

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

## **Pennsylvania Special Education Hearing Officer Final Decision and Order**

### **Open Hearing**

#### **ODR File Number:**

File No. 23213-19-20

#### **Child's Name:**

B.D.

#### **Date of Birth:**

[redacted]

#### **Parents:**

[redacted]

#### **Counsel for Parents:**

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#### **Local Education Agency:**

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#### **Hearing Officer:**

Cathy A. Skidmore, Esquire

#### **Date of Decision:**

08/25/2020

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>1</sup> is a middle school-aged student in the Cornwall Lebanon School District (District) and is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Student has attended school in the District since the kindergarten school year and has been provided with accommodations at school before eligibility under the IDEA was determined. In approximately the middle of the 2019-20 school year, 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 of the Rehabilitation Act of 1973,<sup>3</sup> and the Americans with Disabilities Act (ADA),<sup>4</sup> as well as the federal and state regulations implementing those statutes.

The case proceeded to a due process hearing which convened virtually for a majority of the sessions.<sup>5</sup> The Parents sought to establish that the District failed to provide Student with FAPE throughout Student's enrollment, requesting compensatory education, reimbursement for private evaluations,

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<sup>1</sup> 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).

<sup>2</sup> 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).

<sup>3</sup> 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).

<sup>4</sup> 42 U.S.C. §§ 12101-12213.

<sup>5</sup> References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. Citations to duplicative 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.

and prospective relief. The District maintained that its educational programming, as offered and implemented, was appropriate for Student and that no remedy was warranted.

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

## **ISSUES**

1. Whether the scope of the Parents' claims should be limited to the two year period immediately preceding the Complaint;
2. Whether the District failed to provide an appropriate educational program to Student for the applicable time period;
3. If the District failed to offer and provide an appropriate educational program to Student in any respect, should Student be awarded compensatory education;
4. If the District failed to offer and provide an appropriate educational program to Student, should Student's Individualized Education Program (IEP) team be directed to convene;
5. Whether the Parents are entitled to reimbursement for independent educational evaluations;
6. Whether the District should be ordered to provide additional independent evaluations of Student;

7. Whether the District should be ordered to provide specific training to staff; and
8. Whether the District discriminated against Student under Section 504?

## **FINDINGS OF FACT**

1. Student is a middle school-aged student residing and attending school in the District during the relevant time period.<sup>6</sup> Student is eligible for special education services. (N.T. 72-73.)
2. Student was adopted as an infant and has had a number of chronic medical conditions over the years that have required ongoing treatment. One of those conditions is epileptic seizures. (N.T. 402-07, 409-11, 419-22, 760-62; S-2; S-11.)
3. Student's seizure disorder has changed over time, and is currently manifested by brief periods of time (up to twenty seconds) when Student lacks awareness of the environment. Others may not notice when Student is having such a seizure, but a recent evaluation noted approximately two per day. Student needs several minutes after those seizures before being able to resume normal activities and cognitive functioning. These seizures were first diagnosed in late 2017. (N.T. 419-20, 598, 676, 761-63, 770, 1058-59; P-12 at 3; S-11 at 2.)
4. Student has exhibited good peer relationships at school with positive interactions. (N.T. *passim*; S-15 at 5.)

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<sup>6</sup> Information was shared after the record closed that Student and the family may relocate outside of the District sometime this fall. That possibility is not material to this decision.

## **Early Educational History**

5. Student was evaluated by the local Intermediate Unit (IU) in the spring of 2013 at which time Student was determined to have developmental delays. Student qualified for early intervention services to address attention to tasks and following directions. (S-2 at 1-3.)<sup>7</sup>
6. When Students are making the transition from preschool to school-aged services, the District routinely conducts a new evaluation. (N.T. 98, 186.)

## **2013-14 School Year (Kindergarten)**

7. The District conducted a reevaluation of Student with parental consent obtained in May 2013, and a report issued in September. The Parents' consent to evaluate was provided on a form document that stated that a Procedural Safeguards Notice was available to them. (N.T. 97; S-1; S-2.)
8. The September 2013 Reevaluation Report (RR) included assessment of Student's cognitive ability (Wechsler Preschool and Primary Scale of Intelligence (WPPSI)) and academic achievement, both yielding average range scores. Student's fine motor skills were noted to be a weakness with an occupational therapy evaluation to follow the RR. Student was not eligible for special education based on that RR, but Student's disabilities did provide a basis for Section 504 accommodations. (S-2.)
9. The District did not administer all of the subtests of the WPPSI for the September 2013 ER or obtain a Full Scale IQ because the school psychologist had sufficient information. (N.T. 106-08, 193-94.)

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<sup>7</sup> The Individualized Education Program (IEP) was not made part of this record.

