

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. 29467-23-24

Child's Name:

S.D.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

August 5, 2024

INFORMATION AND PROCEDURAL HISTORY

The student (Student)¹ is currently [redacted] years old and most recently enrolled in the [redacted] grade in a cyber charter school. The Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) as a child with Autism, Other Health Impairment (OHI) (ADHD) and a Specific Learning Disability.

The Parents allege that for the last two years, the District violated the Student's rights under the IDEA, Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA) for failing to properly implement programming, provide accommodations, ignoring claims of bullying, and engaging in intentional discrimination.² For these violations, the Parents seek compensatory education and reimbursement for an independent evaluation and fees associated with the Student's attendance at a cyber charter school.

The District counters that that it met its obligations to the student and that no relief is due.

ISSUES³

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision, and will be redacted from the cover page prior to posting on the website of the Office for Dispute Resolution.

² 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15). Americans with Disabilities Act as Amended (ADA), 42 U.S.C. § 12101 et seq.

³ (N.T. 10-11)

1. While enrolled in the District during the 2022-2023 and 2023-2024 school years, did the District deny the Student a FAPE under the IDEA by failing to:

- a. offer an appropriate program and placement;
- b. implement the provisions of the IEP that provided for eighty minutes per day of individualized math instruction and 150 minutes per week of social - emotional support?

2. While enrolled in the District during the 2022-2023 and 2023-2024 school years, did the District deny the Student a FAPE under Section 504 of the Rehabilitation Act by failing to offer reasonable accommodations?

3. While enrolled in the District during the 2022-2023 and 2023-2024 school years, did the District intentionally discriminate against the Student in violation of Section 504 and Title II of the ADA by:

- a. disregarding and refusing to investigate Parent's October 2023 formal complaint;
- b. behaving with deliberate indifference toward complaints of disability-related bullying and harassment?

4. If the District denied the Student a FAPE under the IDEA Section 504 or the ADA, what, if any, remedy is appropriate?

5. If the District denied the student a FAPE under the IDEA Section 504 or the ADA, are the parents entitled to reimbursement for

expenses associated with the Student's enrollment in a Pennsylvania cyber school or the privately obtained IEE?

FINDINGS OF FACT

Previous Education

1. From [redacted] to [redacted] grade, the Student attended a private school. (P-6)
2. The Student has a history of poor sleeping, anxiety, hyperactivity and impulsivity. Since 2017, the Student has received cognitive therapy. (P-2, P-6 P-32; N.T. 94-95, 245)
3. During the 2021-2022 school year, the Student was enrolled in the [redacted] grade in a cyber school charter. (P-6)
4. In February 2022, the Student received an educational evaluation (ER). Parent input in the ER indicated the Student was diagnosed with ADHD, generalized anxiety disorder, [redacted] and suspected Autism. (P-2, p.2, S-5, p. 2)
5. As a patient of a psychiatric provider, the Student was prescribed [redacted] (P-1, P-2, p, 2, S-5, p. 2)
6. The ER concluded the Student's cognitive ability was within the average range (FSIQ=101). Scores from the WIAT suggested average

performance in math and above average in reading, No significant discrepancy was found between the Student's cognitive ability and achievement. (P-1, p. 10)

7. Based on Parent and teacher reports, behavioral observations and ratings, and a review of records that indicated off-task and executive functioning difficulties consistent with the ADHD diagnosis, the team concluded the Student met the criteria for other health impairment (OHI). (S-5)
8. The offered IEP included goals to address math, reading, and social skills. The offered SDI included strategies to address executive functioning difficulties in math and reading skills. The offered SDI included strategies for implementation upon return to in-person learning. The team determined the Student was ineligible for ESY. (P-3)

2022-2023 School Year

9. During the 2022-2023 school year, the Student started the [redacted] grade at a private school before transferring to the District. (P-45, p. 9)

Education in the District

10. On December 1, 2022, the Student transferred to the District and enrolled in the [redacted] grade. (P-4)
11. On December 8, 2022, through a NOREP, the Parent approved the Student's receipt of itinerant learning support. (P-4)

12. A December 13, 2022, speech-language screening concluded that speech services were not warranted for the Student. A December 14, 2022, District occupational therapy (OT) screening recommended further testing.⁴ (P-5, P-6, p. 6, 12)
13. After a review of the Student's academic and provided medical records and parental concerns, the District requested permission to reevaluate the Student. (N.T. 368)
14. On December 22, 2022, the IEP team met to develop educational programming. (P-6)¹
15. The Student's present levels indicated an instructional level in writing at the beginning of fourth grade. The Student was instructional in broad reading skills within the fifth grade range. In math calculation, the Student's instructional level was at the end of second grade and in math problem solving, at the beginning of third grade. (P-6, p. 7-10)
16. The December 2022 IEP offered two math goals (automaticity problem solving). Offered SDI included eighty minutes of daily, small group, math instruction, extended time, daily check in/check out, chunking, a visual schedule and chunking. The team determined the Student did not qualify for ESY. (P-6)
17. On December 2022 IEP, the Parent approved the placement of the Student in supplemental learning support. (P-6, p. 28-29, P-7)

