they are to be removed to separate classes and separate schooling only if the nature or severity of the disability “is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. §300.114(a)(2). (emphasis added.) See also, W.Va. Policy 2419, Chap 5 §2, G, requiring IEPs to contain special education, related services, supplementary aids and services to allow a student to be educated with other students. (emphasis mine)

Additionally, LEAs are charged with a duty to provide a continuum of alternative placements available to their eligible students. These placements, in order from least to most restrictive are:

- Regular classes
- Special classes
- Special schools
- Home Instruction
- Hospital / Institution instruction

34 C.F.R. §300.115(a) and (b)(1), authorized by 20 U.S.C. § 1412(a)(5)

Regarding students between six and twenty-one years of age, in West Virginia, the categories for placements in order from least restrictive to most restrictive are:

- General Education – Full time

- General Education – Part time (i.e., 40-79% time)
- Special Education – Separate class (i.e., general education class less than 40% of school day)
- Special Education – Special School
- Special Education – Out of School Environment. This placement is defined as “specially designed instruction and related services [which] are temporarily delivered” at non-school environments, medical treatment facilities or home (emphasis added).
- Special Education – Residential facility
- Special Education – Parentally Placed in Private Schools, and finally
- Special Education– Correctional Facilities

W.V. Policy 2419, Chap. 5, § 2, J.

In the case of the student before us, she has been in a Special Education – Out of School Environment (OSE) from the beginning of the statutory period until the most recent IEP on June 11, 2018. (Petitioner 24). Between October 2, 2016, and June 11, 2018, at least four IEP documents or amendments were created, all of them calling for OSE placements. (Pet’s 14, dated October 24, 2016; Petitioner 15, dated March 28, 2017; Petitioner 16, dated May 23, 2017; and Petitioner 20, dated April 18, 2018). This is however, just the continuation of a pattern that began considerably earlier (Petitioner 1, dated January 2, 2015; Petitioner 5, dated August 25, 2015; Petitioner 8, dated September 2, 2015; Petitioner 9, dated October 9, 2015; Petitioner 11, dated November 19, 2015; Petitioner 12, dated May 16, 2016; and Petitioner 13, dated August 18, 2016). In fact, the origin of this practice appears to be a decision made by the LEA’s Autism Specialist that

the student would “need Out of School Environment (OSE) Services until her behaviors are under control.” LEA 2, dated December 9, 2013.

With the briefest of exceptions, the student has been relegated to an Out of School Environment since December 2013, now over 5 years ago, always for the same reason: Student’s propensity to volatile behaviors.

As will be more fully discussed at Issue 6 below, the LEA never treated this placement as a disciplinary placement although it clearly was for disciplinary reasons.⁴ No manifestation determination was ever made, no functional behavior analysis done, nor a positive behavior plan created at any time between December 9, 2013 and June 11, 2018. No efforts were made to support her behavior in the instructional setting except for the provision of teaching staff and an aide, who presumably were left to their own devices in the event of behavioral episodes.

Notably, the discussion concerning placement change at the time when it occurred seemed to be focused on transitioning Student back to a general education environment. This occurred briefly in the summer of 2016. Petitioner 13, p 5 bottom paragraph. After that lone attempt, Student continued in OSE until her current IEP, dated June 11, 2018, took effect. Petitioner 24.

As of the 2018 – 2019 school year Student receives her current instructional hours (one hour per day, three times per week), in a classroom with an autism teacher, 3 aides, a total of seven students including Student, and some non-disabled Student peers, who come

⁴ I should clarify that the word disciplinary is not merely synonymous with “punitive” in this context. Discipline also means training to allow someone to exercise internal self-control, and it was expressly for this reason the LEA placed Student into OSE in December 2013. (LEA 2).

to help in the class. TR 3, pp 717-719. The teacher provides instruction for “functionality related to learning skills for autism.” The children to whom she gives direct instruction all have autism. TR 3, pp 717-18. Although the IEP of June 11, 2018, identifies this as a general education classroom, the teacher’s description is undeniably of a special education setting. Petitioner 24, p 25 of 27.