10. The Parents did not agree with the District's determination that Student was ineligible for special education services. (N.T. 829.)
11. The District issued a Prior Written Notice in early October 2013 recommending that Student "continue with regular education" with accommodations (S-2 at 4). The Parents had options to agree with the recommendation, or hold an informal meeting, or disagree with the recommendation. The opportunity to request mediation or a due process hearing was also included on the form. Additionally, the form stated that procedural safeguards were available to them and indicated how the Parents could obtain more information about those, including contact information for various resources. The Parents understood that they could disagree with the recommendation, but they did not. (N.T. 463-65; S-2 at 14-17.)
12. The District developed a Section 504 Plan for Student in kindergarten.<sup>8</sup> (N.T. 197-98, 467.)
13. The District also developed an Individual Health Plan (IHP) for Student in October 2013. (N.T. 610-11.)

### **2014-15 Through 2016-17 School Years**

14. By the time Student was in first or second grade, the Parents were concerned enough about Student's performance at school and at home that they asked the District to provide an IEP. They repeated that request when Student was in third grade. (N.T. 417-18, 782.)
15. Student's Section 504 Plan developed in the fall of 2014 provided for occupational therapy, accommodations for fine motor skill weaknesses, and access to the nurse as needed for medical reasons. The Plan stated that Procedural Safeguards were attached. The Parents were

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<sup>8</sup> There is no real dispute that one was created although it is not in the record.

concerned that the Plan was not adequate for Student. (N.T. 829; S-3.)

16. Student's Section 504 Plan developed in the fall of 2015 provided for occupational therapy, accommodations for fine motor skill weaknesses, and access to the nurse as needed for medical reasons. There were two goals for the occupational therapy services addressing handwriting and maintaining focus and attention. Medical emergencies would be handled with a procedure beginning with calling 911. The Parents were concerned that the Plan was not adequate for Student but indicated agreement on the document itself. (N.T. 829; S-4.)
17. Student's Section 504 Plan developed in the fall of 2016 provided for occupational therapy, accommodations for fine motor skill weaknesses, a visual schedule, preferential seating, prompts to check work, end of day check-ins, and access to the nurse as needed for a medical condition. There were three goals for the occupational therapy services addressing handwriting, maintaining focus and attention, and organizing materials. Medical emergencies would be handled with a procedure beginning with calling 911, and the Plan referenced an IHP. The Parents were concerned that the Plan was not adequate for Student. (N.T. 829; S-5.)
18. An isolated incident with a peer occurred during the 2016-17 school year that did not relate to Student's disability. (N.T. 438-40.)

### **2017-18 School Year (Fourth Grade)**

19. Student's Section 504 Plan developed in the fall of 2017 provided for occupational therapy, accommodations for fine motor skill weaknesses, a visual schedule, preferential seating, prompts to check work, end of day check-ins, and access to the nurse as needed for medical reasons. There was one goal for maintaining focus and attention, and

organizing materials. Medical emergencies would be handled with a procedure beginning with calling 911, and the Plan referenced an IHP. The Parents were concerned that the Plan was not adequate for Student. (N.T. 829; P-43; S-6.)

20. In the spring of 2018, the Parents asked the District to conduct another reevaluation of Student and gave their consent. At that time, their concerns were with a possible learning disability and Student's difficulty expressing information Student knew. (S-7 at 1-2, 21-27.)
21. Student earned mainly A and B grades over the course of the 2017-18 school year. (S-20 at 7-8.)
22. Student scored in the basic range in English/Language Arts and in the below basic range in mathematics and science during the spring 2018 administration of the Pennsylvania System of School Assessment (PSSA). (S-21 at 5-8.)
23. An isolated incident with a peer occurred during the 2017-18 school year that did not relate to Student's disability. (N.T. 441-42.)

### **2018-19 School Year (Fifth Grade)**

24. In early October 2018, the Parents advised the District that Student had been diagnosed with absence seizures, but did not provide medical documentation at that time. (N.T. 644-46; P-22 at 28.)
25. The school nurse provided some information to the teachers about absence seizures in the fall of 2018. (N.T. 642.)

### **October 2018 RR**

26. Teacher input into the Reevaluation Report completed in October 2018 reflected difficulty with multiple-step directions, maintaining attention to tasks, and exhibiting organizational skills. (S-7 at 2-3.)



27. Cognitive assessment for the October 2018 RR (Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V)) yielded an average range Full Scale IQ with a relative weakness in fluid reasoning (low average range). (S-7 at 6-8.)
28. The District did not administer all of the WISC-V subtests for the October 2018 RR because the school psychologist had sufficient information without them. (N.T. 177-79, 211-12.)
29. Student scored in the average range on all subtests administered to assess Student’s academic achievement for the October 2018 RR, and all Composite scores were also in the average range. (S-7 at 8-11.)
30. Speech/language assessment for the October 2018 RR did not reflect any skill deficits. (S-7 at 11-12.)
31. The October 2018 RR did not determine that Student was eligible for special education, but did find qualification for a Section 504 Plan. Recommendations included continued occupational therapy and writing supports, accommodations for attention and organization, checks for understanding, preferential seating, and end of day check-ins. (S-7.)

## **Fall 2018**

32. Student’s Section 504 Plan developed in the fall of 2018 provided for occupational therapy to include organizational skills, accommodations for fine motor skill weaknesses, test accommodations, and access to the nurse as needed for medical reasons. Medical emergencies would be handled with a procedure beginning with calling 911 and referenced an IHP. The Parents were concerned that the Plan was not adequate for Student. (N.T. 829; S-8.)
33. An IHP developed in November 2018 included a seizure action plan. The description of absence seizures was not accurate but the plan was

for Student to be escorted to the nurse and an ambulance to be called. (P-40; P-41.)

