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Pennsylvania Special Education Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number:

24518-20-21

Child's Name:

[D.B]

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

July 30, 2021

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a primary elementary school-aged student in the West Greene School District (District) who currently is identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.³

In early 2021, Student's Parents filed a Due Process Complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA, Section 504, and the Americans with Disabilities Act (ADA).⁴ Their claims related to the entire 2020-21 school year. The case proceeded to a due process hearing⁵ at which the parties presented evidence in support of their respective positions. The Parent sought to establish that the District failed to provide Student with FAPE throughout the school year when Student was participating in remote learning at their option. The District maintained that its special education programming was appropriate for Student, and that no remedy was due.

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ 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).

⁴ 42 U.S.C. §§ 12101-12213.

⁵ The hearing sessions convened remotely due to the COVID-19 pandemic and resulting restrictions. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Citations to duplicate exhibits may not be to all. References to Parents in the plural will be made where it appears that one was acting on behalf of both.

For the reasons set forth below, the claims of the Parents will be granted in part and denied in part.

ISSUES

1. Whether the District provided Student with FAPE over the 2020-21 school year;
2. If the District did not provide Student with FAPE over the 2020-21 school year, is Student entitled to compensatory education; and
3. Did the District act with deliberate indifference under Section 504?

FINDINGS OF FACT

1. Student is a primary elementary school-aged student who resided and attended school in the District over the 2020-21 school year. Student is eligible for special education on the basis of Autism. (N.T. 24-25; S-14.)
2. Student exhibits significant difficulties with communication and activities of daily living. Student communicates through eye movements, gestures, some sign language, and a communication device that Student does not use independently. (N.T. 46-47, 131-32, 219; S-14.)
3. Student attended an elementary school in an autistic support program operated by the local Intermediate Unit (IU) at the start of the 2019-20 school year. Student remained in that program for the 2020-21 school year. (N.T. 45-46, 130-31, 314-15; S-12.)

4. The autistic support program was based on principles of Applied Behavior Analysis (ABA). Student's instructional programming was individualized and addressed deficits with early learning skills, social skills, and behavior. (N.T. 316-17, 321-24, 341-45, 363-64, 406-07; S-12 at 8.)
5. In addition to wraparound behavioral health services, since approximately the end of 2019 through May of 2021, Student received private therapy for six hours in the home each week. The services included weekly family-based therapy by a team of professionals. After the start of the COVID-19 pandemic, those services were provided by telephone and slowly progressed to some in-person services in the spring of 2021 when the family agreed to those professionals being physically present in the home. Student was discharged from family-based services in May 2021 with goals met. (N.T. 50, 89-90, 216-20, 236-37, 240-44, 246, 254-56, 265-66; S-12 at 22.)

Spring 2020

6. A meeting of Student's Individualized Education Program (IEP) team convened in May 2020. At that time, the team discussed the form of instruction for Student, and the Parents declined to have Student attend school in person for the 2020-21 school year. They did not change that position over the course of that school year and Student remained remote due to medical concerns for Student and the family. (N.T. 52-54, 78, 82, 92, 101-03, 105-06, 134-35, 173-74, 227, 252, 298, 402-03; P-1; S-12.)
7. Student's May 2020 IEP reflected the results of various administrations of the Verbal Behavior Milestones Assessment and Placement Program during the 2018-19 and 2019-20 school years. As of April 2020, Student attained a score of 8 (of 170 milestones), all within the first

level. A barriers assessment revealed a number of factors impeding Student's skill acquisition. (S-12 at 8-9.)

8. The May 2020 IEP reflected that Student required a full-time personal care aide (PCA) for safety throughout the school day. The role of the PCA included assistance with activities of daily living and prompting (such as hand-over-hand assistance). (P-1; S-12.)
9. Identified needs in the May 2020 IEP were for an increase in fluency of motor actions; receptive and expressive language skills; fine motor, self-regulation, and self-care skills; gross motor skills; and a PCA. (S-12 at 28.)
10. Annual goals in the May 2020 addressed gross motor skills (walking on level surfaces and stairs); fine motor skills (tracing letters of Student's name, and using clothing fasteners); speech/language skills (expressive and receptive language, and following simple directions); and early learning skills (listener response and motor imitation skills). (S-12 at 36-52.)
11. Program modifications and items of specially designed instruction in the May 2020 IEP included a variable reinforcement schedule; a modified schedule (approximately 26 hours per week); prompting and cuing; movement breaks; using an iPad for reinforcement; and safety accommodations. (S-12 at 53-55.)
12. The May 2020 IEP provided for occupational, physical, and speech/language therapy services (for a combined total of 2 hours each week), and a full-time PCA in school. (S-12 at 56.)
13. The May 2020 IEP specified a full-time autistic support program through virtual learning. (S-12 at 62-63.)