⁴ The Student received a District OT re-screening on January 20, 2023, and February 1, 2023. The OT made several suggestions for classroom accommodations but concluded an OT evaluation was not recommended. (P-8)

18. On February 2, 2023, a medical provider noted the Student's history of anxiety that, although medicated, appeared not well controlled. The provider indicated the Student would need surgery at some point to address [redacted]. The Student was prescribed [medication]. (P-40)
19. On February 9, 2023, the District completed its reevaluation of the Student. (P-40)
20. The RR included medical, Parent, and educator input, previous aptitude and achievement testing results, current academic data, OT and Speech screening results, and teacher recommendations. The RR determined the Student had math calculation and problem solving needs. (P-8, P-9)
21. The February 2023 RR concluded the Student was eligible for special education under the disability categories of Autism (primary) and OHI-ADHD (secondary). The team recommended itinerant learning and emotional support. (P-6, P-8, P-9)
22. On February 9, 2023, the IEP team developed educational programming for the Student. (P-10)
23. The February IEP contained goals to address math (automaticity and problem-solving). The Student's instructional level in math calculation was determined to be at the end of year of second grade. The Student's problem solving instructional level was at the beginning of the third-grade level. (P-10, p. 29-30)

24. The February IEP incorporated SDI from the previous IEP and added visual cues and prompts, small group testing support, advance notice of schedule changes, multi-step directions broken down, and preferential seating. (P-10, p.32)

25. On February 9, 2023, through a NOREP, the Parent approved the recommendation for programming. (P-11)

26. On March 19, 2023, after a peer pushed the Student at school, the Parents, through a letter to the District, complained of bullying and referenced peer behaviors that made the Student feel unsafe, the invasion of personal space and name calling "idiot". The Parents requested an investigation. (P-12)

27. On March 20, 2023, the Student was slapped in the face by a seventh-grade student. The assault resulted in a suspension from school for the assailant, the filing of charges by the Parents, and a citation for harassment with the district magistrate. The assailant pled guilty and paid fines and costs. (P-13, P-14; N.T. 170)

28. On March 26, 2023, the Parents contacted the District and expressed concerns for the Student's safety after learning that during a hallway transition and at lunch, a classmate instead of school staff was assigned to accompany the Student. The Parent also expressed concerns about insufficient school surveillance and requested a reprimand of staff for punishing the Student for autistic behavior. (P-14)

29. While receiving in-person instruction in the District, the Student's IEP was implemented, and eighty minutes of daily small-group math instruction was received. (N.T. 65, 70)

30. On March 30, 2023, the IEP team reconvened to discuss the Parents' bullying concerns and the Student's enrollment in the District's asynchronous cyber program. In response to concerns that the offender student from the lunchroom was not sufficiently disciplined, the District indicated a full investigation occurred, and it could not discuss another student. (P-15, p. 8, 14, P-16; N.T. 373)

31. At the IEP meeting, the District offered in-person instruction with a safety plan, a hybrid program with in-person math instruction, and additional SDI to address social/emotional learning. The Parents rejected all options and insisted on cyber education. The District expressed concern that cyber learning would be detrimental and would not meet the Student's behavioral, emotional and academic needs. (P-15, p. 14-15, P-16; N.T. 172-173)

32. On April 3, 2023, the District requested permission from the Parents to reevaluate the Student. On April 6, 2023, the District issued a NOREP to change the Student's placement to an interim forty-five-day trial cyber placement with itinerant emotional and learning support. The NOREP indicated the requested placement was at the Parents request and against the District's recommendation. The Parents refused to sign a waiver of FAPE. (S-22, S-23; N.T. 182)

33. The Student remained in the District's asynchronous cyber program until the end of the 2022-2023 school year. (P-16, P-26)

34. On April 27, 2023, the Student's therapist, through a treatment plan indicated goals for the management of fears and thoughts so schoolwork focus and self-soothing could occur and assignment completion with fewer distractions. The therapist noted the Student had difficulty with a family move and dealing with peers in the new school, bullying and the lack of school support. (P-25)
35. On May 16, 2023, the District issued an RR regarding the Student. The RR included a records review, parent input and teacher input, aptitude and achievement testing, and assessments of social-emotional functioning. (P-19)
36. On the Wechsler Intelligence Scale for Children - Fifth Edition (WISC-V), the Student received a FSIQ of 92, suggesting average cognitive functioning. (P-19)
37. The Behavior Rating Inventory of Executive Functioning, Second Edition, (BRIEF-2) concluded the Student may demonstrate difficulty with beginning a task (initiate), struggle with transition (shift) and have trouble tracking how behaviors affect others within the school environment (self-monitor). (P-19, p. 28)
38. On ratings of social skills, the Student, a Parent, and a teacher rated social skills within the average to above average ranges. Relationship skills fell within the below-average range, according to the teacher, suggesting difficulty communicating with others. (P-19, p, 29)
39. On the Sentence Composition of the Wechsler Individual Achievement Test – Fourth Edition (WIAT-4) to assess writing skills, the Student

performed in the average range for sentence building and sentence combining. The Student's overall sentence composition performance was average. (P-19, p. 29)