In this setting, Student functioned fairly well between August 15, 2018, when school started, and the last day of hearing on November 30 2018,⁵ with the exception of November 1, 2018, when she did have a prolonged behavioral episode for which she was suspended from school for three days. TR 3, p. 720 line 3 – p. 721 line 1 and LEA 101; TR 3, p. 736.

In spite of her aversion to noise, Student likes being around other students, and interacting with them, especially in a one-on-one setting. TR 3, p. 737 lines 10-19.

There is no evidence that the LEA made any concerted effort to support Student in an in-school classroom through the use of supplementary aides and services as required by federal and West Virginia state laws. See WV Policy 2419, Chap 5, § 2, G, 1, and 34 C.F.R. 300.114(2)(i) and (ii). Specifically with regard to students with behavioral problems which threaten to remove them from the school environment, both federal and West Virginia law provide that a functional behavior analysis and resulting behavior intervention services and modifications should be designed to address the behavior violation so that it does not recur. 34 C.F.R. §300.530(d)(ii). W.Va. Policy 2419 states “If a student’s behavior, regardless of the disability, impedes his/her learning or the learning

⁵ Student was absent from school between September 19, 2018, and October 25, 2018. Student was the victim of an apparent sexual assault in her home and was afraid to venture from her home during this time. LEA 101.

of others, the IEP team must consider the use of strategies, including behavioral interventions and supports, to address the behavior” (emphasis original). W.Va. Policy 2419, Chap 7 introductory paragraph, citing W.Va. Code §18A-5-1.

Between December 2013, and June 11, 2018, the only strategy or intervention that the LEA used to address Student’s behavior was to totally remove her from an in-school environment by placing her in Out of School environment (OSE). This decision to remove her from school was made repeatedly, so the failure to consider the use of supplementary aids and services in the form of behavioral interventions and supports was also repeated numerous times.

It is clear that OSE is quite a restrictive environment in the sense that a student in OSE is receiving their education and services out of the presence of other students. The entire purpose of the LRE requirement is to educate disabled students with non-disabled children to the maximum extent appropriate. 34 C.F.R. §300.114(a)(2)(i). “The LRE decision focuses on with whom the student is educated rather than where the student is educated.” W.Va. Policy 2419, Chap 5, §2, J, 1. The continuum of alternative placements requirement is intended to create a spectrum of educational placement options available to the IEP team “to meet the needs of children with disabilities.” 34 C.F.R. §115, authorized by 20 U.S.C. §1412(a)(5).

A review of the placement options recognized in West Virginia schools shows that OSE placements are more restrictive than either special education full time or special education, special school. W.Va. Policy 2419, chap 5, §2, J (*Placement options for students ages six through twenty one*).

The record reflects that Student's placement in a 100% special education environment pursuant to her IEP, (Petitioner 24), is generally working well. (See testimony of classroom autism teacher, TR 3, pp. 718 – 722). Notably, Student sees and interacts with non-disabled peers in this setting. TR 3, p. 17, line 24- p. 718, line 18. Student has a behavior plan available to her teacher and, with the exception of the one incident on November 1, 2018, the teacher was able to de-escalate problem behaviors as they were presented. TR 3, p 722, line 15 – p. 723, line 11.

Prior to the June 11, 2018, IEP, the hearing record is devoid of evidence that the school district considered additional supplementary aids and / or services to her IEP in order to help her control her behavior in either a special education classroom, or a special education special day school, both less restrictive placements than OSE. Rather, there is evidence that OSE was the immediate default placement for Student, made before she even returned to the LEA in December 2013, (LEA 2) decided upon out of fear of the Student. LEA personnel admitted at hearing that no FBA was ever given to Student between her return to the LEA in 2013 and the one administered for the 2018-2019 school year, so no PBIP was offered. There is no indication a personalized aid was considered, nor any other service, program, or modification. Neither did the LEA consider placement in a Special Education Day School before deciding on OSE.