14. Student qualified for extended school year services in the May 2020 IEP which was to be provided virtually in the summer of that year. (S-12 at 57-60.)

2020-21 School Year

15. Another meeting convened in August 2020 prior to the start of the school year to revise Student's IEP to reflect a continuation of remote instruction. The team determined that Student would not need a PCA in the home setting. (N.T. 80-82, 137-40, 144-45, 174, 404-05, 476-77; P-1; S-12.)
16. Student's IEP was revised in August 2020 to provide that the majority of program modifications and items of specially designed instruction would be provided virtually. Three items were specifically removed: monitoring of peer interactions, a safety chair, and transportation. The related services section was also revised to reflect that no PCA would be provided virtually. Student's program was fully remote in the home, but full time autistic support was the identified placement. (S-12 at 53-56, 61-62.)
17. The Parents did not ask for an in-person paraprofessional in the home to be provided by the District. The District professionals understood that the family did not want people to come to the home environment. (N.T. 92, 166, 181, 185-86, 198.)
18. The IU special education teacher planned in the fall of 2020 to explain to parents of all students who would continue remote learning how to work with their child at home. She met with the Parents on at least one occasion for that purpose and had systems available to communicate with them. (N.T. 148, 412-13; P-24.)
19. The District provided the Parents with materials necessary to access remote learning in the home as the Parents asked for those and the

items were available, with one exception that the District declined for safety reasons. Many materials needed for Student were everyday household items but the teacher offered to provide modifications when needed. The District also offered to reimburse the Parents for the cost of other materials. (N.T. 95-96, 150-51, 175-78; P-4; S-18.)

20. The Parents were not provided adequate information or training on how to access the remote learning platform and were unclear on the specifics on how to work with Student at the very start of the school year. They did not seek clarification or guidance from the teacher after the initial conversation with her that included use of the remote learning platform at home. (N.T. 56-58, 60-61, 100.)
21. Student worked with the Parents for approximately two hours each day on educational and related service tasks during the 2020-21 school year. Student engaged in problematic behavior at home during remote instruction, including physical aggression toward others and toward objects. (N.T. 73-74.)
22. Student was provided with all related services via videoconferences with the Parents during the 2020-21 school year. The times for those services were scheduled in advance with the Parents at their convenience. (N.T. 58-59, 88-89, 90, 108, 288-89, 291-96, 452, 453-56, 468-73.)
23. Student's remote instruction over the 2020-21 school year included exposure to grade-level content materials as Student developed early learning prerequisite skills. (N.T. 317-18, 360, 363; P-24 at 29-30.)
24. In October 2020, a different special education teacher replaced the previous teacher for Student. At that time, the Parents were provided with additional information and resources from the new teacher on how to work with Student appropriately in remote learning.

Communications between the teacher and Parent were also ongoing over the 2020-21 school year, including modeling by the teacher during the instructional sessions. (N.T. 100, 154, 314-15, 325-28, 327-31, 348, 351, 353, 382, 416.)

25. Beginning in early October 2020, Student was provided with remote daily instruction with the new teacher for thirty minutes each day with the Parents assisting. Student did work on using the communication device during those sessions. (N.T. 63, 71, 154, 328-29.)
26. Student exhibited off-task behaviors after approximately fifteen minutes of remote instruction with the teacher. Student would not likely attend to more than thirty minutes of instruction at a time, but would benefit from multiple sessions during a school day. Additional sessions in a school day may have been difficult to arrange around all schedules, but were not explored by the IU or the District or requested by the Parents. (N.T. 99, 330-32, 380.)
27. Both the teacher and the Parents collected data on Student's performance. The Parents were provided with instruction on how to do that. (N.T. 63-64, 328, 369-70.)
28. The District issued a Reevaluation Report (RR) in October 2020. The RR contained information from a May 2018 evaluation and the May 2020 IEP, and updates from the related service providers. (S-14.)
29. The October 2020 RR included an assistive technology evaluation. At that time, Student did not exhibit the use of a single finger necessary to functionally utilize the communication device. (S-14 at 17-19.)
30. The October 2020 RR set forth as part of the assistive technology evaluation a number of recommendations for augmentative and alternative communication (AAC) for receptive and expressive language to include a trial of devices. (S-14 at 22-26, 30-31.)

