This is a redacted version of the original decision. Select details have been removed from the decision to preserve the anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

CLOSED HEARING

ODR No. 30797-24-25

Child's Name:
S.A.

Date of Birth:
[redacted]

Parent:
[redacted]

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Hearing Officer:
Charles W. Jelley Esq.

Date of Decision:
March 17, 2025

Background

The Parents filed a Due Process Hearing Complaint under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), and the Americans with Disabilities Act (ADA), challenging the Student's extended exclusion from school. The District's Title IX Coordinator, relying on the "emergency removal" provision in the Title IX regulations, unilaterally barred the Student from attending school pending the completion of the Title IX investigation.[1] As a result of this removal, the Student has been deprived of the benefits of specially designed instruction, related services, and equal access to the classroom since October 10, 2024. The Parents next challenge the Title IX "decision-maker's" February 28, 2025, report directing the Student's IEP team to place the Student in an out-of-district setting as a further violation of the IDEA, Section 504, and the ADA. The Parents now seek the Student's immediate return to the classroom, compensatory education, and prompt revisions to the Student's IEP to enable the Student to receive a FAPE in the least restrictive setting. In response, the District contends that the Title IX "emergency removal" provisions and investigation process overrides or at least pauses the Student's IDEA and Section 504 procedural and substantive protections. Finally, they argue that any future removal is not a disciplinary suspension or a change in placement, thereby exempting them from providing IDEA and Section 504 procedural safeguards.

[1] The Parents claims arise under Section 504 of the Rehabilitation Act and 22 Pa. Code Chapter 15. The federal regulations implementing Section 504 are codified at 34 CFR §104.101 *et seq*. The claims also arising under the Individuals with Disabilities Education Act, 20 USC §1401, *et seq*. The Decision Due Date was extended for a good cause, upon written motion of the Parties. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. The content of this Decision will be redacted to protect the Student's and the Parents personally identifiable information.

Upon review of the record, applicable statutes, and regulations**,** I find that the District failed to ensure compliance with the requirements of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.) and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794). I make no findings of fact or conclusions of law about the District's Title IX policy, process, or decision-making. I make no findings or conclusions about the Parents' Section 504 or ADA intentional discrimination claims seeking legal relief. Accordingly, an appropriate Order implementing the IDEA and the Section 504 FAPE requirements follows.

Statement of the Issue

Did the District deny the Student a free appropriate public education under the IDEA or Section 504 after the District decided to remove the Student from the school on October 10, 2024? If the answer is yes, is the Student entitled to return to the classroom, and should this hearing officer order compensatory education?

Did the Student's unilateral removal from the school on October 10, 2024, violate Section 504 or the ADA anti-discrimination provisions? If the answer is yes, what relief, if any, can this hearing officer award?

The Parties' Joint Stipulation[2]

A. Introduction of Student and [redacted] Identification as a Special Needs Child

1. [Redacted] started the 2024-2025 school year as a [redacted] grade (sic) student receiving special education services under the disability category of Autism.

[2] The Parties submitted and this hearing officer accepted a Joint Stipulation of the facts and circumstance leading up to the Student's removal from school. The Parties further agreed to supplement the record with additional testimony from the Mother, the teacher, the Special Education Supervisor and the Title IX Student Coordinator (hereafter "Title IX Coordinator). The Stipulation was redacted to protect all personally identified information. The parties' Stipulations are now part of the record. Those stipulations have been revised below for stylistic consistency but have not been edited or altered in any material way.

2. [Redacted] attended [Redacted] School and participated with [redacted] general education peers in homeroom, lunch, recess, and specials. [Redacted] participated daily in [redacted] grade level (sic) Science/Social Studies class but did not receive a grade. [Redacted] received Speech and Occupational Therapy in that setting. [Redacted]. [Redacted] benefitted from special transportation to and from school and utilized a shared paraprofessional throughout educational environments due to [redacted] academic, functional, behavioral, and social needs. J-1.

3. [Redacted] received [redacted]. J-1.

4. At Parent's request, the District completed a Reevaluation Report dated September 10, 2024. J-2.

5. The Reevaluation Report included the completion of a Functional Behavioral Assessment. Recommendations included the continuation of related services and ongoing support in the autistic support classroom. J-2.

6. On October 8, 2024, the IEP team convened to develop [Redacted's] IEP. The IEP recommended [redacted] with the related services of Speech Therapy and Occupational Therapy. J-4.

7. A NOREP was issued on October 31, 2024, in response to parents' request for an IEE.[3] Within the NOREP, it was recommended that [Redacted] continue to receive [redacted] current level of supportive programming and supplemental autistic support. J-8.

