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Pennsylvania Special Education Due Process Hearing Officer Final Decision and Order

Closed Hearing

Consolidated ODR File Numbers

23603-1920KE

23621-1920KE

Child's Name

A.A.

Date of Birth

[redacted]

Parent(s)/Guardian(s)

[redacted]

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Hearing Officer

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Date of Decision

08/26/2020

Introduction

This special education due process hearing concerns the educational rights of A.A. ("student"), a student who resides in the Lower Merion School District ("District").¹ The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")² as a student who requires special education to address the student's needs related to an intellectual disability and speech and language ("S&L") impairment. The parties disagree over the student's past, and proposed, educational programming.

The student's parents claims that the District has denied the student a free appropriate public education ("FAPE") through various acts and omissions since the 2017-2018 school year³, including the District's current programming for the student. Parents also request reimbursement for summer 2019 extended school year programming and reimbursement for an independent speech and language evaluation ("IEE"). Analogously, the parent asserts these denial-of-FAPE claims under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").⁴ Furthermore, the parent claims that the District acted with deliberate indifference toward the student's needs and, therefore, makes a claim for disability discrimination under Section 504.

¹ The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

² It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.162 ("Chapter 14").

³ The parents' complaint was filed in April 2020. Parents' denial-of-FAPE claims ranged back to the 2017-2018 school year, beyond a point two year prior to the filing of the complaint (i.e., beyond April 2018). As set forth below, hearing-planning included the issue of whether or not parents' claims in the complaint for the period August 2017 – March 2018 were timely. The scope of parents' claim will be addressed below.

⁴ It is this hearing officer's preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 ("Chapter 15").

The District counters that at all times it met its obligations to the student under IDEIA and Section 504. In light of the parents' request for a District-funded IEE for the private speech and language evaluation, the District also seeks to defend the appropriateness of its most recent evaluation process and re-evaluation report. Accordingly, the District argues that the parent is not entitled to any remedy.

For reasons set forth below, I find that the District has, in part, provided FAPE to the student and, in part, denied FAPE to the student. Compensatory education will be awarded and reimbursement for the student's summer 2019 programming will be ordered. The District's most recent re-evaluation processes and reports across all evaluations are appropriate, and, therefore, the parents are not entitled to an IEE at District expense in the form of reimbursement for any privately-obtained evaluation. Finally, the April 2020 IEP, to be in place for the student at the outset of the upcoming 2020-2021 school year, is appropriate.

Issues

1. Did parents know, or should they have known, of the actions/omissions which form the basis of their complaint at a point where their April 2020 complaint was untimely as to any of their claims?
2. Did the District provide FAPE to the student from April 2018—when their complaint was undoubtedly timely— through the date of the student's current programming?
3. If the foregoing question is answered in the affirmative what, if any, remedy is owed to the student?

4. Are parents entitled to reimbursement for any privately-obtained evaluation report?

Findings of Fact

All evidence in the record, both exhibits and testimony, were considered. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

Prior Evaluation History

1. The student has attended the District since kindergarten. (Parents Exhibit ["P"]-1, P-2, P-3, P-4; School District Exhibit ["S"]-2, S-3, S-4, S-5).
2. As a child with [redacted], the student was identified early on as a student with an intellectual disability. The student entered the District in kindergarten in the 2010-2011 school year. (P-1, S-2).
3. The student has long exhibited expressive and receptive language needs, although the student was not explicitly identified with a S&L impairment until the District's re-evaluation report ("RR") in March 2012. (P-1, P-2; S-2, S-3).
4. The student's speech intelligibility was consistently rated as fair to good, with no report of articulation needs until the March 2016 RR when slight articulation needs were identified. Stuttering was never identified as a S&L need, although the student exhibited speech

disfluencies. (P-1, P-2, P-3, P-4, P-12; S-2, S-3, S-4, S-5, S-17; Notes of Testimony ["NT"] at 67-149).