34. At the start of the second half of the 2018-19 school year, Student's Parents raised concerns that Student was bullied by a peer. The incidents did not relate to Student's disability. The District made arrangements to keep the two children apart as much as possible without causing attention to Student, including monitoring them, and modified Student's Section 504 Plan. (N.T. 181, 182-84, 207, 213-17, 222-23, 227, 347-50, 354, 364, 368, 372, 379, 446-48; S-22 at 11.)

### **Spring 2019**

35. The revised March 2019 Section 504 Plan increased the frequency and amount of occupational therapy services; and additional accommodations were added: end of day check-ins, organizational support, breaks throughout the school day, separation from the peer, lunch groups, and activities in place of unstructured recess. (S-9.)
36. At a meeting in May 2019 following an incident with Student and the peer, the Parents requested a safety plan for Student. Two adults were identified that Student could speak with if further difficulties occurred. The parties also agreed to implement additional interventions for Student's transition to the middle school in the fall of 2019, including hallway monitoring, separation from the peer, a permanent pass to visit the school counselor, and a new Section 504 Plan meeting prior to school starting. (N.T. 354, 357-58, 365; P-25.)
37. In late spring of 2019, Student experienced suicidal ideation. The Parents informed the District of Student's thoughts, and the District staff monitored Student at school. The District also issued a Permission to Evaluate form to the Parents. (N.T. 154-55, 156, 159-60, 219; S-11 at 4; S-15 at 46-49.)

38. Also in late spring 2019, the Parents shared a safety plan created by the hospital where Student had been evaluated for suicidal ideation. The District did not request a copy of the plan that provided for warning signs, coping skills, and interventions, all in the home; but it did agree to discuss its content with staff. (N.T. 159-60, 454-46; P-36.)
39. Student earned mainly A and B grades over the course of the 2018-19 school year. (S-20 at 9-10.)

### **Private Neuropsychological Evaluation Summer 2019**

40. Student was evaluated by a neuropsychologist at a prominent hospital in May and June 2019. (S-11.)
41. Cognitive assessment for the neuropsychological evaluation reflected an average range overall score with a relative weakness in visual-spatial problem solving and visual working memory. (S-11.)
42. Student was also administered an assessment of academic achievement (Wechsler Individual Achievement Test – Third Edition (WIAT-III)) for the neuropsychological evaluation, scoring in the average range in all areas. (S-11.)
43. Assessment of Student’s executive functioning skills for the neuropsychological evaluation (Behavior Rating Inventory of Executive Functioning – Second Edition (BRIEF-2)) completed by the Parents reflected significant difficulty with sustained attention, distractibility, inhibition, working memory, and organizational skills. (S-11.)
44. Student’s fine motor skills were also part of the neuropsychological evaluation, with results indicating bilateral weaknesses. (S-11.)
45. The private neuropsychologist provided diagnoses of Attention-Deficit/Hyperactivity Disorder (ADHD), Developmental Coordination

Disorder, and Adjustment Disorder with anxiety and depressed mood; epilepsy was also noted. (S-11.)

46. Educational recommendations in the neuropsychological evaluation included special education services pursuant to an IEP; accommodations and specially designed instruction for attention such as preferential seating and test and assignment accommodations; individualized or small group review of materials for reading and mathematics; supports for and instruction in organizational skills and executive functioning deficits; prompting and frequent check-ins; breaks throughout the school day; occupational therapy and assistive technology; instructional approaches to compensate for Student's memory weaknesses; and emotional support for coping skills and managing anxiety and depression. (S-11.)
47. The Parents reiterated their request for a safety plan in July 2019. (S-12.)

### **2019-20 School Year (Sixth Grade)**

48. Student and one of the Parents toured the middle school prior to the start of the 2019-20 school year with the sixth grade counselor. (N.T. 968.)
49. A meeting convened at the start of the 2019-20 school year to review Student's Section 504 Plan. The Plan developed prior to the start of the school year provided for occupational therapy to include organizational skills, accommodations for fine motor skill weaknesses, testing accommodations, a guidance pass to use as needed, end of day check-ins, separation from the peer with whom Student had conflict in the spring, movement breaks, and access to certain items or the nurse as needed for medical reasons. Medical emergencies would

be handled with a procedure beginning with calling 911. (N.T. 1004; S-13; S-14.)