31. Another meeting convened remotely on October 30, 2020 at which the assistive technology evaluation was discussed. (N.T. 91, 160-61, 320-21, 365, 417.)
32. A new IEP was developed at the October 2020 meeting. That document contained significant information from the May 2020 IEP. In an update to the present levels of academic achievement, Student's mastery of 35 listener response targets was reported, a slight increase over the number at the end of the 2019-20 school year. (S-16.)
33. The assistive technology evaluation was also set forth in the October 2020 IEP, with a new need identified in that area. A speech/language update from October 2020 reflected incremental progress on the annual goals but with significant dependence on prompts and assistance. Updates on occupational and physical therapy were also provided. (S-16.)
34. The October 2020 IEP retained the goals from the prior IEP, and the same program modifications and items of specially designed instruction from the August 2020 revision were maintained with the lone exception of the modified schedule. The schedule that was omitted at that time because Student was not able to engage in instructional tasks for more than approximately two hours per day. The PCA was also removed as a related service. (N.T. 73-74, 99, 162-63; S-16.)
35. Trials of assistive technology devices were conducted after the October 2020 RR. (N.T. 159, 165, 193, 373, 440.)
36. Student developed the prerequisite skill of independently using a single finger to access the communication device by the end of the 2020-21 school year. (N.T. 299-300.)

37. Progress reporting for the 2020-21 school year reflected some inconsistent performance but overall progress on the physical therapy goals; some progress on the occupational therapy goals with assistance; and significant progress on or mastery of speech/language goals. Student also exhibited some progress on early learning skill goals and objectives with prompting. (S-24.)
38. The Parents believed that Student made progress with instructional services, occupational, physical, and speech/language therapy needs over the 2020-21 school year. (N.T. 100-01.)
39. Neither the District or IU took steps to have Student participate virtually with peers attending school in person during the 2019-20 school year. (N.T. 423.)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

The burden of proof is generally viewed as comprising two elements: the burden of production and the burden of persuasion. In cases such as this, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Thus, here, the burden of persuasion rests with the Parents who filed the Complaint and requested this administrative hearing. Application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipoise,” however. *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, who assume a role as a fact-finder, bear 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). This hearing officer found each of the witnesses who testified to be generally credible as to the facts as they recalled them. In the relatively few instances where witness accounts varied, those are attributed to lack of specific recollection and differing perspectives. The weight accorded the evidence, however, was not equal. The documentary evidence was quite persuasive particularly where there were lapses in memory.

In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

General IDEA Principles: Substantive FAPE

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Many years ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with the procedural obligations in the Act.

The state, through its local educational agencies (LEAs), meets 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.'" *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court

has observed, an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Andrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

Individualization is clearly the central consideration for purposes of the IDEA. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands services are reasonable and appropriate in light of a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Andrew F.*, *supra*; *Ridley*, *supra*; see also *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); see also *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same). Still, the duty to ensure a student’s right to FAPE lies with the LEA, and not with parents. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996)(explaining that, “a child's entitlement to special education should not depend upon the vigilance of the parents[.]”).

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family has “a significant role in the IEP process.” *Schaffer*, *supra*, 546 U.S. at 53. 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). Procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E).

General Section 504 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).

In the context of education, Section 504 and its implementing regulations “require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); see also *Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a). The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood, supra*, 172 F.3d at 253; see also *Lower Merion, supra*.

In order to establish a violation of § 504 of the Rehabilitation Act, the filing party must prove that (1) he is “disabled” as defined by the Act; (2) he is “otherwise qualified” to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. By contrast, intentional discrimination under Section 504 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, 265 (3d Cir. 2013). However, “deliberate choice, rather than negligence or bureaucratic inaction” is necessary to support such a claim. *Id.* at 263.

The Parents' Claims

The Parents' claims were limited to the District's programming over the 2020-21 school year when Student attended school remotely pursuant to the Parents' clearly understandable choice. Even more specifically, their Complaint, and the focus at the hearing, was on whether the District appropriately addressed Student's needs academically and behaviorally, and whether they were provided with requisite materials over that school year. They did not challenge the occupational, physical, or speech/language services provided to Student.