2017-2018/7th Grade

5. An IEP developed in April 2017 guided the student's educational programming at the outset of the 2017-2018 school year, the student's 7th grade year. (P-6; S-6).
6. The present levels of functional performance included present-levels information, as of March 2017, from the student's S&L therapist. The student's needs in the IEP continued to identify certain articulation needs but did not mention stuttering. (P-6; S-6).
7. The April 2017 IEP contained eleven goals in the following areas: reading comprehension, reading accuracy, vocabulary & context, math calculation, time concepts, money concepts, self-care (shoe-tying), handwriting, identifying/labeling, functional language (object description/location/use), and conversational exchange. (P-6; S-6).
8. The April 2017 IEP did not include any speech articulation goal but specially designed instruction included instruction in "fluency strategies and...clear speech production." (P-6 at page 54; S-6).
9. The April 2017 IEP provided that the student would receive two 30-minute group sessions of S&L therapy per week, which the student had received for multiple prior school years. The specially-designed instruction in fluency was embedded in the weekly sessions. (P-6; S-6; *see also* P-1, P-2, P-3, P-4; S-2, S-3, S-4, S-5).
10. In the fall of 2017, the student was involved in a problematic social interactions with a peer. The student's affect changed, becoming more sad and anxious. The student's IEP team met in October and November 2017 and implemented certain changes, including

separating the two students and revising the IEP to add a weekly counseling session. (P-6; S-6, S-13, S-15; NT at 67-149).

11. In December 2018, as part of the student's biennial re-evaluation process, the student's mother was interviewed by the District school psychologist evaluating the student. (S-17).
12. The student's mother shared concerns that the student's stuttering was "getting worse" and that the parents "did not think the (District) does not see or understand this". (S-17 at page 4).
13. In February 2018, the student was evaluated for speech fluency at a local children's hospital. (P-12).
14. The parents sought the fluency evaluation over concerns about the increase in stuttering behaviors. (P-12; NT at 67-149).
15. The fluency evaluation confirmed that stuttering was not part of any identified need or programming in the student's educational programming, although it was present in the student's speech. Input from the student's teacher indicated that she recognized disfluencies in the student's speech but did not feel the disfluencies significantly interfered with the student's education. (P-12).
16. While the evaluator found that the student's speech "was not indicative of a stuttering disorder", the evaluator opined that it was difficult to ascertain whether the student's disfluencies were the result of such a disorder, or the result of the student's developmental language skills. (P-12).
17. The evaluator made a number of recommendations, including individual work with a S&L therapist and the collaboration of this therapist with the student's IEP team. (P-12).
18. In March 2018, the District issued a RR as part of the student's biennial re-evaluation schedule. (S-17).

19. The March 2018 RR included the parents' concerns about an increase in stuttering. The March 2018 RR included input from the District S&L therapist, including a formal assessment of the student's stuttering. Based on the assessment, and supported by the therapist's anecdotal observation, the student was rated with a moderate stutter. (S-17).
20. In March 2018, the student's IEP team met for the annual revision of the student's IEP. (P-13, S-21).
21. The student had made progress on IEP goals over the period of the April 2017 IEP (April 2017 – March 2018) including, seemingly, the S&L goals. (P-6, P-50; S-6, S-17).
22. The March 2018 IEP contained nine goals in the following areas: reading comprehension, reading accuracy, vocabulary & context, math calculation, time concepts, money concepts, self-care (shoe-tying), handwriting, social skills, and speech fluency (stuttering). (S-17).
23. The student's S&L therapist attended the March 2018 IEP team meeting. (P-13 at page 3; NT at 67-149, 166-278).
24. In April 2018, the student's IEP team met to consider the February 2018 children's hospital fluency report. (P-12, P-13, S-21; NT at 67-149, 166-278).
25. The student's S&L therapist did not attend the April 2018 IEP meeting. Instead, a District S&L coordinator attended in her place. (P-13 at page 4; NT at 67-149, 166-278).
26. At the April 2018 IEP meeting, the March 2018 IEP was revised to add a S&L goal to address stuttering and explicit specially-designed instruction to address fluency. The student's group S&L services were reduced to one 30-minute session per week and added one individual 30-minute session per week for direct instruction to address fluency and stuttering. (P-13; S-21).