40. The RR noted the Student's diagnosis of ADHD, Autism, anxiety and [redacted] (P-19)
41. The team concluded the Student continued to qualify for special education as a child with Autism and OHI (ADHD). The team recommended the continuation of itinerant learning and emotional support programming. (P-19, p. 30)
42. While attending the District's cyber program, the Student received asynchronous instruction. (P-16; N.T. 82, 171)
43. During the 2022-2023 school year, the Student made demonstrable progress toward both IEP goals. From February to May 2023, the Student's math automaticity increased from 25 facts per four minutes to 72 facts per four minutes. The Student's problem solving increased from 4.7 to 9.3 correct problems per ten minutes. (P-26, p. 20-21; N.T. 271)
44. On June 6, 2023, the IEP team met and developed programming for the Student's return to in-person instruction.⁵ The IEP contained a safety plan goals to address math (automaticity, problem-solving) and social skills. SDI included eighty minutes of daily small group math instruction, extended time, chunking, 120 minutes a week of social learning instruction, and daily implementation of the safety plan. (P-22, p. 49-51)

⁵ Legal counsel for the Parents and the District attended the meeting. (P-22, p. 1)

45. The June IEP offered the Student itinerant learning support. Although the Parents approved the programming, they expressed concern about bullying and sufficient SDI to support math needs. (P-22, p. 55, P-23)
46. On June 15, 2023, the Parents obtained a private pediatric OT assessment. The OT recommended the Student receive bi-weekly OT services to address manual coordination to assist with higher level coordination tasks for [redacted]. (P-28)
47. During the 2022-2023 school year, the Parents were afforded the opportunity to provide input for every RR and participate in each IEP meeting. (P-6, P-10, P-19, P-22)
48. On August 16, 2023, the IEP team reconvened to prepare for the Student's return to in-person instruction for the 2023-2024 school year and review and revise the Student's safety plan. (P-26)
49. The revised August IEP incorporated the recent RR information added goals to address social interaction skills and coping. Updated SDI included a safety plan and 150 minutes a week of small group social, emotional, behavioral instruction. (P-26; N.T. 269)
50. The safety plan identified the student support team, internal, teaching and learning, and external supports, suggestions for the Parents, a plan review, and others with a duty of care. (P-26, p. 31-37)

51. The safety plan required staff to escort the Student: upon arrival and departure to school, to first-period class, to all unified arts classes, to and from lunch and assemblies, during transitions to the office, nurse or areas outside the [redacted] grade hallway. The plan offered an alternate location for lavatory use. The safety plan identified how the Student should alert staff if the plan was not followed and that the Parents would be notified of plan violations. (P-26, p. 31-37)

52. Through a NOREP, the Parents approved the implementation of the August 2023 IEP and the Student's placement in supplemental learning support with 64% of the day in the regular classroom. (P-26, p. 57-58, P-27)

53. On August 24, 2023, the District proposed a reevaluation after Parents provided information regarding the Student's anxiety and the June OT screening report. (P-25, P-28, S-36)

2023-2024 School Year

54. During the 2023-2024 school year, the Student returned to in-person instruction in the District and enrolled in the [redacted] grade. (N.T. 268)

55. On September 7, 2023, the team met to review data collected by the learning support teacher and consider the Parents' concerns regarding the Student's challenges with math, organization, task sequencing, and time management. (P-30, p. 42; N.T. 270)

56. The September IEP offered a safety plan, goals to address math (automaticity, problem solving), social skills, and coping skills. Offered

SDI included eighty minutes of daily, direct small group math instruction, twice-a-day check-in, 150 minutes a week of small group social, emotional, behavioral, and emotional support, a daily visual schedule chunking, and preferential seating. Through a NOREP, the Parents approved the September IEP. (P-30, p. 54-58, P-31)

57. On September 12, 13, and 14, 2023, an independent neuropsychologist conducted a District funded evaluation of the Student. The evaluation included an interview with the Parents, a review of records, Student observations, and the administration of assessments of aptitude and achievement.⁶ (P-32; N.T. 384)

58. The evaluation concluded the Student's psychosocial history and neuropsychological profile were consistent with the previous diagnosis of Attention Deficit Hyperactivity Disorder (ADHD), SLD (math), and Autism. (P-32)

59. The private evaluation recommended a continued high-level of supervision to ensure Student safety, alternate lunch and restroom locations, exploration of a smaller school setting, group social skills, alternative math curriculum, consideration of headphone use, direct instruction to develop executive functioning skills, testing accommodations, shortened assignments, preferential seating, repetition, breaks, ongoing consultation with a child and adolescent psychologist. (P-32, p. 11-13)

⁶ Although the District RR was incomplete, it agreed to fund the IEE as a "good faith effort" to ensure the Parents' comfort. (N.T. 384)