Student's IEP team met in May 2020 to discuss Student's program for the 2020-21 school year when there undoubtedly was significant uncertainty about what forms of District instruction would be possible for any of its students. The Parents elected to have Student attend remotely. At that point in time, Student's IEP was revised to provide for a modified schedule of approximately 26 hours per week; and the PCA at school remained.

In August 2020, prior to the start of the school year, the IEP team determined that Student did not require the PCA in the home environment. Several other program modifications and items of specially designed instruction were similarly removed as unnecessary outside of the school building. It appears that the District intended to provide the supports that the Parents needed to facilitate Student's special education services in the home at the start of the 2020-21 school year. Unfortunately, however, the preparation and training was inadequate for the first month of the school year other than the related services, during which time Student received no direct instruction from the special education teacher.

One month later, with a new special education teacher, additional training and resources were provided to the Parents, and Student began to receive 30 minutes of teacher instruction each school day. It was not until

October 30, 2020, however, that the IEP provision for the modified schedule was removed in recognition that Student was not able to attend to more than approximately 2 hours of remote services each school day, an amount consistent with that provided by the Parents. Thus, the majority of those 2 daily hours (other than related services) was instruction by the Parents that they did not feel sufficiently prepared to provide. Their obvious dedication cannot reasonably be considered an adequate substitute for the rigors of ABA programming. The record establishes that consideration for providing additional sessions of teacher instruction was not meaningfully explored, and that failure cannot be attributed to any question of parental vigilance.

Moreover, even in the middle of the COVID-19 pandemic, there was no suspension or other alteration of IDEA obligations: “no matter what primary instructional delivery approach is chosen, [State Educational Agencies (SEAs)], LEAs, and individualized education program (IEP) Teams remain responsible for ensuring that a free appropriate public education (FAPE) is provided to all children with disabilities.”⁶ In short, the not insignificant reduction of Student’s special education services for the 2020-21 school year constitutes a material flaw in Student’s special education program and entitlement to FAPE. Accordingly, Student is entitled to a remedy.

The question of Student’s progress does merit some discussion. The evidence in the record reflects the Parents’ belief that Student made some progress during the 2020-21 school year across domains, yet they clearly and understandably want Student to overcome disability-related deficits. The progress monitoring for the school year, even based upon remote instruction in the home with the Parents collecting some of the data, is likely disappointing from a parent’s perspective in light of their wish for an ideal

⁶ U.S. Department of Education, Question and Answer document, September 28, 2020, at 2, addressing Implementation of IDEA services, available at <https://www.ed.gov/coronavirus/program-information#speced> (last visited July 28, 2021).

program of ongoing steady growth. However, the law demands an appropriate program, not a perfect one, based on Student's unique circumstances. Student's needs are such that, at this stage of acquiring early learning skills, progress will almost certainly be incremental. But a foundation of prerequisite skills is crucial to Student's development of higher level skills. Indeed, Student's acquisition of the fine motor dexterity to use the communication device in a meaningful manner by the end of the 2020-21 school year is quite significant. This hearing officer cannot conclude that FAPE was denied on the additional basis of Student's progress over the 2020-21 school year.

Finally on the FAPE claims, the Parents have not established that the District failed to provide or facilitate the Parents' access to materials necessary to implement Student's program in the home. Similarly, the IEP team's agreement prior to the start of the 2020-21 school year that Student did not need a PCA in the home environment defeats their contention that the failure to provide one was also a clear denial of FAPE. The explicit role of the PCA was not one that could have been provided virtually, and it must be recalled that even the family-based professionals were understandably not permitted to begin entering the home environment until the spring of 2021. While the record would likely have been more definitive on IEP decisions with signed NOREPs included, there is no evidence to contradict the above findings regarding the provision of materials and the decision on the PCA, nor to find that the Parents were denied meaningful participation in programming decisions for Student.

Section 504 Deliberate Indifference

The Parents assert that the District's actions further establish deliberate indifference under Section 504. This hearing officer cannot agree. As noted above, this claim requires a showing of a deliberate choice. The evidence does not even intimate that any of the professionals consciously

chose, in the middle of a pandemic with all of the worldwide uncertainty regarding health and safety, to deprive Student of any disability-related protections. This record simply does not support this claim.