27. In July 2018, a District special education administrator contacted the parents with information that the student had missed certain S&L sessions in the 2017-2018 school year. (NT at 87-93, 283-316).
28. The District offered a notice of recommended educational placement (“NOREP”) to make up 66 missed S&L sessions in the 2017-2018 school year. (P-14; S-24; NT at 87-93; 283-316).
29. The July 2018 NOREP proposed that the missed S&L sessions would be made up during the school day in the upcoming 2018-2019 school year, the student’s 8th grade year, a total of 33 hours of makeup S&L services. The District also asked parents to sign a waiver related to claims for the missed sessions. (P-14; S-24; NT at 87-93, 283-316).
30. At the March and April 2018 IEP meetings, no one—including the S&L therapist at the March 2018 meeting or the S&L coordinator at the April 2018 meeting—had mentioned that there were missing S&L sessions, and the fact of the missed S&L sessions came as a complete surprise to parents in July 2018. They rejected the NOREP, concerned that the makeup sessions would take away from instructional time in the upcoming 2018-2019 school year. (P-14; S-24; NT at 87-93).⁵
31. The student’s special education teacher for the 2017-2018 school year testified that she knew early on in the school year that the student was missing certain S&L sessions. District special education administration only became aware of the situation when the S&L therapist took a medical leave in April 2018 and, in working to provide S&L services for students on the therapist’s caseload,

⁵ Parents later learned through community contacts that the student’s S&L therapist in the 2017-2018 school year had allegedly been derelict in her duties to multiple students on her caseload and had allegedly engaged in an affair with a District administrator, allegations which led to the resignation of both the S&L therapist and the administrator. The S&L therapist did not testify at the hearing. (NT at 87-93, 289-290; P-53, P-54).

discovered irregularities in paperwork and other indications that the S&L therapist may have been derelict in her duties. (NT at 172-174, 283-290).⁶

32. It is an explicit finding that, on this record, the individuals who testified at the hearing with regard to the S&L therapist's role in the student's education in the 2017-2018 school year were not in any way derelict in their duties. The testimony and documentary evidence surrounding the events of the 2017-2018 school year, and the missed S&L sessions, appear to lie entirely at the feet of the S&L therapist and her direct supervisor, who was not a part of District special education administration. (P-11, P-13; NT at 166-278, 283-316).
33. The student attended a District-based extended school year ("ESY") program for the summer of 2018. (P-13; S-20, S-21).

2018-2019/8th Grade

34. The student attended the 2018-2019 school year, the student's 8th grade year, under the terms of the March 2018 IEP, as revised in April 2018. (P-13; S-21).
35. In the 2018-2019 school year, a daily communication log was maintained between the student's teacher and the family. (P-44).
36. Of the ten goals in the student's March/April 2018 IEP, the student mastered the goal in self-care (shoe-tying). The student made

⁶ The record contains emails from the S&L therapist in the 2017-2018 school year to other educators regarding S&L-session scheduling issues. On the face of the emails and based on information in this record, District special education administrators were not copied on those emails. The District building-level administrator who was the therapist's direct supervisor, and with whom the therapist allegedly had an affair, was the only District administrator copied on those emails. (P-11).

meaningful progress in reading accuracy, time concepts, money concepts, social skills, and speech fluency (stuttering). (P-51).

37. Of the ten goals in the March/April 2018 IEP, the student failed to make meaningful progress (as indicated by the average of the final progress monitoring data taken in the 2nd quarter of the 2018-2019 school year) in: reading comprehension (baseline 65%, goal 90%, final average of progress 72%), vocabulary & context (baselines 75% & 75%, goal 90%, final average of progress 72% & 72%), and math calculation (baselines 63% & 56%, goal 90%, final average of progress 62% & 52%). The progress monitoring for handwriting is flawed because the progress monitoring (trial data collapsed across skills) does not line up with the goal-measurement (precise percentages for each skill). (P-51).

38. In February 2019, the student's IEP team met for its annual review of the student's programming. IEP team deliberations continued over the period February – August 2019, with various IEP team revisions. (P-18, P-27; S-27, S-34, S-35).

39. In March 2019, the parents obtained a second S&L fluency evaluation from the same children's hospital which evaluated the student in February 2018. (P-21).

40. The conclusions of the March 2019 fluency evaluation appear to be largely aligned with the results of the February 2018 fluency evaluation. While the evaluator found that the student had some "hallmark features of a true stuttering disorder", the evaluator opined that it was difficult to ascertain whether the student's disfluencies were

the result of such a disorder, or the result of the student's developmental language skills. (P-21).⁷