60. On September 28, 2023, in the learning support classroom, the Student advised the teacher, that students were talking about the Student **not** having an autism diagnosis. The teacher addressed this with the class classroom, interviewed the students, advised their comments were inappropriate, documented the incident and advised the Director of Special Education. (N.T. 272-273)
61. On September 28, 2023, after recess, the learning support teacher approached the Principal to advise of a concern regarding the Student. The teacher and Principal both spoke with the Student. During the conversation with the Principal, the Student indicated during a game of cops and robbers, the peer [redacted]. The Student denied [the action] or that anything was said. During the conversation with the teacher, the Student said [redacted]. While recounting the events, the Student was not crying, shaking, visibly upset and returned to class. Although staff, including the Principal, an instructional aide and first grade teachers were present, none saw the incident. ⁷ (N.T. 275, 282, 451, 457-460)
62. The learning support teacher and Principal telephoned the Parents. The Parents notified the police, CYs, the Student's therapist and healthcare team, and their attorney. (P-33; N.T. 278-282, 457-460)
63. On October 2, 2023, the Principal interviewed the Student and the peer involved in the playground incident. The information received was unchanged from the original interview with the Student. The Principal

⁷The District has a playground video of that day. However, it was not subpoenaed nor introduced into evidence by either party. The Parents' objection to the Principal describing a review of the video was sustained. The Hearing Officer requested production of the video before questions could occur. By the conclusion of the hearing the status of this request was unknown and not raised by either party. (N.T 463.)

referred the matter to the Title IX coordinator, the District superintendent, and the school resource officer (SRO).⁸ The District made a Childline referral. (N.T. 461-462, 465, 469, 488)

64. The District's SRO is a former Pennsylvania state trooper with thirty years of service. The SRO conducted a criminal investigation into the October incident. The SRO read the Childline referral, statements from staff and faculty, and the County forensic report. The SRO interviewed the alleged perpetrator, viewed the video footage of the interaction, and referred the matter to the County District Attorney's office for further action. (N.T. 475, 488-490, 495, 499)

65. On October 6, 2023, counsel for the Parents requested a Title IX investigation into the playground incident. The District started the investigation. The status of the Title IX investigation is unknown. (P-58, p. 1; N.T. 422-424, 476)

66. On October 9, 2023, a medical provider of the Student recommended a home schooling program citing bullying, assault and [redacted]. The District spoke with a nurse at the provider's office that indicated no assessments occurred and the recommendation was based upon the family's report. The District treated the providers' recommendation as a request for homebound instruction. (P-34; N.T. 391, 426)

67. On October 15, 2023, the District reevaluated the Student. Parent input indicated the Student was the victim of multiple assaults and verbal bullying and could not return to in-person learning because of

⁸ The District's Title IX coordinator, the school superintendent, did not testify during this due process hearing.

trauma. The RR included social, emotional, behavioral, and OT assessments, as well as consideration of the IEE. The RR recommended that the Student qualify as a child with Autism, OHI (ADHD), and added SLD (math). (P-36)

68. On October 17, 2023, the Parents filed a Title IX discrimination complaint. In the complaint, the Parents indicated that during a playground game, [redacted]. The classmate reportedly told the Student [the classmate] would be the Student's husband. (P-33)

Homebound Instruction/Asynchronous Cyber Education

69. On October 23, 2023, the Parents applied to the District for homebound instruction. The application contained a physician's recommendation and signature. (S-42)

70. On October 24, 2023, the Parents' counsel requested reclassification of the request for homebound instruction to instruction in the home. (P-58, p. 7)

71. On October 24, 2023, the Student received a forensic interview at a hospital child advocacy center (CAC) from the referring County Children & Youth Services (CYS) agency. During the interview the Student said during outdoor recess, a friend wanted to play "cops and robbers", but the Student declined. The friend knocked the Student down. The friend was the cop, and the Student was the robber. The friend held the Student's hands behind the back and was walking the Student toward peers; [redacted]. The Student also said the friend said something about being a husband, but the Student was not sure of the context. The

Parent advised the Student that the incident was [redacted].⁹ (P-39; N.T. 493)

72. The CAC victim advocate attempted to administer the Child and Adolescent Trauma Screen (CATS), but the Parents refused. (P-39, p. 1)

73. The District referred the playground incident to the school resource officer (SRO). The SRO investigated the incident and referred the matter to the County District Attorney's office. No charges were filed against the child accused of [redacted]. (N.T. 488-490, 495)

74. On October 26, 2023, the District approved the Parents' request for home-bound instruction and confirmed the Student would receive one hour of direct instruction to address math and social skills. (P-58, p. 8, 18; N.T. 428)

75. During homebound, the Student received sixty-minutes of daily, individual, special education instruction, divided between social skills and math. No other students were present during the instruction. (N.T. 288-289, 327, 337, 406)

76. In addition to the homebound instruction, the Student received social studies, science, and ELA through the District's synchronous cyber program. (N.T. 289, 431-432)

⁹ During testimony, a Parent indicated the child abuse investigatory process and the Student's forensic interview was a "hit job" because of the connection between the CAC and the District. (N.T. 252)