It is always difficult to prove that something has not happened, but I believe the petitioner has carried her burden of proving, more likely than not, that the LEA failed to provide Student education in the LRE, since it appears she could have participated in a special education classroom had she had appropriate behavioral supports, and that is a less

restrictive environment, with more contact with both non-disabled and disabled peers than is the Out of School Environment she was relegated to for so long.

Issues 5 and 6

Issues 5 and 6 as originally identified in the petitioner's "Supplement to Original Complaint," dated October 24, 2018, were not addressed in that original format, in the "Petitioner's Proposed Findings of Fact and Conclusions of Law," submitted post hearing on January 3, 2019. Rather, the two issues were combined and reframed as follows, and will be addressed as such.

Issue - Whether the LEA violated the IDEA by failing to follow procedure, including making unilateral placement decisions, failing to conduct IEP meetings where required, failing to conduct evaluations, [and] failing to develop positive behavior support plans or behavior intervention plans.

A. Unilateral placement decisions

With regard to these two subparts, the petitioners do not identify any testimony or documentation supporting their claim that the school made unilateral placement decisions nor do they identify the particular procedural requirements of the law which they perceive to have been violated. The evidence does show that Student's mother was afforded the opportunity to participate in every IEP fashioned since October 2, 2016. She was notified and attended the IEP meeting on October 24, 2016 (Petitioner 14, pp 2, 3). She was contacted by the LEA and agreed to an amendment without an IEP meeting on March 28, 2017 (Petitioner 15), and on May 28, 2017 (Petitioner 16). The IEP meeting on April 19, 2018, was also attended by her, accompanied by numerous representatives of public agencies, including two members of [REDACTED], the [REDACTED] [REDACTED] the [REDACTED] Coordinator, and the W.Va. [REDACTED] supervisor. (Petitioner 20).

The last dated IEP admitted at hearing was dated June 11, 2018, and the document indicates she attended / participated “by phone.” Three representatives from [REDACTED], including one of her legal counsel from this hearing, attended the process. Also attending that meeting were other persons there to represent her interest including the Director of Rehabilitation, [REDACTED] an Advocate from [REDACTED] Resources; and a representative from W. Va.’s [REDACTED] (Petitioner 24, p. 1).

Accordingly, I find that Student’s mother, the petitioner here, had notice and opportunity to participate in each IEP document revision or amendment made within the two-year statutory limitation period leading up to this hearing.

B. Failure to conduct IEP meetings

Petitioner fails to identify any instance where the LEA was required to hold an IEP meeting without doing so, nor is there evidence the petitioner requested one without getting it. Therefore, this contention is rejected.

C. Failure to conduct evaluations, develop positive behavior support plans or behavior intervention plans.

The petitioner’s argument, as presented in her Proposed Findings of Fact and Conclusions of Law, effectively groups these issues together, so I will treat them similarly.

The student here was originally placed in an OSE environment in December 2013, (LEA 2) well before the most distant date cognizable under the two-year statute of limitations applicable under W.Va. Policy 2419, Chap 11, §4, A. This case was initiated on October 2, 2018, so the statutory limitations period would reach back to October 2, 2016. This raises the question whether Student had a change of placement due to a

disciplinary violation within this period such that the procedural requirements applicable to disciplinary removals would apply. I conclude that they do.

At the IEP meeting held October 24 2016, Student was already assigned to OSE pursuant to two behavioral episodes she had while attending summer ESY classes. An IEP of August 18, 2016, notes that the ESY services had been intended to transition her “back into the general education environment” (Petitioner 13, p. 5 of 15). The IEP team recommended that Student “continue to receive her educational services in OSE. She is believed to be a flight risk and is a danger to both herself and those around her. This IEP will be reviewed in 45 days” (Petitioner 13, p. 5 of 15). Further, in that same document, the prior written notice indicates the action of placing the child in OSE is “because: [Student’s] IEP 45-day review is due” (Petitioner 13, p. 15 of 15). The evaluation procedures and records used as a basis for that decision are “discipline records, attendance” (emphasis added).