41. The evaluator made a number of clinic-based recommendations, and recommended individual and group S&L services in an educational setting, 2-3 times per week. (P-21).
42. In May 2019, a neuropsychological evaluation was issued by a private evaluator. (P-23; S-32).
43. The results of the May 2019 neuropsychological evaluation were largely consistent with the District's prior evaluations, although the evaluator formally diagnosed attention deficit hyperactivity disorder in addition to an intellectual disability. (P-23; S-32).
44. The neuropsychological evaluation report contained a number of recommendations for educational programming. (P-23; S-32).
45. Of the goals for the student being monitored for progress over roughly April 2018 – November 2019, the student made meaningful progress in reading comprehension, money concepts, narrative skills, speech fluency (stuttering), social skills, and self-care (buttoning). (P-52; S-40 at pages 46-73).
46. Of the goals for the student being monitored for progress over roughly April 2018 – November 2019, the student failed to make meaningful progress (as indicated by the average of the final progress monitoring data taken in the 2nd quarter of the 2018-2019 school year) in: vocabulary & context (baselines 75% & 70%, goal 90%, final averages of progress 80% & 60%), math calculation (baselines 80% & 75%, goal 90%, final average of progress 75% & 73%). The progress monitoring for the math concepts goal is largely unintelligible in terms

⁷ See below, however, for a detailed, expert comparison of the children's hospital fluency reports. (P-12, P-21, P-35).

of triangulating the baselines, data, and progress. The progress monitoring for handwriting is flawed because the progress monitoring (trial data collapsed across skills) does not line up with the goal-measurement (precise percentages for each skill), making it difficult to know exactly how the student is progressing on the handwriting goal. (P-52; S-40 at pages 46-73).

47. In May and June 2019, the District proposed an ESY program for the student for the summer of 2019. (P-25; S-33).
48. The summer 2019 ESY program offered by the District included half-day instruction over the period June 25th – August 1st (excluding Independence Day) with weekly 30-minute sessions in S&L and occupational therapy. (P-25; S-33).
49. The parents disapproved the offer of ESY services and, at private expense, enrolled the student in a summer camp program, a specialized program based on each camper's IEP. (P-30; NT at 67-149).
50. The IEP did not complete a new IEP for the student until August 2019, after the 2018-2019 school year ended, and on the cusp of the 2019-2020 school year, the student's 9th grade year. (S-36, S-37).

2019-2020/9th Grade

51. The parents approved the August 2019 IEP. (S-36, S-37, S-40).
52. The August 2019 IEP contained ten goals in the following areas: reading comprehension, vocabulary & context, math calculation, math concepts (time, measurement, estimating), money concepts, narration skills, speech fluency (stuttering), social skills, handwriting, and self-care (buttoning). (S-40).

53. The August 2019 IEP increased the student's S&L services to two 30-minute group sessions weekly and one 30-minute individual session weekly. (S-40).
54. In November 2019, the student's IEP team agreed that the student should be re-evaluated in various areas of programming, so the District undertook a re-evaluation process. (S-40 at page 9).
55. By the time of the IEP team's decision to re-evaluate the student, the parents had already arranged for a private S&L evaluation. The private S&L evaluator saw the student in October and November 2019, issued a report in December 2019, and parents provided the report to the District in January 2020. (P-35).
56. The private S&L evaluator opined in her report that the student exhibited a significant increase in disfluencies/stuttering between the February 2018 and March 2019 children's hospital fluency reports. Her own data showed elevated assessments when compared to the February 2018 report and assessments consistent with the March 2019 report. (P-35; NT at 536-593).
57. The private S&L evaluator summarized the student's presentation vis a vis fluency as markedly deteriorating since February 2018, increased awareness and negativity associated with stuttering, including secondary (i.e., grimacing, jaw-locking) characteristics. The student was exhibiting these fluency deficits across settings. (P-35).
58. During a school-based observation of the student in November 2019, the evaluator noted that the District's S&L therapist addressed all of the student's S&L needs. (P-35).
59. The private S&L evaluator concluded that the student has needs, long-identified by the District, in expressive and receptive language. The evaluator further concluded that the student has a severe fluency disorder. (P-35).