8. [Redacted] began receiving Homebound Instruction on November 25, 2024. This occurs in a community-based setting, where a special education teacher provides one-on-one instruction. [Redacted] has received an average of ten hours a week, totaling 117.25 hours since the service began. *J-13.*

[3] The IEE request was resolved between the Parties and is not a subject of the current proceeding and is not before this Hearing Officer.

B. The Title IX Complaint and Investigation

9. On [date], an incident was reported to District administration regarding [redacted]. Specifically, [redacted] reported:

"On [date]… [incident redacted]*."* J-3.

10. [Redacted] J- 3.

11. On this same date, based on information received, [Redacted] submitted a [redacted] report. J-3*.*

12. [Redacted] also contacted Respondent's Parent, Ms. [redacted], and explained the nature of the incident. J-3.

13. [Redacted].

14. In response to the information received, [Redacted] submitted a [redacted]. J-9.

15. [Redacted] also contacted Respondent's Parent, [Redacted], and explained the nature of the incident with Student B. J-9.

16. On October 10, 2024, an individualized safety and risk analysis was conducted pursuant to §106.44(c) of the Title IX Regulations by the school counselor, building administrator, Title IX Coordinator, and Supervisor of Special Education. It was determined that the District would [redacted]. J-6; J-9*.*

17. On October 10, 2024, [Redacted] spoke with Respondent's parents and advised that it was determined that an emergency removal of Respondent was necessary under the circumstances given the allegations regarding Respondent's interactions with Student A and Student B, and confirmed the decision to remove Respondent on an emergency basis by way of a letter directed to Respondent's parents. J-6.

18. The [date], letter includes a brief summary of [redacted] J-6.

19. Additionally, the [redacted] letter stated the Title IX investigation period would be 15 days and *"the timeline may be extended for due cause."* Additionally, the letter advised parents:

"in the event you disagree with the "individualized safety and risk analysis" conducted by the North Allegheny School District, you may seek review of this decision by contacting… within 5 days of this notice." J-6.

20. Parent/Respondent did not request a hearing to challenge the Emergency Removal pursuant to the North Allegheny School District's Title IX policy. *Id*.

21. October 10, 2024: [Redacted], serving as Title IX Investigator, commenced an Investigation, consisting of multiple interviews and a review of documents, into the allegations involving Respondent and Student A and Student B.

22. October 15, 2024: Respondent's parents received the Formal Notice of Complaints, along with access to District Policy No. 103.2: Sexual Harassment, via email from the Title IX Coordinator. J-14.

23. The Notice of Complaint included District Policy 103.2, adopted on August 26, 2020.

24. Section 106.30 of the Final Rule and District Policy No. 103.2 both define "sexual harassment" as conduct based on sex that satisfies one or more of the following: (i) an employee conditioning educational benefits on participation in unwelcome sexual conduct (*i.e*., *quid pro quo*); (ii) unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the educational institution's education program or activity or (iii) sexual assault (as defined in the Cleary Act), or dating violence, domestic violence, or stalking as defined in the Violence Against Women Act ("VAWA").

25. According to District Policy No. 103.2, "unwelcome sexual conduct" may include, but is not limited to: making sexual propositions or pressuring others for sexual favors; touching of a sexual nature; writing graffiti of a sexual nature; displaying or distributing sexually explicit drawings, pictures, or written materials; performing sexual gestures or touching oneself sexually in front of others; telling sexual or dirty jokes; spreading sexual rumors or rating others as to sexual activity or performance; and circulating or showing emails or websites of a sexual nature."

26. On October 16, 2024, the District Supervisor of Special Education, [Redacted], contacted the family and alerted them to the options available for [Redacted's] education:

Option 1:

- *Instruction conducted in the home:*
  This would be provided virtually – via the computer 10 hours per week
  Taught by a certified special education professional virtually

Option 2:

- *Instruction conducted in the home:*
  This would be provided at a mutually agreed upon secondary location, transported by you, in the community (i.e., [redacted]) 10 hours per week
  Taught by a certified special education professional in person

27. October 23, 2024: The Investigator contacted the Complainant via email to provide [redacted] with the evidence collected during the investigation. Complainant was advised that she had ten (10) days – until November 2, 2024 – within which to provide a written response to the evidence or any additional information she wished to have considered by the

Investigator in the investigatory report.

28. October 23, 2024: The Investigator contacted the Respondent's Parent via email to provide the evidence collected during the investigation and offered to conduct a telephone discussion/interview with her. Respondent's Parent was also notified that she had ten (10) days – until November 2, 2024 – to provide a written response to the evidence or any additional information she wished to have considered by the Investigator in the investigatory report.