Both the Special Education Director and the LEA’s Autism Specialist freely admitted that no FBA was performed nor a BIP implemented for Student during the two years preceding the petitioner’s complaint. Yet it appears clear to me that under applicable law, Student received repeated disciplinary placements in OSE, a placement more restrictive than the special education classroom that would otherwise have been appropriate for her.

While OSE placements are defined as being “temporary,” (W.Va. Policy 2419, Chap. 5 §2, J. (*Placement Options for students ages six through twenty one, at Special Education – Out of School Environment*)), I cannot locate any provision requiring that an OSE placement be reviewed every 45 days. Yet it is clear the OSE believed that they were

compelled to review this placement decision every 45 days (Petitioner 13, p. 15 of 15; Petitioner 14, p. 15 of 15 stating "...IEP needs to be reviewed every 45 days,"). The reason again given for Student's placement in OSE, as of October 24, 2016, was "[Student] is a flight risk and her behaviors make her dangerous to herself and those around her" (Petitioner 14, p. 15 of 15).

The place where a 45-day time limitation is mandated is in an Interim Alternative Education setting (IAES). Generically speaking, an IAES is also an Out of School Placement, which a school district is authorized to make following disciplinary violations. IAES placement can be made without regard as to whether the Student's behavior is a manifestation of their disabling condition. However, an IAES placement is only authorized "for not more than 45 days" total duration and only if the student's behavior involved:

- The carrying or possession of a weapon at school, on school grounds or at a school function;
- The knowing possession, use or carrying of illegal drugs at school, on school grounds, or at a school function

Or

- Infliction of serious bodily injury to someone at school, on school premises or at a school function.

To rise to the level of serious bodily harm, the injury must pose:

- a) serious risk of death
- b) extreme physical pain
- c) protracted / obvious disfigurement or
- d) protracted loss or impairment to a body part, organ or mental faculty.

See W. Va. Policy 2419, Chap. 7, §2, C. Nothing in this statutory provision indicates that the 45-day IAES can be renewed for additional 45-day periods. The “not more than” language would indicate that 45 days is the absolute outside limit for an IEAS disciplinary placement.

None of the above listed factual situations were present with regard to conduct of this student evidenced at this hearing. No weapons or illegal drugs were involved, nor was there any serious injury inflicted. Therefore, an IAES could not have been justified regarding her actions. Further, even if she had committed such a serious and dangerous behavioral violation of school rules, the district would have been limited to a single removal to an IAES for a total non-renewable 45-day period.

It is clear in this case that the plans to put Student back in school were scuttled when she had disciplinary incidents in June 2016, and a decision was then made to put her out of school for 45 days on that account (Petitioner 13, pp. 5, 13, 15). When Student’s placement was again reviewed on October 24, 2016, within the two-year limitation period, she was again put in an Out of School placement due to the same disciplinary events. (Petitioner 14, pp. 5 and 15). Even if Student had committed a much more serious and dangerous act, her time out of school would have ended after the initial 45 days. The LEA also would have been required, as appropriate, to perform an FBA and give her Behavioral Intervention services “to address the behavior violation so that it does not recur.” W.Va. Policy 2419, Chap 7, §2, D. I conclude that Student’s OSE placements were *defacto* IAES placements, made without sufficient severity of cause, and continued far beyond the statutorily permitted length of time.

When an eligible disabled student is removed from their current educational placement for disciplinary reasons beyond 10 consecutive school days, or more than 10 cumulative school days in a school year, such removal constitutes a change of placement. Id. At “Disciplinary Change of Placement” and §1 and §2.

The LEA’s attitude here appears to be that Student’s OSE placement was not a disciplinary removal; it was just a placement she needed because of her behavior. But it is undeniable that OSE is not an ordinary placement for any child, being only temporary by definition, and this child was in it for purely disciplinary reasons.