50. In early September 2019, the Parents reported that Student had made improvement over the summer of 2019 and suicidal ideation was no longer a concern. (N.T. 305, 324, 457; S-15 at 2.)
51. The District middle school implements a community-building program for its students as well as a school-wide positive behavior support plan. The community-building program contains elements of bullying prevention. (N.T. 968-69, 974-75, 978.)
52. District professionals at the middle school monitored Student's interactions with the peer with whom Student had difficulty the prior year but did not observe any continuation of their conflict. In late 2019, the parents of both students agreed that the two should not be kept separate, so they were no longer. (N.T. 970, 1015-17; S-22 at 12-14.)
53. At the middle school, students have a daily class period at the end of the school day to complete work or seek help from teachers, who can require students to meet with them. Student met with the mathematics teacher approximately two or three times each six-day cycle during the 2019-20 school year for additional support. (N.T. 308, 329, 790, 1074, 1110, 1138-39, 1158-59, 1186-87.)
54. In the middle school, parents have the option to attend field trips with the students. A nurse or other medical professional attends field trips with students. The Parents in this case did so when Student attended a field trip. (N.T. 350, 390, 752-54, 806-07, 972, 1036.)
55. All students at the middle school are provided with a laptop that has speech-to-text capability. (N.T. 1117.)

## **October 2019 Reevaluation**

56. The District conducted another reevaluation of Student in the fall of 2019 with the consent of the Parents. A report issued in October. (N.T. 256, 259; S-15.)
57. The October 2019 RR included input from the Parents reflecting that they remained concerned with Student's ability to express information Student knew, and also raised social skill weaknesses including reading social cues. They did not return the input form provided, but did speak with the school psychologist and others. (S-15.)
58. Teacher input into the October 2019 RR provided relative strengths and needs of Student, with the latter including repeated directions, checks for understanding, opportunities for practice, prompts and redirection for attention to task and task completion, study guides, and movement breaks. (S-15 at 3-6, 34.)
59. An observation by the school psychologist of Student's mathematics class for the October 2019 RR revealed that Student was on task for the entirety of the observation. (S-15 at 3.)
60. On a measure of cognitive assessment for the October 2019 RR (WISC-V), Student earned scores in the average to low average range, with a Full Scale IQ in the low average range (Standard Score 81) and a weakness with fluid reasoning. Notably, Student's scores were lower on tasks that were timed, and Student's processing speed likely impacted those scores. (S-15 at 7-8.)
61. The District administered the WIAT-III for the October 2019 RR. Student attained scores in the average range in the areas of reading and written expression, but in the low average range on many of the mathematics subtests. (S-15 at 8-9.)

62. Student's emotional functioning was assessed for the October 2019 RR using the Behavior Assessment System for Children – Third Edition with four teachers and the Parents completing rating scales. None of the teachers' scales reflected any concerns, which contrasted with the Parents' scales suggesting clinically significant concerns with hyperactivity, depression, and attention problems; and at-risk concerns with aggression, anxiety, somatization, atypicality, withdrawal, adaptability, social skills, functional communication, leadership, and adaptive skills. (S-15 at 10-11.)
63. Teachers also completed the Gilliam Autism Rating Scale – Third Edition for the October 2019 RR, with results suggesting such a diagnosis was not likely. A separate autism diagnostic assessment yielded similar results. (S-15 at 11-15.)
64. Assessment of Student's executive functioning was conducted for the October 2019 RR through BRIEF-2 rating scales completed by the teachers. Although working memory was identified as an area of concern by two teachers, results did not overall suggest deficits. (S-15 at 15-16.)
65. Speech/language assessment for the October 2019 RR included an observation. Testing revealed significant deficits in social pragmatic communication skills, particularly those perspective taking and intentions of others, inferences, and interpreting social language. Services including direct instruction were recommended. (N.T. 514-15; S-15 at 22-26.)
66. Occupational therapy assessment for the October 2019 RR reflected weaknesses with fine motor and visual perceptual and visual motor skills, but not with sensory processing. (S-15 at 16-19.)

67. Physical therapy assessment for the October 2019 RR did not reveal any skill deficits requiring services. (S-15 at 21-22.)
68. The October 2019 RR identified needs in mathematics skills, visual perceptual and visual motor skills, and speech/language and fine motor skills, in addition to time for processing concepts and directions. The RR identified Student as eligible for special education based on a Speech/Language Impairment after consideration of other IDEA classifications. (S-15.)
69. The Parents and the District did not receive the neuropsychological report until October 2019 after the recent RR was completed. (N.T. 262-63, 450, 477, 1020; P-22 at 60.)
70. A meeting convened to review the RR in November 2019. (N.T. 1018-19.)

### **November 2019 IEP**

71. An IEP meeting also convened in November 2019. (N.T. 264, 285, 311, 472, 1018-19, 1113; S-16 at 67-70.)
72. Needs identified for the November 2019 IEP were: a guidance pass; assistive technology; test and assignment accommodations; access to items for a medical condition; end of day check-ins; separation from the peer with whom Student previously had conflict; speech/language therapy; and those specified in the October 2019 RR. (S-16 at 48.)
73. The November 2019 IEP contained annual goals addressing social language; fine motor skills; and organizing materials. (S-16 at 56-58.)
74. Program modifications and items of specially designed instruction in the November 2019 IEP incorporated all of the needs and recommendations in the October 2019 RR. Student's program was



one of itinerant speech/language support, with Student participating in regular education except during speech/language and occupational therapy sessions. (S-16 at 59-65.)

75. The Parents approved the Notice of Recommended Educational Placement (NOREP) accompanying the November 2019 IEP. (S-16 at 69-71.)