29. November 1, 2024: The Parent of the Respondent provided the Investigator with a written statement via email, which was incorporated in full into the Investigator's investigatory report.

30. November 7, 2024: The Investigator's completed investigatory report was circulated to the Complainant and Respondent's Parent simultaneously via email, and the parties were advised that they would have until November 20, 2024, to provide a written response to the investigatory report after which time the report would be submitted to the Decision- Maker for review and consideration.

31. The Final Investigatory Report describes the two incidents as follows:

a. [redacted incident].

b. [redacted incident].

32. On November 12, 2024, [Redacted] 's parents/Respondents retained the legal services of Extraordinary Law and Brandi Suter, Esquire.

33. November 20, 2024: Respondent's attorney submitted questions to the Investigator, which were answered and/or addressed by addendum to the Investigator's investigatory report for submission to the Decision-Maker.

C. TITLE IX FINAL WRITTEN DETERMINATION

34. October 4, 2024: [Redacted] submitted a Formal Title IX Complaint/District harassment form to the Title IX Coordinator, [redacted], regarding the incident involving respondent and [redacted].

35. December 11, 2024: The decision-maker received the final investigatory report with an addendum.

36. January 2, 2025, the Decision-Maker wrote to the parties to explain the decision-making process and advise them of their right to submit cross-examination questions within ten (10) days to the Decision-Maker for a relevancy determination before forwarding them to the witnesses.

37. January 11, 2025: Respondent's attorney submitted over eighty (80) questions, including subparts, to the decision-maker.

38. January 24, 2024: The decision-maker advised the respondent's attorney of the questions found to be relevant and explained the determination regarding each.

39. January 24, 2024: The decision-maker issued Respondent's attorney's questions that were found to be relevant to each witness by separate email.

40. January 31, 2024: The decision-maker forwarded to Respondent's counsel the verbatim responses of the three witnesses to whom cross-examination questions were posed.

41. The Final Written Report specifically included the two allegations as follows:

a. Title IX Allegation #1: [Redacted] reported an incident between Respondent and Student A that had occurred in [Redacted] Learning Support classroom to Lead Teacher, [Redacted], Complainant herein, on [date]. Specifically, [redacted incident]."

b. Title IX Allegation #2: On [date], Paraprofessionals [Redacted] and [Redacted] reported to [Redacted] that [redacted incident].

c. In both incidents, it was reported that the Respondent immediately stopped the observed conduct upon redirection. J-11; p. 3.

42. The Decision-maker found that there was clear and convincing evidence to support a determination that Respondent engaged in sexual

harassment as defined in the Title IX Regulations and in the District's Policy No. 103.2. J-11, pg. 8.

43. In light of the evidence collected during the investigation, including the information provided by witnesses with first-hand knowledge, as well as that which was learned during the interview of Students A and B's parents, the Decision-Maker found it was clear that Respondent's conduct, as to each Student, was "unwelcomed conduct" such that a reasonable person in either Student's position would consider the conduct to be "severe" and "objectively offensive." J-11, pg. 7.

44. Based on the fact that two instances of substantially similar conduct occurred within approximately one (1) week of each other, the Decision-Maker concluded that the conduct meets the definition of "sufficiently pervasive" under the Final Rules and District Policy No. 103.2. J-11, pg. 7.

45. The Decision-Maker recommended Respondent's placement in an alternative educational setting that is better equipped to meet [redacted] specific needs, would best serve Respondent's interests, and allow [redacted]. J-11; pg. 9.

46. The Decision-Maker noted, *"A determination of Respondent's actual "responsibility" for such conduct may only be made after additional procedural steps are undertaken, which are outside the scope of this Title IX investigation."* J-11, pg. 9.

Findings of Fact From the March 10, 2025, Expedited Session

1. The Director of Student Services also functions as the Title IX Student Coordinator for the North Allegheny School District (NT p. 109).
2. The Director/Coordinator confirmed that at the time of the [dates/methods of contact] with the lead teacher, no pupil or staff interviews had been conducted, meaning that the emergency removal was based solely on the initial [date], complaint (NT p. 136).