77. On October 30, 2023, the District completed the RR and confirmed homebound instruction was scheduled to start that day. (P-37, P-58, p. 15-16)
78. On October 31, 2023, the District advised the Parent that a NOREP was not issued for homebound instruction because the request was medically driven and not a change in placement. On November 1, 2023, the District provided the Parents with access to the PA Department of Education, circular explaining the difference between "instruction in the home" and "homebound instruction". (P-58, p. 14-15)
79. On November 7, 2023, a medical provider recommended a home education program for the Student. (P-40, p. 14)
80. In mid-November 2023, the Parent secured a protection from abuse (PFA) order as the victim of physical and emotional abuse against the other Parent in the family home. The Parent did not provide information about the disruption to the Student's private providers. (P-24, P-25, P-28, P-32, P-40, P-49; S-47, p. 8-10; N.T 242-245)
81. On November 16, 2023, the team revised the Student's IEP in anticipation of in-person instruction. The November IEP offered goals to address math (automaticity, problem solving) and social skills (social interaction, coping skills) Offered SDI included eighty minutes of small group math instruction, 150 minutes of weekly small group social, emotional skills instruction, and a daily safety plan. (P-43)

82. The November IEP offered related services that included a school day 1:1 paraprofessional, thirty minutes of bi-weekly autistic support, and OT consultation. (P-43, p. 33)
83. On November 24, 2023, the Parents rejected the programming proposed in the November IEP, requested instruction in the home, and a due process hearing.¹⁰ (P-42, P-43; N.T. 435-436)
84. On December 14, 2023, counsel for the Parent indicated the Student was entitled to "instruction in the home" because of rampant bullying and requested an IEP to prevent abuse. (P-58, p.22)
85. From August 2023 to January 2024, the Student made progress toward the math automaticity goal, moving from answering 33 to 48 problems correctly. (P-44)
86. From September 2023 to January 2024, the Student progressed toward the math problem-solving goals from answering fourth-grade problems from 2.0 to 2.7 problems correctly. (P-44)
87. From August 2023 to January 2024, the Student progressed toward the social skills goal of identifying emotions from 50% to 100%. (P-44)
88. From August 2023 to January 2024, the Student made inconsistent progress toward the coping skills goal (P-44, p. 5)
89. On January 12, 2024, a medical provider recommended a home-based education for the Student. (P-40, p. 15)

¹⁰The due process complaint was filed on March 29, 2024.

90. On January 12, 2024, the IEP team reconvened in anticipation of the Student's return to in-person instruction. The January IEP offered the same programming rejected by the Parents in November, but this time, it offered a 1:1 paraprofessional assigned exclusively to the Student. (P-45, p. 32)
91. On January 22, 2024, through a NOREP, the Parents rejected the District's offered programming, indicated the Student was placed on "instruction in the home," not "homebound instruction," and again requested a due process hearing. (P-46)
92. On February 1, 2024, the attorney for the Parents provided the District with a signed homebound instruction form and requested the District stop marking the Student absent. (P-58, p.25)
93. On February 5, 2024, the District acknowledged receipt of the homebound instruction form and indicated the Student would receive math instruction for 1.10 daily, social skills instruction following math, itinerant autism support bi-weekly for thirty minutes, English, social studies and science through Edgenuity. (P-58, p. 26)
94. On February 9, 2024, the Parent withdrew the Student from the District and enrolled in a cyber school. (P-47)
95. On March 29, 2024, the parents filed a due process complaint. (P-48)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

Witness Credibility

Hearing officers, as factfinders, are charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014).

The Parent, the Director of Special Education, the [redacted] grade learning support teacher, the Principal and the school resource officer (SRO) testified at this due process hearing. Notably, the Parents did not introduce testimony from any of the Student's medical or mental health providers, instead relying on excerpts from the child's medical records to establish ultimate issues in this matter. The Parent's testimony was persuasive that concern for this child is genuine, and no efforts will be spared to right the perceived wrongs of this Student's educational experiences. Although the testimony was credible at times, it was inconsistent at times, did not fully align with documentary evidence and showed great disregard for the County child abuse investigatory processes.

The Principal's testimony was regarded as credible. He was on the playground during the event characterized as [redacted]. Although he did not see what transpired, he interviewed the Student quickly after the event and a few days later. Likewise, the testimony of the SRO was also credible. He provided critical details about the procedures the District followed and its investigatory efforts.

Burden of Proof

In *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006), the Court first noted that the term "burden of proof" is commonly held to encompass both the burden of persuasion (i.e., which party loses if the evidence is closely balanced) and the burden of production (i.e., the party responsible for going forward at different points in the proceeding). In *Schaffer*, only the burden of persuasion was at issue. As the party filing the complaint, the Parents bore the burden of persuasion. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipose." *Schaffer, supra*, 546 U.S. at 58.