Had the LEA acknowledged their disciplinary change of placement, they would have then been compelled to conduct a manifestation determination as to whether the offending conduct was a manifestation of her disabling condition. W. Va. Policy 2419 Chap. 7, §2. If the behavior is a manifestation of the disability then an FBA, and a resulting BIP, are mandated and the child is returned to the placement from which they were removed. See Id. At §2,A. If the behavior violation is not a manifestation of the disability then the child’s IEP team is to reconvene (1) “to determine educational services to be provided to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student’s IEP; and (2) Provide, as appropriate, a functional behavioral assessment (FBA), and behavioral intervention services and modifications that are designed to address the behavior violation so it does not recur.” (emphasis added). Id., at §2.B. Thus, once a change of placement for disciplinary reasons take place, a manifestation hearing is triggered, and whether the behavior is determined to be a manifestation of the disabling condition or not, an FBA is to be performed as appropriate. Where a student is to be totally

removed from school and denied any contact with student peers due to an inability to behave appropriately, in my opinion an FBA is both appropriate and necessary. Student has inappropriately been confined to an Interim Alternative Educational setting, for successive 45-day periods over the past two years. Since the limit for such removal is 45 days total, it is appropriate to consider each 45-day renewal of the IAES (OSE) placement as a renewed decision to place her in IAES, which is a removal to a more restrictive setting.

Student's repeated OSE placements were violative of the provisions of IDEA and W.Va. Policy 2419 for disciplinary removals and placements. The decision not to do a manifestation determination, particularly as to how it led to a failure to do a necessary FBA and create a BIP, deprived Student of a valuable opportunity to be in school and to have her behavior appropriately monitored, influenced, and shaped. As a consequence of the failure, she was also deprived of opportunities to associate with student peers, both disabled and non-disabled which contact might have helped her develop relationships and social skills. It will never be known how Student might have been impacted had an FBA and BIP been consistently enforced and updated over the years. However, it was an evaluative process / related service benefit to which she was entitled, and its absence is an opportunity lost. For these reasons, I conclude that the failure of the LEA to conduct a manifestation determination and the failures to conduct an FBA, and create a BIP, as of October 24, 2016, violated Student's rights under IDEA and W.Va. Policy 2419.

These violations constitute separate but concurrent justifications for providing Student with compensatory education and services.

Issue 7 - Whether [REDACTED] County Schools violated the IDEA, Section 504 and/or WV Policy by failing to allow student to re-enroll?

This issue is not addressed in Petitioner's Proposed Findings of Fact and Conclusions of Law, nor was it addressed in Petitioner's Opening and Closing Statements at hearing. This issue is, therefore, considered to be abandoned by the petitioners, and they have not carried the burden of proof as to it.

Issue 8 - Whether ██████ County Schools has intentionally, purposefully and with deliberate indifference violated Petitioner's rights as secured by Section 504 by:

- a. denying her, because of the nature and severity of her disabilities, the opportunity to participate in and benefit from appropriate federally assisted education services, programs and activities;**
- b. subjecting her to discrimination on the basis of the nature and severity of her disabilities;**
- c. refusing to accommodate her disability and then disciplining her because of her disability;**
- d. limiting her enjoyment of the right and opportunity to receive a public education in the least restrictive environment?**

In order to demonstrate that the LEA violated Student's rights under Section 504, the petitioner must prove that

- 1) the student is disabled;
- 2) the student was an otherwise qualified person with a disability;
- 3) that Student was excluded from participation in, or denied benefits of, or subjected to discrimination under any program that received Federal financial assistance;
- 4) and such exclusion was solely by reason of [her] disability.