3. The Director/Coordinator acknowledged that the District did not hold an IDEA Manifestation Determination Review (MDR) before or after removing the Student (NT p. 176).
4. The Director/Coordinator stated that she did not consider the emergency removal to be a disciplinary action, and she believed that the removal was exempt from the application of IDEA or Section 504 procedural safeguards (NT p. 176).
5. The Director/Coordinator admitted that she was aware the Student was entitled to receive FAPE during the emergency removal but did not arrange for services (NT p. 177).
6. The Director/Coordinator confirmed that the Title IX process was not coordinated with IDEA or Section 504 procedural protections and that no efforts were made to determine if the behavior was related to the Student's disability before or after implementing the removal (NT p. 192).
7. The Director/Coordinator testified that the District did not provide the Parents with a copy of her formal risk analysis decision (NT p. 146).
8. The Director/Coordinator also acknowledged that no school psychologist or behavioral specialist evaluated the Student prior to or after the removal (NT p. 146).
10. The Special Education Supervisor serves as the Special Education Supervisor for the District (NT p. 200).
11. The Special Education Supervisor testified that the District did not inform the Parent that the emergency removal could extend beyond 15 days until after it had already been implemented (NT p. 226).
12. The Special Education Supervisor confirmed that the District's 2024 Functional Behavioral Assessment (FBA), while part of the reevaluation, was

conducted in October but was not considered in the emergency removal decision (NT p. 272).

13. The Special Education Supervisor testified that after receiving the Title IX "decision maker's" direction that the Student should be educated outside of the District, neither she nor the IEP team completed an independent review of the existing circumstance to determine if an out-of-district placement was necessary. (NT pp. 167, 169, 260 271).[4]

14. The Special Education Supervisor confirmed that the District did not seek parental consent before initiating referrals for out-of-district placements (NT p. 228).

15. The Special Education Supervisor acknowledged that the Student was not receiving special education services in accordance with the IEP during the removal period (NT p. 242).[5]

16. The Special Education Supervisor acknowledged that the IEP team did not have an opportunity to formally discuss alternative placements before the District proceeded with out-of-district referrals (NT p. 273).

17. The Parent testified that she did not understand the Title IX investigation or the emergency removal process (NT p. 288).

18. The Mother stated that the District never explained what a Title IX investigation entailed. To better understand what she was being told, the Mother did a Google search (NT p. 289).

[4] The Special Education Supervisor stated that the IEP team was following the Title IX "decision makers" recommendation for out-of-district placement: *"As it stands now, the team is following the direction that it be outside the District?" "Yes."* (NT p. 271).

[5] "*We could provide the speech in OT virtually but, again, that was not a preferred platform."* (NT p. 254); *"And the reason that the speech and OT is not provided in this community after-hours program is you don't have the personnel that would work in that type of program?" Okay. And we've reviewed early on communication where the District said, 'We're going to address the lack -- the missing related service through comp ed'; correct?" "That's correct."* (NT p. 255) *"Right."* (NT p. 254). *Do you know if SLP services or OT services were specifically offered in November or in October?" "I don't believe they were."* (NT p. 237)

19. The Mother testified that she did not understand how to challenge the Title IX emergency removal decision (NT p. 290).
20. The Parent testified that the District's suggestion in November 2024 of virtual instruction during the exclusion was inadequate for the struggling, easily distracted learner (NT p. 300).
21. The Mother stated that she learned that the District was pursuing out-of-district placement when she received the Title IX "decision maker's" report (NT p. 300).
22. The Mother confirmed that she was not given access to the District's risk analysis, which led to the Student's removal, nor was she allowed to provide input into the analysis (NT p. 146).

Credibility and Persuasiveness of the Witnesses' Testimony

In a due process hearing, the hearing officer must assess witness credibility, weigh the evidence, and determine the persuasiveness of testimony. *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. 2008); *A.S. v. Office for Dispute Resolution (Quakertown Community School District),* 88 A.3d 256, 266 (Pa. Comm. 2014). The Mother's testimony was clear and direct. Likewise, the District's witnesses' testimony was frank, cogent, and concise.

Applicable Law

Under the IDEA and Section 504, a school district must provide special education and related services that are reasonably calculated to enable a child to make progress appropriate in light of the child's unique circumstances. *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017). A failure to provide appropriate services may constitute a denial of free appropriate public education (FAPE) if the individual program is not reasonably calculated to provide meaningful benefit in the least restrictive environment. The District's affirmative defense here rests on the argument that the Title IX emergency

removal provision - 34 CFR § 106.44(c) – supersedes or pauses the Student IDEA's and Section 504's more specific protections until the District completes its Title IX investigation and "decision making."