60. The private S&L evaluator made a number of programming recommendations, including both group and individual school-based S&L sessions. Additionally, the evaluator recommended that a board-certified fluency specialist work with the student. (P-35).
61. In January 2020, the District issued its RR. (P-36, S-41).
62. The January 2020 RR contained comprehensive data from prior evaluations, including content in the S&L section from the private S&L evaluation and updated S&L assessments performed by the District. (P-36, S-41; NT at 386-473).
63. The January 2020 RR largely reinforced the educational and developmental needs of the student. (P-36; S-41).
64. In February 2020, the student's IEP team met to discuss the January 2020 RR and to revise the student's IEP. (P-37; S-42).
65. The team met in two truncated IEP meetings, time-limited to one hour by the District. Over the course of these two IEP meetings, the IEP team did not make much progress in its consideration of the IEP. (NT at 67-149, 604-716).
66. On March 13, 2020, Pennsylvania closed all schools in the Commonwealth as a result of the COVID-19 pandemic. Initially, this was slated to be a 2-week closure, which was subsequently extended to an indefinite school closure. Eventually, schools in the Commonwealth were closed for the remainder of the 2019-2020 school year, and physical schooling did not resume.
67. Over the period March – June 2020, the student received daily synchronous and asynchronous distance instruction across most of the student's goal areas. (P-29; S-66; NT at 478-531, 604-716).

Proposed 2020-2021 Programming/10th Grade

68. In April 2020, the student's IEP team met to craft an extensive, 104-page IEP for the student. (P-41).
69. The April 2020 IEP contains comprehensive data for the present levels of academic and functional performance. (P-41).
70. The April 2020 IEP contains detailed transition planning. (P-41).
71. The April 2020 IEP contains twelve goals in the following areas: reading comprehension, vocabulary & context, writing (email composition), math calculation, math concepts (time, measurement, estimating), functional money concepts (pricing), executive functioning (vocational task analysis & completion), speech (expressive & receptive language skills), speech fluency (stuttering), speech (pragmatic language skills), handwriting, and self-care (buttoning a worn garment). (P-41).
72. The April 2020 IEP contains modifications and specially-designed instruction for goal areas and to address the student's needs. (P-41).
73. The April 2020 IEP provides for a weekly 30-minute occupational therapy session, twice-weekly 30-minute group S&L sessions, a weekly 30-minute S&L session, a weekly 30-minute counseling session, and a 1:1 aide in all settings. (P-41).
74. The April 2020 IEP contained detailed ESY-2020 goals and programming. (P-41).
75. The April 2020 IEP provides that the student will be in the regular education environment for 32% of the school day. (P-41).

Witness Credibility

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. Where particular emphasis was accorded to a witness's testimony on a particular issue or event, that emphasis is pointed out above in a specific finding of fact, as applicable.

Discussion

IDEIA/Denial-of-FAPE

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. (Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982)). 'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis* or minimal education progress. (Andrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); Dunn v. Downingtown Area School District, 904 F.3d 208 (3d Cir. 2018)).

Furthermore, parents are claiming compensatory education as a remedy. The Third Circuit's holding in *G.L. v. Ligonier Valley School Authority*, 801 F.3d 602 (3d Cir. 2015) has provided parameters for handling compensatory education disputes in light of the statute of limitations filing requirement in IDEIA. The critical factual consideration in light of the holding in *G.L.* is the date parents knew or should have known ("KOSHK") of the

action(s)/omission(s) which form(s) the basis of the claims in the complaint. This is the so-called "KOSHK date".

For parents' claims in a complaint to be timely, the complaint must be filed within two years of the KOSHK date(s), the date(s) parents knew or should have known of the "action" that forms the basis of parents' complaint. (34 C.F.R. §§300.507(a)(2), 300.511(3)).

Here, as a preliminary matter, the parents knew or should have known of any denial-of-FAPE claim for the 2017-2018 school year, prior to April 2018, except for the claims related to the missed S&L sessions that school year. The parents fully participated in IEP meetings and updates, including the *ad hoc* meetings in the fall of 2017 related to the behavior incident involving a peer. The parents received procedural safeguards notices and, on the basis of this record, showed themselves to be vigilant and engaged in the education of their child. Parents knew contemporaneously of the student's programming and progress over the period August 2017 – April 2018 and, therefore, any claim alleged on the basis of acts/omissions of the District regarding denial-of-FAPE for this period is untimely when presented in a complaint filed in April 2020.

But the parents did not know, nor should they have known, of any claim related to the missed S&L sessions in the 2017-2018 school year because they can only be charged with knowledge as of those acts/omissions as of July 2018 when the District contacted the parents with the July 2018 NOREP and informed them that S&L sessions had been missed. Therefore, the parents' claims based on the acts/omissions related to the missed S&L sessions in the 2017-2018 school year are timely when presented in their complaint of April 2018.