IDEA PRINCIPLES: SUBSTANTIVE FAPE

FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that the FAPE requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. LEAs meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Fairly recently, the U.S. Supreme Court considered once again the application of the *Rowley* standard, observing that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F. v.*

Douglas County School District RE-1, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

The Court explained that “an educational program must be appropriately ambitious in light of [the child’s] circumstances... [and] every child should have the chance to meet challenging objectives.” *Id.*, 137 S. Ct. at 1000, 197 L.Ed.2d at 351. This is especially critical where the child is not “fully integrated into the regular classroom.” *Id.* The Court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.*, 137 S. Ct. at 1001, 197 L.Ed.2d 352. This standard is not inconsistent with the above interpretations of *Rowley* by the Third Circuit. See *Dunn v. Downingtown Area School District*, 904 F.3d 248, 254 (3d Cir. 2018).

IDEA PRINCIPLES: PROCEDURAL FAPE

From a procedural standpoint, the family plays “a significant role in the IEP process.” Schaffer, *supra*, at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b); see also *Letter to Veazey*, 37 IDELR 10 OSEP 2001 (confirming the position of OSEP that LEAs cannot unilaterally make placement decisions about eligible children to the exclusion of their parents). Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). The IEP proceedings entitle parents to participate not only in the implementation of IDEA’s procedures but also in the substantive formulation of their child’s educational program. Among other things, IDEA requires the IEP Team, which includes the parents

as members, to consider any “concerns” parents have “for enhancing the education of their child” when it formulates the IEP. *Winkelman v. Parma City School District*, 550 U.S. 516, 530 (2007). Full participation in the IEP process does not mean, however, that LEAs must defer to parents’ wishes. See, e.g., *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999)(noting that IDEA “does not require school districts simply to accede to parents' demands without considering any suitable alternatives,” and that failure to agree on placement does not constitute a procedural violation of the IDEA). As has previously been explained by the U.S. Department of Education, The IEP team should work towards a general agreement, but the public agency is responsible for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE).... If the team cannot reach an agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint. *Letter to Richards*, 55 IDELR 107 (OSEP 2010); see also 64 Fed. Reg. 12406, 12597 (1999).

LEAST RESTRICTIVE ENVIRONMENT

A critical and paramount premise in the IDEA is the obligation that eligible students be educated in the “least restrictive environment” (LRE), which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special

classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C.S. § 1412(a)(5)(A). *see T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993).

Homebound Instruction

Homebound instruction describes the instruction a local educational agency may provide when a student has been excused from compulsory attendance under 22 Pa. Code §11.25 due to temporary mental or physical illness or other urgent reasons. Homebound Instruction applies to all students – general education students, as well as students who receive special education services. Homebound instruction is not a special education placement and is intended to be a temporary measure.

Instruction Conducted in the Home

Instruction conducted in the home is included in the definition of special education located in the federal regulations (34 CFR §300.39(a)(i)) and is recognized as a placement option on the continuum of alternative placements for students with disabilities (34 CFR §300.115). Instruction conducted in the home is restricted to students whose needs require full-time special education services and programs outside of the school setting for the entire day.

General Section 504 and ADA Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). Further, the substantive standards for evaluating claims under Section 504 and the ADA are essentially identical. *See, e.g., Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those two statutes, particularly when considered together with claims under the IDEA. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

Parents’ Claims

Before transferring to the District in December of the [redacted] grade of the 2022-2023 school year, the Student received education through private and cyber charter schools and had known academic, social-emotional, physical and mental health needs. The Parents contend that during the 2022-2023 and 2023-2024 school years, the District violated the Student’s rights through the provision of inadequate special education

programming and accommodations, and intentionally discriminated against the Student through its failure to investigate and respond to bullying and [redacted] assault claims. A thorough discussion of the issues that gave rise to the discrimination claim follows, but first, the Student's implemented programming must be reviewed. Based on the evidence of this hearing record and for the following reasons, the Parents failed to meet their burden of proof concerning most of the claims

The evidence has established that three reevaluations occurred while enrolled in the [redacted] grade, and four IEPs were developed. Each IEP provided special education programming through two measurable, data-driven, appropriate math goals, along with program modifications and specially designed instruction that included eighty minutes of daily, direct "small group" mathematics instruction, extended time, visual cues, and chunking. Although the Parents contend the District failed to provide the Student with 150 minutes of social-emotional support, at this juncture, it was not a component of the Student's IEP and when offered later in the school year, it was rejected. Notably, none of the RR's performed by the District recommended that the Student receive school-based speech, OT or any related services. From the beginning of the 2022-2023 school year until the Student's April enrollment in the District's cyber program, the provided special education programming was appropriate, individualized and calculated to afford the Student meaningful educational benefit. No FAPE denial occurred during this period.

Unfortunately, in March 2023, the Student experienced two negative peer interactions. The first incident, a shove in the hallway, was witnessed by school staff and addressed with the offender. After this occurred, the Parents immediately contacted the District, citing a climate where the Student felt unsafe, personal space was invaded and name-calling occurred.