The Intersection and Overlap of Title IX, the IDEA, and Section 504

IDEA Procedural Due Process Protections

Whether viewed as a "change in" or a "change of" placement subject to the IDEA or the IDEA removal requirements under the discipline rules 34 CFR § 300.536(a) or the generally applicable procedural due process requirements, disabled students retain procedural due process rights when they are removed from school. A "change of" or a "change in" placement under the IDEA and by analogy under Section 504 occurs when a modification to a student's educational program significantly alters their learning experience in a material way. Courts apply a fact-specific analysis to determine whether a change is substantial enough to be considered a change. The most often used test examines whether the modification is likely to affect the child's learning experience in a meaningful way (*J.R. v. Mars Area Sch. Dist.*, 318 F. App'x 113 (3d Cir. 2009); *DeLeon v. Susquehanna Cmty. Sch. Dist.*, 747 F.2d 149 (3d Cir. 1984). For example, reducing a student's time in school and in the special education class from 25 to 10 hours per week, altering their exposure to non-disabled peers, or requiring them to eat lunch alone rather than with peers is a fundamental "change in" or "change of "placement (*G.B. v. District of Columbia*, 78 F. Supp. 3d 109 (D.D.C. 2015). Similarly, the removal of essential behavioral health services was found to be a material change that significantly impacted a student's education (*Robert M. v. State of Haw.*, 51 IDELR 211 (D. Haw. 2008). Under Section 504, a substantial limitation of a major life activity due to a change in services can also qualify as a fundamental change, requiring procedural protections (*D.M. v. N.J. Dep't of Educ.*, 801 F.3d 205 (3d Cir. 2015).

Section 504 Significant Change in Placement Protections

A significant "change in" placement, under Section 504 and the IDEA regulations, occurs when: 1. A student is removed from a general education setting to a more restrictive environment. 2. A student's services or accommodations are substantially reduced. 3. A student is excluded from school for an extended period, including 1. Expulsion. 2. Suspension of more than 10 consecutive school days. 3. A series of removals that create a pattern of removals/exclusions. Or, 4. If a student is transferred to an alternative school setting due to behavior or disciplinary reasons. In other words, a "change in placement**"** or "change of placement" occurs when the local educational agency places the child in a setting that is distinguishable from the educational environment to which the child was previously assigned and includes: (34 CFR 106.36; 34 CFR §300.102(a)(3)(iii), 34 CFR §300.532(b)(2)(ii) and 34 CFR §300.536).

Also, under Section 504, a school's enforcement of its own private school policies that interferes with an individual student's access to FAPE can, however, be viewed as a significant change (*D.M. v. N.J. Dep't of Educ.*, 801 F.3d 205 (3d Cir. 2015). If a change in placement occurs, the District must ensure the new placement aligns with the last agreed-upon IEP, particularly under stay-put protections (*Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115 (9th Cir. 2003); *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440 (2d Cir. 2015)). Additionally, when Section 504 eligibility or services are altered, procedural rules, like prior written notice, must be followed to prevent discrimination and ensure FAPE compliance (*Sheils v. Pennsbury Sch. Dist.*, 64 IDELR ¶ 294 (E.D. Pa. 2015).

The Title IX Restrictions and Procedural Protections

Title IX allows for the emergency removal of a student (34 CFR § 106.44(c) prior to the initiation of the investigation if the results of the risk analysis indicate that the individual poses an immediate threat to the physical health or safety of any

student or other individual, and the justification for removal arises from allegations of sexual harassment. After the removal, the Student has a limited right to appeal the removal to the individual who made the initial decision to remove the Student.

The text of Title IX requires that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...." 20 U.S.C. § 1681.[6] Title IX generally requires school districts to respond promptly to reports or formal complaints of sexual harassment. Failure to act can result in liability. See *Davis v. Monroe County Bd. of Educ*., 103 LRP 20059, 526 U.S. 629 (1999) (holding that a district could be liable for failing to address known sexual harassment).

The 2020 Title IX regulations -34 CFR § 106.45(a) - require districts to follow a grievance process for sexual harassment complaints. Schools must also provide supportive measures to both complainants (victims) and respondents (accused students) while investigations are pending. 34 C.F.R. § 106.44(a).

The specific Title IX regulations at issue here provide as follows:

> 34 CFR 106.44(6)(i) If the complainant or respondent is an elementary or secondary student with a disability, the recipient must require the Title IX Coordinator to consult with **one or more** members, as appropriate, of the Student's Individualized Education Program (IEP) team, 34 CFR 300.321, if any, or one or more members, as appropriate, of the group of persons **responsible for the Student's placement decision** under 34 CFR 104.35(c), if any, to determine **how to comply** with the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.,* and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, in the

[6] As a general observation, I also note that a 37 word statute passed by Congress in 1972 – Title IX- now requires 2,033 pages of three column text in the Federal Register, encompassing pages 30026 to 32059.

implementation of supportive measures. 34 CFR 106.44(6). (emphasis added).