The District denied FAPE to the student in three areas. First, these missed S&L sessions in the 2017-2018 school year are clearly a denial of FAPE. While not recognizing any denial-of-FAPE in the response, the District

itself, through its offer of makeup services in the July 2018 NOREP, recognizes that the dereliction of duty exhibited by the S&L therapist is, at the least, problematic. Of course, it is more than merely problematic. Indeed, the student underwent a marked decline in fluency (i.e., an increase in stuttering) from that school year onward. There may well be countervailing arguments lodged by the District—the student did not exhibit disfluencies that interfered with understanding or the educational process, or fluency services were not being provided to the student in the 2017-2018 school year and, as such, missed services were not related to fluency. These are true. But it is clear that every S&L professional, including the District's own S&L therapists, recognize that it is difficult to tease out the student's disfluency from the student's overarching functional language needs. Therefore, a denial of any S&L services, let alone over a significant portion—if not most—of a school year, is a cause for concern. The District, laudably, recognized this. But it rises to the level of a very significant denial of FAPE that reverberates through this record.

Second, on various goals, the progress-monitoring clearly shows that the student did not make progress, or in places even regressed. (And, with certain goals, the progress monitoring cannot be used to understand accurately whether progress is being made or not. This is clearly a denial-of-FAPE as it prevents parents from fully understanding their child's education; it also interferes with the ability of fellow educators who might need to understand that progress monitoring.) The student was not wholly denied FAPE over the 2018-2019 and 2019-2020 school years—there are elements of progress and, in one instance, even goal mastery. But the nature and number of the instances of lack-of-progress amount to a denial of FAPE in both school years.

Third, District's proposal of programming for ESY in the summer of 2019 was inappropriate. By the spring of 2019, the District had both fluency

reports from the children's hospital, showing that the student exhibited disfluencies. Given the problematic nature of the S&L services in the 2017-2018 school year, and the content of those reports, an ESY program providing only one weekly 30-minute session of S&L services is inappropriate. Therefore, with a District proposal of inappropriate ESY programming, parents' undertaking of a privately-funded program for the summer of 2019 provides the basis for reimbursement of the private summer 2019 specialized camp. (See Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985); see also 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)).

Accordingly, compensatory education will be awarded for the first two of these instances of denial-of-FAPE and, as indicated, the order will contain a provision for the reimbursement of parents for the specialized summer-2019 programming.

Parents make two claims for remedy, however, that fail. One, parents claim that they should be reimbursed for two privately obtained evaluation reports—the May 2019 private neuropsychological evaluation and the December 2019 private S&L evaluation. As to the first of these, all evaluation processes and reports undertaken by the District are appropriate. This decision finds that the District denied the student FAPE for the lack of S&L programming in the 2017-2018 school year and in the implementation of special education programming over the 2018-2019 and 2019-2020 school years. But at all times the District fully met its obligations to the student in its evaluation of the student, and the District has met its burden of persuasion on this issue as part of these proceedings. (34 C.F.R. §300.502(b)). As to the second of these (the private S&L evaluation), the parents undertook the evaluation at some point prior to the IEP's decision in November 2019 to re-evaluate the student (as the private evaluator's report

indicates that the initial evaluation date was in the first half of October). Therefore, the parents seek reimbursement for a S&L evaluation where, one month into that process, they were discussing a S&L evaluation by the SD, as part of a comprehensive re-evaluation. Equitable considerations in this dynamic forestall parents' claim, notwithstanding the fact that the District took the private report and utilized its content in addition to its own comprehensive S&L re-evaluation, both as evidenced in the January 2020 RR. Thus, parents are not entitled to reimbursement for any privately-obtained evaluation.

Two, the District made detailed, documented efforts to provide daily, distance-learning, goal-based instruction to the student after the closure of Commonwealth schools in March 2020. Parents have not met their burden of persuasion in showing that the District denied the student FAPE. In fact, this record fully supports a conclusion that over the period after the school closure, including the summer of 2020, the District designed and implemented instruction that was reasonably calculated to yield meaningful education benefit to the student given the extraordinary societal circumstances unfolding for everyone in the spring of 2020.

Finally, the April 2020 IEP is appropriate, reasonably calculated to yield meaningful education benefit to the student.