The second incident unfortunately occurred days later when a peer slapped the Student in the face. This event resulted in a District issued discipline, filing of charges by the Parents that resulted in a citation for harassment, and monetary penalties to the offender. These incidents understandably upset the Student and devastated the Parents who seek a safe, supportive learning environment for their child. After the lunchroom incident, the District took the appropriate steps to implement measures to ensure FAPE for the Student. The District offered the Student in-person instruction with a detailed safety plan and IEP revisions that included 120 minutes of weekly social-emotional learning awareness instruction. Alternatively, the District also proposed a hybrid program with in-person math instruction. Ultimately, the Parents rejected the offered options and requested cyber educational programming, which the District reluctantly initiated.

From April 6, 2023, until the end of the 2023-2024 school year, the Student received asynchronous instruction through the District's cyber program. During this time, the Student's special education math programming was not implemented. Although the District expressed grave concerns about the Student's ability to receive FAPE, it nonetheless issued a NOREP to institute that programming and was obligated to continue the last agreed upon services, which provided eighty minutes of daily math programming. Despite the missing special education math programming, the Student made demonstrable progress toward both IEP math goals. However, the District's agreement to asynchronous programming without the implementation of the IEP-mandated special education services constituted a FAPE denial for which compensatory education is owed to the Student. The Parents have sustained their burden of proof as stated.

The Student returned to in-person instruction at the commencement of the 2023-2024 school year and enrolled in the [redacted] grade. Through an

IEP the Student received programming that included a safety plan, goals to address math (automaticity, problem solving), social skills, and coping skills. Offered SDI included eighty minutes of daily, direct small group math instruction, twice daily check-in, 150 minutes weekly of small group social, emotional, behavioral, and emotional support, a daily visual schedule chunking, and preferential seating. Despite the Parents' claims, the evidence has established that this IEP was appropriate.

Unfortunately, the Student's return to the District was interrupted by a September playground incident that the Parents characterized in their complaint and during testimony as [redacted].¹¹ Following the recess incident, the District received conflicting requests from the Parents, their counsel and Student's providers for homeschooling, "homebound instruction," home education and "instruction in the home." After the Parents completed an application for homebound instruction, programming began.

The implemented homebound instruction included one hour of daily, individual instruction with the time divided between math and social skills. The Student's remaining academic needs were met through enrollment in the District's cyber asynchronous program. Homebound instruction, which the Student received until the Parent's disenrolled from the District describes the instruction a LEA may provide when a student has been excused from compulsory attendance under 22 PA Code § 11.25 due to temporary mental or physical illness or other urgent reasons. The most important difference between instruction in home and homebound instruction is that the former "homebound instruction" is not a special education placement while "instruction in the home" is a placement made by the IEP Team. Only an IEP team can change a Student's placement to instruction in the home, which is

¹¹ [redacted]

one of the most restrictive alternatives on the spectrum of a continuum of special education services.¹² The initiation of homebound instruction for this Student was not a change of educational placement. To fine-tune the Student's programming and in the spirit of cooperation with the Parents, the District agreed to fund an independent evaluation, although it was finalizing its RR. The private evaluation and District RR reached the same conclusions. This Student had needs related to ADHD, SLD (math), and Autism. Appropriately, the District reconvened the IEP team in November and again in January and offered appropriate, responsive programming that included social skills and math, a safety plan and a 1:1 school day paraprofessional to assist the Student. Each time, the Parents rejected the programming and indicated their intention to request a due process which did not occur until the end of March, after they disenrolled the Student from the District.

This hearing officer takes notice of the District's provision of five hours of homebound instruction per week, which is typical in the Commonwealth and grounded in a funding process by the Department of Education. Overall, the Student's special education programming in place during the 2023-2024 school year was individualized and calculated to afford the Student with meaningful educational benefit and did not deny a FAPE.

Section 504/Discrimination

Finally, the Parent's claim the District intentionally discriminated against the Student for disregarding and refusing to investigate the Parents' October formal complaint from the recess incident and behaving with deliberate indifference toward their repeated complaints of bullying and

¹² An LEA may file a due process complaint when the LEA "[p]roposes to initiate or change the identification, evaluation, or educational placement of...a child with a disability... or the provision of FAPE to the child..." 34 C.F.R. §§300.503

harassment over both school years at issue. Based on the totality of this hearing record, the Parent has not met the burden of proof that the District intentionally discriminated against the Student.

Intentional discrimination under both Section 504 of the Rehabilitation Act (Section 504) and Title II of the Americans with Disabilities Act (ADA) requires a showing of deliberate indifference, which may be met only by establishing "both (1) knowledge that a federally protected right is substantially likely to be violated ... and (2) failure to act despite that knowledge." *S.H. v. Lower Merion School District*, 729 F. 3d 248 (3d Cir. 2013). However, "deliberate choice, rather than negligence or bureaucratic inaction," is necessary to support such a claim. *Id.* at 263.

Cruelty to others is indefensible. Bullying can be an IDEA issue when a child's victimization hinders the ability to obtain a FAPE. *See, e.g. Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194 (3d Cir. 2004).¹³ *Shore* stands for the proposition that a child's "legitimate and real fear" of an educational placement caused by bullying can render that placement inappropriate. That case also provides an example of evidence used to establish a legitimate and genuine fear. Documentation of persistent abuse, psychological diagnoses that are directly attributable to that abuse, and expert testimony directly linking the child's mental state to the provision of FAPE are the hallmarks of such claims.