The 2020 Title IX regulations, for the first time since the passage of Title IX in 1972, authorized the Title IX Coordinator to remove students unilaterally pending the outcome of the investigation. The emergency removal provision provides as follows:

> (h) ***Emergency removal.*** Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an imminent and serious threat to the health or safety of a complainant or any students, employees, or other persons arising from the allegations of sex discrimination justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. **This provision must not be construed to modify any rights under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.,* Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, or the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq. (emphasis added)***

Once the Title IX Coordinator determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, the Coordinator must provide the respondent – the Student- with notice and an opportunity to challenge the removal decision 34 CFR § 106.44(c). The emergency removal power is an exception to the general Title IX rule that a school district may not impose disciplinary or other sanctions on a respondent prior to the conclusion of the grievance process. (Title IX *Preamble* at 30,230). Furthermore, a school district may impose an emergency removal "before an investigation into sexual harassment allegations concludes (or where no grievance process is pending) ...." (Title IX *Preamble* at 30,224). Districts must maintain any supportive measures provided to the complainant or respondent as confidential to the extent that maintaining such confidentiality would not impair the ability of the school district to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures. (34 C.F.R. § 106.30(a); Title

IX *Preamble* at 30,128).

Legal Analysis and Conclusions of Law
The First Unilateral Decision

On [date], the Title IX Coordinator met with the Special Education Supervisor and the Student's guidance counselor to complete the Title IX risk analysis. After discussing the Title IX allegations, the Coordinator concluded that the Student should be removed. I now conclude that the Coordinator satisfied the requirements of -34 CFR § 106.45(a)- when she consulted with the Special Education Supervisor and guidance counselor, who were part of the Student's IEP team, in completing the risk analysis. When the meeting ended, the Coordinator sent the Parents a letter memorializing her decision that the Student would be excluded for 15 days. The letter included the Title IX notice and an opportunity to challenge the removal decision. Thereafter, the District staff erred when the Title IX Coordinator and the Special Education Supervisor failed to confer and decide - **"how to comply"** 34 CFR 106.44(6)(i) - with the IDEA, Section 504, and the ADA. Instead, they erred when they modified and agreed that the Student's substantive and procedural due process rights under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.,* Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* would not be enforced.

In *Honig v. Doe*, 484 U.S. 305 (1988), the Supreme Court ruled that schools cannot unilaterally exclude students with disabilities for misbehavior related to their disability. In *Dunkin (MO) R-V Sch. Dist*. (OCR 2009), OCR advised that an MDR is required under Section 504 before removing a student with a disability for more than 10 days. In *Letter to Williams*, 21 IDELR 73 (OCR 1994), OCR concluded that the District violated Section 504 by failing to evaluate a student before moving them to a more restrictive placement. If a student's placement is changed for disciplinary reasons, schools must conduct a Manifestation Determination Review (MDR). An MDR must be held if a student is removed for

more than 10 school days. The school must determine whether the behavior was caused by or had a direct and substantial relationship to the Student's disability. Rather than follow the applicable procedural requirements like issuing prior written notice and a manifestation determination review meeting, the District stopped providing all direct services and related services. The unilateral decision on October 10, 2024, to provide no services whatsoever substantially interfered with the Parents' participation in the IEP process and caused an ongoing denial of a FAPE.

The First Unilateral Decision Also Caused Substantive and Procedural Due Process Violations

In *PARC v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (E.D. Pa. 1972). (PARC Consent Decree, 1972), the court stopped the removal and exclusion of disabled students from public schools without due process. The Decree required the districts to provide the following protections: 1. Parental involvement in placement decisions. 2. The right to challenge placement decisions through a due process hearing. and 3. Schools were required to provide notice before, not after, making a suggested change in placement. Then, in *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), the court concluded that certain procedural due process rights attach when school districts move to remove or exclude students with disabilities from public education. The *Mills* ruling requires school districts to provide pre-removal due process safeguards to children with disabilities, including but not limited to 1. Written notice before denying or changing educational placement. 2. A formal hearing process before a placement change is advanced. 3. The right to appeal the placement before it occurs, and 4. Additional procedural safeguards include parental involvement, the right to confront and cross-examine witnesses, and documentation of the decisions. These procedural due process holdings laid the foundation for the IDEA and Section 504 "change in," "change of" prior written notice, procedural

due process, stay put placement, or disciplinary removal restrictions.