See 34 C.F.R. §104.4

The documentary evidence presented is very clear that an IEP was developed on October 24, 2016 (Petitioner 14), that at that time, no OSE teacher was available (Petitioner 31) and did not become available until January 3, 2017, and that transportation for Student was not available between August 18, 2016, and April 24, 2018 (Admissions

of the LEA in closing statement. TR 3, p. 778, and LEA Post Hearing Brief, LEA 86 at p. 2, LEA 87 at p. 1. The LEA knew when it completed the October 24, 2016 IEP that it had neither an OSE teacher nor transportation for Student, yet they went ahead and selected OSE as her placement anyway. (Petitioner 14, p. 13 of 15). Further, their continued inability to obtain a teacher and to provide transport did not spur them to reconvene an emergency IEP meeting to address the situation. This knowing placement of Student in an OSE setting, when the LEA had neither a teacher nor a means to get Student to instruction, was an intentional decision which effectively eliminated Student's ability to receive educational instruction or services. No teacher was obtained for Student until January 7, 2017. The LEA did not provide transportation to Student at any time during the 2016-2017 school year. Instead, they told her to take a city bus which would have required Student to walk a mile and a half to catch a city bus and make a transfer to a second bus, and walk further to the school. This is a child the LEA believed incapable of even attending school on a regular basis yet this commute scenario apparently did not impress them as something beyond Student's abilities.

The removal from the classroom was made on account of Student's behaviors which are likely, wholly or in part, manifestations of her disabling conditions of autism, mental impairment, disruptive mood dysregulation disorder, and bipolar disorder. The LEA also failed to ever hold a manifestation determination regarding Student's behaviors, so under equitable principles, they should not be heard to contend that Student's offending behaviors were other than a manifestation of her disabling conditions.

These findings compel a conclusion that Student was excluded from participation in her education program because of behavioral manifestations of her disabilities.

The legal question then presented is whether excluding a student from the classroom because of behavior manifestations of her disabilities rises to the level of a violation of § 504.

Clearly, this presents a violation of Student's rights of FAPE under IDEA.

However, as stated in *Sellers v. School Board of Manasses Virginia*, 141 F.3d. 524 (4th Cir., 1998). "IDEA and § 504 are different statutes. Whereas, IDEA affirmatively requires participating states to assure disabled children a free appropriate public education, see e.g., 20 U.S.C. § 1421(1), Section 504 of the Rehabilitation Act instead prohibits discrimination against disabled individuals." *Id.* at 528.

"No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." *Id.* at 528, citing 2 U.S.C. § 794(a).

To show a violation of § 504 in the context of an IDEA special education hearing, more must be shown than a mere failure to provide a free appropriate education as required by IDEA. "In the context of education to handicapped children, it must be shown that either bad faith or gross misjudgment" were demonstrated. *Id.* at 529., citing Lunceford v. District of Columbia Bd of Educ., 745 F.2d. 1577, 1580 (D.C. Cir. 1984).

In the case at hand, as of October 24, 2016, Student was removed from attendance in any setting where other students attended. The very placement selected was called Out-of-School environment. The LEA had no teacher for her and knew that they had to get one of their teachers to volunteer for the job, since they could not compel a teacher to teach outside the school environment.

In spite of the LEA's knowledge that Student was autistic and a flight risk, the mode of transport to class suggested by them was for Student to take a long complicated city bus trip by herself to get her one hour of instruction.

The LEA's own buses apparently only ran in the morning, midday, and in the afternoon when the school let out. No attempt was made by the LEA to tailor Student's instructional time to match the schedule of the bus, neither were they willing to change a bus schedule to accommodate Student's schedule.

Given these facts, it is hard to imagine how the school district could have failed to understand that their IEP of October 24, 2016, was little better than an expulsion from school, the sole reason for which was the Student's misbehaviors in the previous summer.

The LEA's counsel indicated that the school district's personnel "didn't seem to know any better." TR III, p. 778. My impression after listening to testimony of the LEA's special education director and autism E/BD specialist is also consistent with their counsel's assessment. I believe they did not mean to harm student or deny her an education. They were, however, extremely misguided in the way, they chose to handle the matter. Consequently, I do not find any bad faith by the LEA, but I do find a decision making process so far wide of the mark as to constitute gross misjudgment.