### **Early Spring 2020**

76. The District conducted a reevaluation and issued another RR in January 2020 to consider the neuropsychological evaluation and provide some updated information. (N.T. 312, 1020-21; S-18.)
77. Additional assessments for the January 2020 RR identified some areas of weak executive functioning. Some of the results of the neuropsychological evaluation were incorporated, including the BASC-3 ratings. Recommendations from that evaluation were also made for task completion, including checks on performance and using adequate time. (S-18.)
78. The IHP for sixth grade was developed in the spring of 2020. That plan maintained an inaccurate description of absence seizures and provided for Student to be escorted to the nurse after any type of seizure activity and an ambulance to be called. (N.T. 661-62, 684-85; HO-1.)

### **Independent Educational Evaluation**

79. The Parents obtained an Independent Educational Evaluation (IEE) by a private psychologist who issued a report in late February 2020. (P-23.)

80. Parent input into the IEE reflected increasing concerns with Student's behavior at home, including lying and maintaining bonds with family members. (P-23 at 3, 16.)
81. Teacher input into the IEE did not endorse concerns with Student's behavior at school. (P-23 at 3.)
82. The private psychologist who conducted the IEE observed Student at school, and noted very few instances of problematic behavior during that observation. (P-23 at 9-15.)
83. The IEE noted that Student presents as polite, pleasant, and cooperative, inhibiting any potentially problematic behavior, but that those traits actually mask feelings of personal insecurity and low self-concept. (P-23.)
84. The IEE reported the results of one of the Parents' BASC-3 rating scales. Those endorsed clinically significant concerns with hyperactivity, anxiety, attention problems, withdrawal, leadership, functional communication, and activities of daily living; and at-risk concerns with aggression, depression, and adaptability. On the content scales, results reflected clinically significant concerns with executive functioning. (P-23 at 16-24.)<sup>9</sup>
85. The private psychologist who conducted the IEE recommended that Student be provided an educational program in a small, structured environment with small class sizes, and that educational staff coordinate mental health services with outside therapist(s). (P-23 at 6-7.)

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<sup>9</sup> Student's teachers were also provided with the BASC-3 rating scales but did not return them to the private psychologist. (P-23 at 3, 25.)

## **Spring 2020**

86. Another IEP meeting convened in February 2020. Student's mathematics teacher participated in that meeting to answer the Parents' questions about that class and Student's performance. (N.T. 312, 475, 564, 1022, 1162-65.)
87. The February 2020 IEP identified new needs with respect to task completion consistent with the January 2020 RR, and added those to the section on program modifications/items of specially designed instruction. In all other respects, the IEP was substantively the same. The Parents approved the accompanying NOREP. (S-19.)
88. Student experienced an episode in February 2020 during a guidance lesson when Student's vision blacked out for a few seconds then became blurry. Student went to the nurse several hours later to report the incident, and the nurse reported it to the Parents. (N.T. 721-23, 725, 729, 764, 770, 983, 1057; P-42.)
89. By the end of February of the 2019-20 school year, Student was earning mainly B grades and was attaining grade level progress in mathematics. (N.T. 1155-57, 1161; S-20 at 11.)
90. Another IEP meeting convened in April 2020. (N.T. 315, 1027, 1125, 1167.)
91. At the April 2020 IEP meeting, the team discussed recommendations in the IEE and agreed to add an additional form of assistive technology for written work, chunking of assignments, and weekly check-ins with the school counselor. Those provisions were added to the IEP as was a provision for an escort when needing to go to the nurse's office. (S-23.)
92. The SDI for avoiding the peer was removed for the April 2020 IEP because the team did not believe it was still necessary. (N.T. 566-67.)

93. Student's physician in late May 2020 recommended an annual training by a school nurse who has experience with seizures for all staff who will work with Student so that they could monitor Student for absence seizures. (N.T. 1030-31, 1061; P-46.)
94. Student was able to succeed in the sixth grade mathematics class during the 2019-20 school year. (N.T. 1167-68.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **General Legal Principles**

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. It should here be recognized that 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). Accordingly, the burden of persuasion in this case must rest with the Parents who filed the Complaint requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, in the role of fact-finders, are also 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). This hearing officer found each of the witnesses who testified to be credible as to the facts and there was little inconsistency material to an informed resolution of the issues. Any variations among

witness accounts are attributed to lapse in memory or recall, or to differing perspectives, rather than an intention to mislead or minimize events.

The weight accorded the evidence, however, was not equally placed. The Parents' testifying expert, who was qualified to speak to the areas in which he was so recognized, provided testimony that was not deemed to lack credibility. However, that testimony was overall unpersuasive with respect to Student's needs largely because the witnesses opined that a student who is not performing at or near the 50<sup>th</sup> percentile requires special education, while also conceding that there is a range to average scores (N.T. 913-15). His testimony was also heavily focused on a single isolated incident related to matters wholly outside the jurisdiction of this hearing officer and regarding asserted systemic practices that similarly are beyond the scope of these proceedings.<sup>10</sup>

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited where unnecessary. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' comprehensive 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

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<sup>10</sup> This is not to say that the Parents' concerns in that respect are not genuine or even, perhaps, well-founded in a broad sense. Their commendable vigilance will continue to be critical in light of the IEE's conclusions, with the writing assignment that was challenged at the hearing a good example.