The Student's Title IX Notice of Removal on October 10, 2024, for a term of 15 days far exceeding the 10-day removal limits under *PARC*, *Mills*, 34 CFR § 300.536 *et seq*., the Section 504 "significant change in placement" protections at 34 CFR 104.3s and 22 PA Code Chapter 12.8 10 day removal due process hearing guarantees. The Title IX Coordinator, the Special Education Supervisor, the Guidance Counselor, and the lead teacher failed to decide "**how to**" comply and apply the District's Title IX Board Policy directing the staff to follow the IDEA, Section 504, and ADA procedural protections in "emergency removals." Simply put, after day 10, and certainly by day 15 and every day thereafter, the District failed to complete an MDR, issue prior written notice, provide FAPE services, follow the "stay put" requirements, issue procedural safeguards, or state law NOREP requirements. This series of continuous violations, beginning in October 2024 and continuing into the present, interfered with parental participation and the student's due process rights, school attendance, and FAPE rights. School districts have a *limited* number of days for which a student may be removed for any reason without implicating free appropriate public education issues. It would be *inconsistent* with the Student's vested rights under the IDEA or 504/ADA not to consider the "emergency removal" days under Title IX separate and apart from the history and tradition interpreting the "changes in" or "changes of" placement restrictions under the IDEA text, history, and tradition.

The Second Unilateral Decision

The Special Education Supervisor's decision to provide ten hours a week of one-on-one instruction without issuing prior written notice, holding an IEP meeting, or issuing a NOREP interfered with the Parents' participation and denied the Student a FAPE. Third Circuit case law provides that special education services must offer "meaningful educational benefits" and "significant learning." *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). The Third Circuit in M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 396-97 (3d Cir. 1996)

held that minimal services, like 10 hours a week, while others are provided 25 or more hours of instruction, falls short of the IDEA's equal access FAPE promise. The record is preponderant, although the District cobbled together a smattering of services - 10 hours a week- after school hours, due to administrative convenience, omitted speech therapy, occupational therapy, and behavioral supports like a one-on-one, otherwise provided for in the pendant IEP, further deprived the Student a FAPE in the LRE.

The Third Unilateral Decision

The Special Education Supervisor, after receiving the "decision maker's" Title IX directions, advised the Student IEP team that the only option placement they could consider was an out-of-district placement. The "decision maker's" report fails to meet the Section 504 requirement that the District complete an evaluation prior to a "significant change" in placement. Furthermore, the report misdirected the IEP team and, if left unchecked, will cause a "change in" or a "change of" essential services prospectively. The record is preponderant that the Student has been removed from the last agreed-on placement since October 10, 2024, which in and of itself is a continuing violation of the "stay put" requirements once the Parents filed the due process complaint.

A change of placement under the IDEA and Section 504 occurs when a modification to a student's educational program significantly alters their learning experience in a material way. Courts apply a fact-specific analysis to determine whether a change is substantial enough to be considered a new placement. Courts review a change of placement and examine whether the modification is likely to affect the child's learning experience in a meaningful way (*J.R. v. Mars Area Sch. Dist.*, 318 F. App'x 113 (3d Cir. 2009); *DeLeon v. Susquehanna Cmty. Sch. Dist.*, 747 F.2d 149 (3d Cir. 1984).

Reducing the Student's special education time to 10 hours a week from upwards of 27 plus hours altered the Student's exposure to non-disabled peers

and interfered with the Student's participation with others, like eating lunch with peers, causing a fundamental change in the Student's placement (*G.B. v. District of Columbia*, 78 F. Supp. 3d 109 (D.D.C. 2015); *Robert M. v. State of Haw.*, 51 IDELR ¶ 211 (D. Haw. 2008); *D.M. v. N.J. Dep't of Educ.*, 801 F.3d 205 (3d Cir. 2015).

At all times after the Parents file a due process request, the District must ensure the Student placement aligns as closely as possible with the last agreed-upon IEP, otherwise known as the stay-put protection (*Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115 (9th Cir. 2003); *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440 (2d Cir. 2015) that did not happen. The direction to place the Student out of the District at the expense of all others predetermined the Student's placement and interfered with the Parents' participation in the IEP.

Individually, the above violations caused a denial of FAPE in the past. If left unchecked, the "decision maker's" direction to change the Student's placement will cause further violations in the future. Therefore, to remedy these three fundamental errors, I am directing the District to hold an IEP meeting within seven (7) school days of this Order to develop a plan to return the Student to the pendent placement/classroom. The team should consider supplemental services, aids, accommodations, support services, and auxiliary services to support the Student's return. Furthermore, the team should also consider what type of support the staff needs to implement the Student's program. Finally, the team should organize a staffing pattern that supports the Student and manages the Student's interactions with peers in the classroom, during regular education, and transportation.