Remedy: Compensatory Education

Compensatory education may be an appropriate form of relief following a due process hearing where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C., supra*, 81 F.3d at 397. This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has also endorsed an alternate approach, sometimes described as a "make whole" remedy, where the award of compensatory education is crafted "to restore the child to the educational path he or she would have traveled" absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Any compensatory education award in this case must equitably factor in the services which Student's IEP specified, as well as the impact of remote instruction on the amount of time Student was available for those services. According to Student's IEP, Student was entitled to 26 weekly hours of full time special education services from the start of the 2020-21 school year until the October 30, 2020 IEP revision. Prior to early October, Student received only related services of approximately 2 hours each week that were

not challenged. Student is, thus, entitled to 24 hours of compensatory education for each week that school was in session from the beginning of the 2020-21 school year through the first day of remote instruction by the new special education teacher in October 2020. Between that date and the date of the IEP revision on October 30, 2020, a period during which Student also had 2.5 hours of instruction weekly, Student is entitled to 21.5 hours of compensatory education (rounded up to 22 hours for clarity and ease of calculation) for each week that school was in session.

By the time of the October 30, 2020 meeting, the team was aware that Student was unable to access more than approximately 2 hours of remote services each day, or 10 hours per week. Of those 10 hours, 2 hours of related services were not challenged; and 2.5 hours of weekly special education instruction were provided. Student would have obviously benefitted from additional direct services by a teacher that were not truly explored, services for which Student was available and to which Student was entitled. The deficiency after October 30, 2020, thus, is 5.5 hours of compensatory education (rounded up to 6 hours for clarity and ease of calculation) for each week that school was in session from October 30, 2020 through the end of the 2020-21 school year.

The compensatory education award is for a number of hours that is significantly lower than the number of hours Student would have received through in-person instruction, but is intended to be equitable in light of the specific circumstances in this case, including those faced by the family, and the District and IU, during the global pandemic. The award further recognizes that Student will almost certainly need COVID Compensatory Services (CCS) pursuant to the guidance by the Pennsylvania Department of Education (PDE) regarding a process for LEAs to determine those for its

students.⁷ Pursuant to the most recent PDE guidance, CCS means “services as determined by an [Individualized Education Program (IEP)] team needed to remedy a student's skill and/or behavior loss and/or lack of progress that resulted from [a Local Education Agency’s (LEA’s)] inability to provide Free Appropriate Public Education (FAPE) while using alternative instructional models due to the COVID-19 pandemic.” Importantly, again according to the same guidance, “CCS should be considered only after the student receives services as set forth in their IEP for a period of time (‘recoupment period’).” The multi-step process is intended to “give the student an opportunity to recoup the lost skills or behavior or to make progress to the level(s) determined appropriate” as well as provide a mechanism for remedying any deprivation.

The traditional award of compensatory education is subject to the following conditions and limitations. Student’s Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers Student’s educational and related services needs. 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. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age sixteen (16). The compensatory services shall be provided by appropriately qualified

⁷ The guidance has been revised from time to time and may be found at <https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/COVID-19-Compensatory-Services.aspx> (last visited July 28, 2021).

professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory education may be limited to the average market rate for private providers of those services in the county where the District is located.

CONCLUSIONS OF LAW

1. Student was denied FAPE over the course of the 2020-21 school year;
2. Student is entitled to compensatory education;
and
3. The District did not act with deliberate indifference under Section 504.

ORDER

AND NOW, this 30th day of July, 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Student was deprived of FAPE over the entirety of the 2020-21 school year.
2. Student is awarded 24 hours of compensatory education for each week that school was in session from the first day of the 2020-21 school year through the first day of remote instruction by the new special education teacher in October 2020. All of the conditions and limitations on that award set forth above are expressly made a part hereof as though set forth at length.

3. Student is awarded 22 hours of compensatory education for each week that school was in session from the first day of remote instruction by the new special education teacher in October 2020 through October 30, 2020. All of the conditions and limitations on that award set forth above are expressly made a part hereof as though set forth at length.
4. Student is awarded 6 hours of compensatory education for each week that school was in session from October 30, 2020 through the end of the 2020-21 school year. All of the conditions and limitations on that award set forth above are expressly made a part hereof as though set forth at length.
5. The compensatory education award is in addition to any future CCS that the IEP team determines is appropriate for Student.
6. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 24518-20-21