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). Fairly recently, the U.S. Supreme Court observed 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). “A focus on the particular child is at the core of the IDEA.” *Id.*, \_\_\_ U.S. at \_\_\_, 137 S. Ct. at 999, 197 L.Ed.2d at 349-50 (2017)(citing *Rowley* at 206-09)(other citations omitted).

Individualization is, thus, 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. *Endrew 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).

## **Substantive FAPE: Child Find and Evaluation Requirements**

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); see also 22 Pa. Code §§ 14.121-14.125. The statute itself sets forth two purposes of the required evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1)(C)(i).

The obligation to identify students suspected as having a disability is commonly referred to as “child find.” LEAs are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). More specifically, LEAs are required to consider evaluation for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to identify a disability “at the earliest possible moment.” *Id.* (citation omitted).

The IDEA further defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). “Special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). More specifically, “specially designed instruction means adapting, as appropriate to the needs of an eligible child [], the content methodology or delivery of instruction.” 34 C.F.R. § 300.39(a)(2).

Certain procedural requirements are set forth in the IDEA and its implementing regulations that are designed to ensure that all of the child’s individual needs are examined.

Conduct of evaluation. In conducting the evaluation, the local educational agency shall—

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining—

(i) whether the child is a child with a disability; and

(ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

20 U.S.C. § 1414(b)(2); *see also* 34 C.F.R. §§ 300.303(a), 304(b). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment



tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); see also 20 U.S.C. § 1414(b)(3). Any evaluation or reevaluation must also include a review of existing data, including that provided by the parents, in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a).

When parents disagree with an LEA’s educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). Here, the Parents obtained private evaluations on their own and now seek reimbursement. The standards for an LEA evaluation, however, apply to addressing the issue in this related context.

### **Substantive FAPE: Least Restrictive Environment**

Another critical premise in the IDEA is the obligation that eligible students be educated in the “least restrictive environment” (LRE) that also satisfies meaningful educational benefit standards:

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).

## **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).

Full participation in the IEP process does not mean, however, that an LEA 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); *see also Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D. Md. 2002)(explaining that “parents who seek public funding for their child's special education possess no automatic veto over” an LEA’s decision). If the parties are not able to reach a consensus, it is the LEA that must make a determination, with parents afforded procedural safeguards if they do not agree. *Letter to Richards*, 55 IDELR 107 (OSEP 2010); *see also* 64 Fed. Reg. 12406, 12597 (1999)(same).

## **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). With respect to the ADA issues, the substantive standards for evaluating claims under Section 504 and the ADA are also essentially identical. *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 statutes. *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.

### **IDEA Statute of Limitations**

The IDEA expressly provides that a party "must request an impartial due process hearing on their due process complaint within two years of the date the parent or public agency knew or should have known about the alleged action which forms the basis of the complaint." 20 U.S.C. § 1415(f)(3)(c); *see also* 34 C.F.R. § 300.511(e).<sup>11</sup> In other words, "[t]he IDEA statute of limitations is triggered when the [filing party] knew or should have known about the action that forms the basis of the complaint." *J.L. v. Ambridge Area School District*, 2008 U.S. Dist. LEXIS 54904, \*28-29, 2008 WL 2798306, \*10 (W.D. Pa. July 18, 2008). The IDEA also expressly provides for two specific exceptions to the two-year limitation period,

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<sup>11</sup> The IDEA statute of limitations also applies to Section 504 claims such as those raised here. *P.P. ex rel. Michael P. v. West Chester Area School District*, 585 F.3d 727, 737 (3d Cir. 2009).

permitting claims beyond that timeframe to a parent who was prevented from requesting the hearing as a result of:

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local education agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

20 U.S.C. § 1415(f)(3)(D); see also 34 C.F.R. § 300.511(f). There is a causation element to these exceptions. *Id.*; *D.K. v. Abington School District*, 696 F.3d 233 (3d Cir. 2012). The *D.K.* Court has also clarified that a misrepresentation must be intentional and egregious, and also involve statements about resolving the parties' dispute; and, that the withholding exception applies to information that the IDEA requires an LEA provide in that section of the statute.

Hearing officers must "make determinations, on a case by case basis, of factors affecting whether the parent 'knew or should have known' about the action that is the basis of the complaint." *J.L. v. Ambridge Area School District*, 622 F.Supp.2d 257, 266 (W.D. Pa. 2008) (quoting 71 Fed. Reg. § 46540-01 at 46706 (August 14, 2006)). This is a "highly factual inquiry." *Id.* The Third Circuit recently reaffirmed the importance of the knew or should have known date in *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 606 n. 4 (3d Cir. 2015). Generally speaking, the fact-finder must determine whether the actions or inaction by an LEA "are sufficient to alert a reasonable parent that the child would not be appropriately accommodated." *Brady P. v. Central York School District*, 2018 U.S. Dist. LEXIS 43230 at \*19, 2018 WL 1367325 at \*7 (M.D. Pa. 2018).