Appropriate Relief

Applying Third Circuit case law, I now conclude that I cannot calculate a make whole package of compensatory services. Guidance from jurisprudence, including *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005), *G.L. v.*

Ligonier Valley School District Authority, 802 F.3d 601 (3d Cir. 2015), and *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996), underscores that equitable remedies must be tailored to the individual needs of the Student. However, in this matter, the limited expedited evidentiary record and exhibits are inadequate to support the calculation and the determination of compensatory education remedy. The limited testimony of only three witnesses about the emergency removal resulted in a lack of necessary facts and evidence needed to calculate either a "make whole" or an hour-for-hour compensatory education award. Accordingly, the claim for compensatory education is dismissed without prejudice, thereby preserving the Parent's right to refile if the Parties cannot reach a complete "make whole" agreement. The bifurcation and dismissal without prejudice of the compensatory education claim ensures that any relief and all relief ultimately granted is individualized, equitable, and fact-specific. This direction, however, does not end the relief analysis.

The Student's [improper] behavior triggered the Title IX referral. The record is preponderant that the Student's [behavior] in school interferes with the Student's learning. Following the Section 504 regulations, the District should have completed an evaluation before the significant change in placement – the emergency removal - occurred, which did not happen here. Therefore, pursuant to my remedial authority under 34 CFR § 300.34, 34 CFR § 300.502(d), and 22 Pa. Code § 14.102(a)(2)(xxix), and in fulfillment of the District's obligation to provide the Student with a comprehensive evaluation and a FAPE, I hereby order that the Student undergo a comprehensive forensic assessment, to examine, assess and analyze the Student's [behavior]. The evaluator should understand and analyze any underlying developmental, psychological, or trauma-related factors contributing to such behaviors. The results of the evaluation shall be used to inform the development of a Positive Behavior

Support Plan (PBSP) that addresses the Student's needs and circumstances in an educational setting.

The evaluation shall be conducted by a qualified related service professional with specialized training and experience in child development, trauma-informed care, [behaviors], and forensic assessment. I leave it to the District to select a qualified licensed psychologist (Ph.D. or Psy.D.), licensed clinical social worker (LCSW), licensed professional counselor (LPC), forensic child and adolescent psychiatrist (M.D. or D.O.), certified forensic evaluator (CFE), board-certified [redacted] treatment provider (BSOTP), forensic interviewer at a Child Advocacy Center (CAC), or pediatric forensic medical examiner as they deem qualified to complete the evaluation.

The evaluation shall include the administration of evidence-based risk assessment tools to assess the level of risk and identify appropriate behavioral interventions. This evaluation shall be considered part of the ongoing IEE comprehensive reevaluation process required under the IDEA and 22 Pa. Code § 14.123, and it shall be used to develop an appropriate Positive Behavior Support Plan (PBSP) in accordance with 22 Pa. Code § 14.133. The District shall ensure that the PBSP incorporates research-based interventions, proactive behavioral strategies, and necessary Student and staff support to facilitate the Student's participation to the maximum extent appropriate in the least restrictive environment.

The District shall select the evaluator, and the evaluation should be completed within the applicable timelines. The District shall bear the cost of this evaluation and ensure that the selected evaluator has no prior conflicts of interest in this matter. The results of the evaluation shall be provided to the Parent, the evaluation team, and the IEP Team within the applicable reevaluation timeline, and the PBSP shall be developed, updated, and implemented accordingly.

Finally, I now find that the issue of appropriate compensatory education relief must be bifurcated from the denial of FAPE analysis to ensure "every right has a remedy." The Student's claim for compensatory education shall proceed as a separate matter, if necessary, in another action.

SUMMARY

The District's unilateral decision-making and reaction to the Student's behaviors and its failure to determine "**how to comply**" and understand the intersection of Title IX, the IDEA, and Section 504 caused a denial of a FAPE.

Final Order and Appropriate Relief

And now, on March 17, 2025, upon consideration of the evidence and arguments presented, the following determinations, directions, and Order are made:

1. The District's Motion to Dismiss Parents' Claims is **DENIED**.

2. The Parents' denial of FAPE under IDEA and Section 504 claims are **GRANTED**.

3. As hearing officers cannot grant legal relief, the Parents' Section 504 and ADA non-FAPE discrimination claims are exhausted and **DISMISSED WITHOUT PREJUDICE.**

4. The Parents' request for compensatory education is **DISMISSED WITHOUT PREJUDICE**. The Parents retain the right to refile the compensatory education claims once they are prepared to present evidence regarding the scope and amount of compensatory education.

5. The District is hereby **ORDERED** to fund the independent educational evaluation described above.

6. The Parties have seven (7) school days from the date of this Order to participate in an IEP meeting to develop a plan to enable the Student to return the Student's pre-removal "stay put" placement. The Student should

return to the pre-removal last agreed-on program and placement on the 10th school day.

7. All directives and Orders described herein shall take effect as scheduled above unless modified by Order of a Court of competent jurisdiction.

8. All other claims and defenses are dismissed with prejudice.

March 17, 2025 */s/Charles W. Jelley, Esq.*
Special Education Hearing Officer