Bullying, harassment and discrimination are not the same. In a *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013), the U.S. Education Department advised that bullying can include verbal or physical aggression

¹³ Dear Colleague Letter, 61 IDELR 263 (OSERS/OSEP 2013), (bullying includes verbal or physical aggression based on sex, natural origin, or disability).

or negative statements used within the peer-to-peer relationship where the aggressor has real or perceived power over the target.¹⁴ The Letter warns that bullying includes verbal or physical aggression based on sex, natural origin, or disability. On the other hand, disability-based harassment under Section 504 and Title II of the ADA includes acts that deny a qualified person with a disability equal access to the same benefits available to all others. Harassment can include words, intimidation, threats, or other abusive behavior toward a student based on the student's disability. Once parents establish predicate acts like verbal abuse, physical violence, intimidation, or coercion, based on disability status, fact finders can infer a hostile environment which can then become the basis for a denial of a FAPE. *Id.* The same predicate acts can establish a denial of participation in or receipt of benefits, services, or opportunities in the district's program.¹⁵

Section 504 and, by inference Title II of the ADA requires districts, once on notice of possible disability-based harassment, to take prompt and practical steps to investigate and remediate all allegations. The investigation should determine what occurred and if the alleged actions caused a denial of benefits or a hostile environment. If the investigator finds a violation, the district must take immediate action to prevent further violations or harassment from recurring.

For this family, much of the alleged deprivations of FAPE occurred as a result of the District's handling of bullying allegations during the 2022-2023 and 2023-2024 school years. The weight of the evidence did not satisfactorily establish that any of the negative interactions experienced by the Student

¹⁴ Dear Colleague Letter, 111 LRP 45106

¹⁵ Westfield (MA) Pub. Schs., 53 IDELR 132 (OCR 2009), and Dear Colleague Letter, 55 IDELR 174 (OCR 2010)

throughout the 2022-2023 and 2023-2024 school years were related to or solely based on disability status. Furthermore, although the record included the testimony of the Student's anxiety, sleeping difficulties, and other mental health issues, these concerns along with a medication regimen, were in place before the Student enrolled in this District. Moreover, the record included evidence of troubling familial events, undisclosed to the Student's private providers, which resulted in an incomplete narrative upon which their input was based.

Additionally, during the school years at issue, the District was responsive to the Parents' complaints and did not demonstrate deliberate indifference. After each reported concern, IEP or status meetings occurred with responsive programming and safety plans suggested, District initiated reevaluations were conducted, and an IEE funded. Following the October 2023 recess incident, the Principal investigated and referred the matter to the Title IX coordinator, the District superintendent, and the school resource officer, (SRO) for investigation. The District also made a Childline referral. The SRO, a former state trooper, conducted a criminal investigation that included a review of the childline report, statements from staff and faculty, and the County children and youth forensic report. After the SRO completed his investigation, he referred the matter to the County District Attorney's office, which declined further action. The District did not fail to act. It appropriately responded through its fully documented investigatory efforts. Furthermore, multiple outside investigative authorities (CYS, SRO, County DA), declined to pursue this matter. Here, Parents failed to meet their burden that the District denied the student FAPE or acted with deliberate indifference with respect to claims of bullying and harassment.

Compensatory Education

It is well settled that compensatory education is an appropriate remedy when a LEA knows, or should know, that a child's educational program is not appropriate, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of deprivation of special education services, excluding the time reasonably required for the LEA to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed an approach that awards the "amount of compensatory education reasonably calculated to bring [a student] to the position that [he or she] would have occupied but for the [LEA's] failure to provide a FAPE." *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650- 51 (Pa. Commw. 2006); see also *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)(explaining that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA.") Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Because the District failed to implement the Student's math programming and provide FAPE during asynchronous instruction during the 2022-2023 school year, the Student is awarded eighty minutes of compensatory education for every day the Student logged onto the District's cyber platform and that school was in session, from April 6, 2023, through the last day of 2022-2023 school year. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers the Student's identified educational and related services needs as determined by a qualified professional. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. The

compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress. The compensatory services shall be provided by appropriately qualified professionals selected by the Parent. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

Accordingly, with the exception of the 2022-2023 school year FAPE denial discussed above, the District met its obligations under both IDEIA and Section 504 to provide an educational program designed to provide FAPE to the student. The District did not intentionally discriminate against the Student.

ORDER

AND NOW, this 5th day of August 2024, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows.

1. The District denied Student a FAPE from April 6, 2023, though the end of the 2022-2023 school year.
2. The Student is awarded eighty minutes of compensatory education for every day the Student logged onto the District's cyber platform and that school was in session from April 6, 2023, through the last day of the 2022-2023 school year.

It is FURTHER ORDERED that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

/s/ Joy Waters Fleming, Esquire

Joy Waters Fleming

HEARING OFFICER
ODR File No. 29467-23-24