The Third Circuit also cogently explained in *G.L.* that there is obvious tension between the obligation to timely pursue a claim against an LEA as a diligent plaintiff and the need for participation in the parent/LEA collaboration process that is inherent in the IDEA:

On the one hand, although a child's right to special education under the IDEA does not turn on parental vigilance, *M.C. [v. Central Regional School District]*, 81 F.3d [389,] 397 [3d Cir. 1996], parental vigilance is vital to the preservation and enforcement of that right. ... Parents are often in a position to be forceful advocates for their children and through their vigilance and perseverance to help fulfill the IDEA's promise of a free appropriate public education. That "cooperative process . . . between parents and schools" that results from a parent's action, after all, is at the very "core of the statute" itself. *Schaffer*, 546 U.S. at 53.

*G.L.*, 802 F.3d at 625.

## **The Parents' Claims**

### **Statute of Limitations**

The first issue to be addressed is the temporal scope of the Parents' claims since the discussion that follows is dependent on that determination. The Parents seek to challenge the District's services since Student's entry in the District in kindergarten, while the District contends that only the two year period prior to the filing of the Complaint are timely.<sup>12</sup>

First, the Parents assert that the two statutory exceptions to the statute of limitations apply. Next, they also posit that the Parents did not

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<sup>12</sup> The parties agreed to defer a ruling on the scope of the claims until the final decision. (N.T. 52-54.)

know or have reason to know of the actions forming the basis of their claims until they filed their Complaint.

With respect to the withholding exception, the record contains several indications that the Parents were provided with notice that procedural safeguards existed when it made various recommendations over the course of the relevant school years. While it appears to be true that the District did not actually provide a copy of the procedural safeguards when it first sought the Parents' consent to an evaluation in 2013, a time when such was required pursuant to 20 U.S.C. § 1415(d)(1), the Parents were clearly aware as of October 2013 that they could disagree with its recommendations and pursue due process. That they may have had reasons for declining to do so does not, on this record, establish that they were prevented from filing for a hearing based on the withholding exception.

The argument on the misrepresentation exception is based on the assertion that the Parents were not aware in 2013 that Student could have been provided services pursuant to the early intervention IEP upon transition into the District. They rely on guidance by the Pennsylvania Department of Education (PDE) and urge that, had the guidance been followed, Student should have had District-based services in the fall of 2013. The evidence is not, however, preponderant that the District's failure to discuss possible implementation of the early intervention IEP was deceptive or an egregious misstatement of any kind, or that it related to resolving any issues. The District's process for Student's transition to school-age services does not provide a basis for disregarding the statute of limitations.

With respect to what the Parents knew or had reason to know, the record is replete with evidence that the Parents were aware of the District's approach to providing disability-related services to Student, and they disagreed with its position from the time Student first enrolled. They have actively participated in programming decisions for and communications

about Student throughout that time, even making requests for an IEP as far back as early elementary school. This hearing officer cannot conclude that there was the lack of requisite notice to the Parents that the case law interpreting the IDEA statute of limitations demands. Accordingly, the Parents' claims must be limited to the two-year time period preceding the date of their Complaint.

## **District Evaluations**

The Parents challenge the District's evaluations of Student as not sufficiently comprehensive to identify Student's needs, and they seek reimbursement for the cost of their privately obtained evaluations including the IEE. This is the logical starting point on the merits since programming must be based on and follow evaluations. The first relevant evaluation is the October 2018 RR, which examined only cognitive abilities, academic achievement, and speech/language functioning. Had this case been presented at that time, perhaps the argument about that evaluation would have succeeded given Student's reported difficulties with multiple-step directions, maintaining focus, and organizational skills. However, the District conducted another RR with a report in October 2019 that preceded any of the private evaluation reports, so its content must also be considered.

The District's October 2019 RR clearly utilized a variety of assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student, all relating to areas of suspected disability including the Parents' concerns. More particularly, the District summarized input from the Parents; obtained and reported input from teachers; included a classroom observation; reported on assessment of Student's current cognitive ability and academic achievement; and included measures of Student's social/emotional/behavioral functioning. Assessments of Student's speech/language and fine and gross motor skills as well as autism-related characteristics were also conducted.

The District's October 2019 RR considered Student's eligibility for special education under several IDEA categories, found Student eligible based on speech/language needs, and made recommendations for the IEP team to address Student's identified needs. All of this evidence together preponderantly supports the conclusion that the District's October 2019 RR met IDEA criteria.

Hearing officers do have the authority to order an IEE at public expense. 34 C.F.R. § 300.502(d). Here, from an equitable and logical standpoint, the IEE provides the first understanding about the vast differences between Student's presentation at home compared to school, and the IEP team including the Parents now have crucial and valuable insight into Student's emotional profile for purposes of educational programming. Because this IEE will significantly aid the parties in development and implementation of a program that meets Student's unique individualized needs as they are currently understood, the Parents will be awarded reimbursement for its cost.<sup>13</sup>

### **FAPE Claims Spring 2018 through Present**

The Parents challenge the District's educational program on several discrete grounds. Before turning to the various areas, it is important to again recognize that Student has historically presented quite differently in the home and school environments. The following discussion is not intended to minimize or ignore the Parents' experiences at home, particularly more recently, but Student's presentation in the starkly contrasting school environment is a highly relevant consideration.