For these reasons, I conclude that the LEA did violate § 504, by writing an IEP which excluded student from the classroom, provided no teacher, provided no transportation, and set the proposed education site in a location too distant for student to reasonably be expected to travel on her own, all without first determining whether her disability was the root cause of the misbehaviors and without taking steps to further support her in a classroom setting.

Issue 9 - Whether, as a proximate result of the Respondent's violation of the Petitioner's rights as secured by Section 504 the Petitioner has sustained past and future mental anguish and/or emotional distress?

Issue 10 - Whether, as a proximate result of the Respondent's violation of the Petitioner's rights as secured by Section 504 the Petitioner has sustained past and future loss of enjoyment of life?

The petitioners did not address either of these issues in the closing statement at hearing, neither were they mentioned in the Petitioner's Proposed Findings of Fact and Conclusions of Law filed on January 3, 2019. Further, no evidence was offered at hearing concerning emotional distress or loss of life's enjoyment. Accordingly, I conclude these issues were abandoned and find that Petitioner did not carry her burden of proof as to these questions.

Relief Awarded

(A) COMPENSATORY EDUCATION – EXTENDED ELIGIBILITY

At the time this decision is written, it is not feasible to give greatly increased class time to Student since she is not yet able to tolerate the school environment for long hours each day. Only if the LEA successfully implements the provisions of the decision is the student likely to increase her comfort level, and consequently, the number of hours she can attend a formal classroom environment.

Ordering additional classroom hours or tutorial services will be meaningless at this time since the evidence indicates she would be unable to tolerate or benefit from a sudden dramatic increase in instructional time. Student is now sixteen and she is statutorily eligible to receive special education until the conclusion of the school year she turns twenty-one. For a child whose learning is severely delayed, and whose classroom exposure has been repeatedly interrupted, this may not be sufficient time to recoup losses and make meaningful progress. For these reasons, it is my conclusion as of this writing, Student is unable to attend school for extended periods of time. To benefit from compensatory services, she must increase her tolerance to be in class longer hours than her current three hours per week. To afford her the opportunity to slowly build up her class time, she must be given back the time she missed. Consequently, Student shall be considered an eligible child under IDEA and W.Va. Policy 2419, for an additional two years; that is until the end of the academic year following her twenty-third birthday.

(B) NEW IEP

Within 30 calendar days following the issuance of this decision, the LEA shall notice the parent and hold an IEP meeting to amend the student's IEP to reflect the relief granted in this decision.

(C) IEP FACILITATOR

The LEA shall contact the WVDE Office of Special Programs to obtain the services of an IEP facilitator to be used in the IEP amendment process. Such facilitator shall be utilized at the LEA's expense, and shall be used for each IEP team meeting for the next 24 months.

(D) TRANSPORTATION

The amended IEP shall include transportation as a related service. The LEA shall also be responsible for providing an employee to accompany student during her transport.

(E) PLAN FOR INCREASED INSTRUCTIONAL HOURS

(i) The IEP team shall be responsible to create a written plan to steadily increase instructional hours the Student attends school. The plan shall be a template for the increase of both days and hours of classroom time. Student currently attends one hour daily, three times a week. The plan shall begin with a minimum of four hours. [For example, the plan may start at 4 days x 1 hour for two weeks, then 5 days x 1 hr for two weeks, then 5 days x 1.5 hours for two weeks, etc.] This directive shall be followed until student reaches a full day's attendance five days a week.

(ii) The LEA shall report in writing to the WVDE – Office of Federal Programs (OFP) on at least a quarterly basis, coinciding with its grade reporting schedule, on the progress made regarding student's hours at school. If no progress is made for any two

reporting periods, or if the LEA, at any time, concludes that student is unable to function in the special education classroom under scheduled times set out in the plan described in (E)(i) above; the LEA shall reconvene an IEP meeting, with an IEP facilitator, and examine whether additional related services, behavior supports, or personnel services are required to make further progress on the attendance goals. If the IEP team concludes Student cannot attend her special education classes at school, with supports and services, and that she requires a more restrictive placement, then they must consider the option of a Special Education – special school (day school) placement.