Section 504/Denial-of-FAPE

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1).⁸ The provisions of IDEIA/Chapter 14 and related case law, in

⁸ Pennsylvania's Chapter 14, at 22 PA Code §14.101, utilizes the term "student with a disability" for a student who qualifies under IDEIA/Chapter 14. Chapter 15, at 22 PA Code §15.2, utilizes the term "protected handicapped student" for a student who qualifies under Section 504/Chapter 15. For clarity and consistency in the decision, the term "student with a disability" will be used in the discussion of both statutory/regulatory frameworks.

regards to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (See *generally P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

Therefore, the foregoing analysis is adopted here— the denials of FAPE outlined above will be remedied as set forth below and in the order that accompanies this decision. The District has, however, met its FAPE obligation to the student in a number of areas.

Section 504/Discrimination

Additionally, the provisions of Section 504 bar a school district from discriminating against a student on the basis of disability. (34 C.F.R. §104.4). A student with a disability who is otherwise qualified to participate in a school program, and was denied the benefits of the program or otherwise discriminated against on the basis of disability, has been subject to disability discrimination in violation of Section 504 protections. (34 C.F.R. §104.4; *S.H. v. Lower Merion School District*, 729 F. 3d 248 (3d Cir. 2013)). A student who claims discrimination in violation of the obligations of Section 504 must show deliberate indifference on the part of the school district in its purported acts/omissions. (*S.H., id.*).

Here, the acts and omissions of the S&L therapist assigned to provide S&L services to the student in the 2017-2018 school year acted with deliberate indifference in not providing S&L services to the student and in not notifying special education professionals that services were not being provided. As a corollary, to the extent that the building-level District administrator knew of the S&L therapist's dereliction of her duties and did not move to correct the situation or to inform special education professionals

in the District is also an act of deliberate indifference. While the exact number and nature of the missed services cannot be accurately ascertained (either on this record or even by the District itself), the deliberate indifference shown to the student by District employees must be imputed to the District and will be an explicit finding in the order below.

Compensatory Education

Where a school district has denied FAPE to a student under the terms of IDEIA, compensatory education is an equitable remedy that is available to a student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)).

In this case, there was no evidence made part of the record by parent regarding a qualitative/make-whole compensatory education award. Therefore, this hearing officer must default to a quantitative/hour-for-hour calculation of compensatory education. But the two aspects of denial-of-FAPE here (the non-provision of necessary services and a lack of goal progress in various areas and to varying degrees) do not easily lend themselves to any concrete calculation. And looming over the record is the fact that simply calculating an hour-for-hour calculation of missed S&L sessions in the 2017-2018 school year does not account for severe fluency difficulties which intensified in the midst of that school year and which have subsequently deepened.

And while not minimizing anything related to the denial-of-FAPE, it must be pointed out that on the entirety of this record, outside of the acts and omissions of two individuals in the 2017-2018 school year, the District has strived to understand, program for, and educate the student in good faith. Admiration and concern for the student was exhibited by every District witness who testified at the hearing. And, as seen above, in many areas the student has shown progress.

Therefore, as a matter of equitable consideration and taking into account these cross-currents of remedy, the student is awarded 500 hours of compensatory education.

As for the nature of the compensatory education award, the parents may decide in their sole discretion how the hours should be spent so long as those hours take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the student's current or future IEPs, or identified educational needs. These hours must be in addition to any then-current IEP and may not be used to supplant an IEP. These hours may be employed after school, on weekends and/or during the summer months, at a time and place convenient for, and through providers who are convenient to, the student and the family. Nothing in this paragraph, however, should be read to limit the parties' ability to agree mutually and otherwise as to any use of the compensatory education hours.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Lower Merion School District denied the student a free appropriate public education as set forth above. The student is awarded 500 hours of compensatory education.

The parents are awarded reimbursement for any documented out-of-pocket costs for the student's summer 2019 private camp program. Documentation of these costs must be provided to the District in the form of credit or debit card charges, proof of electronic payment, cancelled check, and/or payment receipt.

The Lower Merion School District need not reimburse the parents for any privately-funded evaluation.

As set forth above, employees of the Lower Merion School District, in the course of their duties in the 2017-2018 school year, discriminated against the student on the basis of the student's disability by treating the student with deliberate indifference.

The April 2020 IEP, as designed, is reasonably calculated to yield meaningful education benefit to the student.

Any claim not specifically addressed in this decision and order is denied and dismissed.

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

08/26/2020