No change of the LRE/placement shall be made for this student without first reporting to the WVDE-OFP on all efforts made to keep student in her special education full time placement, and the options considered in the new LRE/placement decision.

(F) FBA/BIP/CRISIS PLAN

In the amended IEP, a current FBA, BIP, and crisis plan shall be included, as well as behavioral techniques to be used with Student. If Student should have future behavioral outbursts in the school, or its grounds, or during transport, the LEA shall promptly re-examine and amend as necessary the BIP to address the behaviors exhibited.

(G) ANGER MANAGEMENT

Student should be provided an anger management program which utilizes role play and practical application of principles such as the “BE COOL” program, recommended by the LEA’s school psychologist.

(H) STAFF TRAINING REGARDING IDEA AND POLICY 2419

The LEA shall consult the WVDE – Office of Federal Programs for the name(s) of person(s) expert in the areas concerning the law and its application as to: (i) placing

students in the Least Restrictive Environment, particularly with regard to students with disciplinary issues; (ii) disciplinary procedures for IDEA eligible disabled students; and (iii) behavior management, behavior modification, and behavior support in the classroom.

The LEA shall contract, at its expense, to obtain the services of such person or persons and provide training to all its Special Education and Administrative personnel on the IDEA/WV Policy 2419, and their legal requirements, and also retain this individual(s) on a consultative basis as a resource for the future. This process should be completed no later than the end of 2018-2019 Instructional year. The LEA shall report in writing to the WVDE-OFD when this training is complete.

(I) COMMUNICATION TO TRANSPORTATION DEPARTMENT

A copy of this decision shall be delivered to the LEA's Director of Transportation.

(J) CONSULTATION SUPPORT SERVICES TO LEA RE: BEHAVIOR

The LEA shall obtain the name of a person who is expert in the area of behavior management, behavior modification, and behavior support techniques for students with autism. Such a person will be obtained under contract to work with the LEA, to provide ongoing assistance and training to Student's teacher(s), aides, and special education administrative personnel, in the creation of an ongoing behavior plan to be utilized and implemented across all school environments, as provided in directive (F).

(K) AVAILABILITY OF BIP TO PARENT

The LEA shall provide to Student's mother a copy of any behavior plan in use in the classroom and provide an explanation of techniques being used, so that she may have the opportunity to use them at home as well. The LEA shall not be responsible for the parent's proficiency in using the plan, or for the behavioral results in the home.

(L) INSTRUCTIONAL AIDE

Student shall have available to her, an aide, across all school settings, who is familiar with autistic students and who is capable both of implementing Student's behavior plan and assisting Student with her academic lessons. This person or persons should be available to Student throughout the school day, from Student's arrival to her departure, and it is anticipated that the school attendance times will be steadily increasing over time. The goal shall be to have a familiar person available to her at all times, but not to have her become dependent on a single individual.

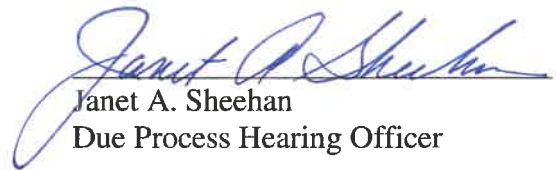
(M) ATTENDANCE

Student shall be held to the same standards for school attendance and excused absence as all other students.

VII. APPEAL RIGHTS

Any party aggrieved by the findings and decisions made in the hearing has the right to bring a civil action with respect to the due process hearing complaint notice in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within 90 days of the issuance of the hearing officer's written decision.

SO ORDERED


Janet A. Sheehan
Due Process Hearing Officer

Entered this 29th day of January, 2019