The first claim is that the District did not comply with its child find obligations and identify Student as eligible for special education due to

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<sup>13</sup> Another evaluation (P-27) was not provided until the eve of the first session of the hearing (N.T. 7-9).



academic difficulties with mathematics. The evidence simply does not preponderantly establish that Student is in need of special education and/or related services to address any mathematics weaknesses. The mere attainment of less than proficient scores on PSSA administrations does not, in and of itself, point to a disability or a need for specially designed instruction for that disability. Moreover, in all evaluations conducted prior to the fall of 2019, Student performed in the average range on standardized measures of mathematics achievement. Student did have some areas of relative weakness in the subject that, on this record, were adequately addressed through regular education supports and Student's accommodations.<sup>14</sup> Student was not deprived of FAPE based on academic needs.

Student's executive functioning deficits were reported by teachers and addressed through Section 504 Plan accommodations for the relevant time period. In the fall of 2017, those needs continued to be addressed through end-of-day check-ins, and occupational therapy services for organizational skills and focus/attention. However, despite Student's reported continued difficulty with focus and attention at school, accommodations for those needs were removed from the Section 504 Plans for the 2018-19 and 2019-20 school years. Still, by the fall of 2019, formalized assessments by the District did not reveal teacher concerns with social/emotional/behavioral or executive functioning to a significant degree warranting intervention beyond typical redirection. The observations that were conducted during the 2019-20 school year along with Student's grade-level performance during the 2018-19 and 2019-20 school years similarly did not support a conclusion

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<sup>14</sup> It merits mention here that grade-equivalency scores, such as those in the private neuropsychological evaluation, are a type of developmental score must be interpreted cautiously and carefully, as they can be misleading for many reasons; and, they do not mean that a student is performing at that grade level.

that Student's attention and focus were impeding Student's learning to the extent that Student's program was inappropriate. Thus, FAPE was not denied on this basis.

The fall of 2018 is also when the Parents reported the new type of seizure. Even without medical documentation, the school nurse was able to provide some general information about those seizures to teachers; yet, the IHPs in the record for the 2018-19 and 2019-20 school years did not include accurate information about what they might be observing in the classroom or during unstructured activities. The steps in the IHPs were also not followed, including after the serious February 2020 incident. For these reasons, Student's disability-related needs were not met with respect to seizures during the 2018-19 from the date of the November 2018 Section 504 Plan and during the 2019-20 school year, and amounted to a denial of FAPE.

With regard to the suicidal ideation, it is important to recognize that the report was made near the very end of the 2018-19 school year and was otherwise not known to the District. The District must be given a reasonable period of time to respond, so even if a safety plan would have been necessary, one likely could not be adequately developed immediately. That concern also diminished significantly by the start of the 2019-20 school year. Based on the evidence presented and particularly the timing of the new information, a conclusion cannot be drawn that the District's monitoring of Student together with a request for a reevaluation was an unreasonable response.

In the area of speech/language, no school-based needs were identified or reported until the fall of 2019 when an IEP was proposed and implemented. At that time, Student exhibited deficits in social pragmatic language to be addressed through speech/language therapy. Other than a few isolated instances of peer conflicts, there is nothing in the record to

suggest that the District should have responded to social language and social skill needs earlier than it did.

In related contentions, the Parents assert that the District did not provide sufficient oversight over students such that Student was subject to bullying. There are two major problems with these averments in this case. The first is that the instances described at the hearing were relatively few and isolated as contrasted with any type of pattern. The second is that the specific allegations in this case related to bullying are well outside this hearing officer's jurisdiction.

The U.S. Department of Education has long acknowledged that, "[d]isability harassment that adversely affects an elementary or secondary student's education may also be a denial of FAPE under the IDEA; [and h]arassment of a student based on disability may decrease the student's ability to benefit from his or her education and amount to a denial of FAPE."<sup>15</sup> The Third Circuit has also recognized that a student who is the victim of bullying and whose special education program is adversely impacted as a result can be denied FAPE. *Shore Regional High School v. Board of Education*, 381 F.3d 194 (3d Cir. 2004). The facts of this case are quite distinguishable from those in *Shore* and simply do not support a conclusion that the District violated Student's right to FAPE on this basis.

Lastly on this issue, the Parents also contended throughout the hearing that the District failed to create or maintain records over the relevant time period, and argue that Student's programming and/or their ability to meaningfully participate in educational decision-making were thereby compromised. It was somewhat of a surprise that a District witness was able to obtain and provide a record relating to Student from March of

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<sup>15</sup> U.S. Department of Education, Office of Civil Rights, Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2000); see also U.S. Department of Education, Office of Special Education and Related Services, Dear Colleague Letter, 61 IDELR 263 (2013).

this year during a virtual hearing session, despite a number of record requests. But LEAs are not required to create documents every time an event that a parent deems significant occurs, nor is it obligated to maintain all documents relating to a student for his or her entire school career. The record developed at the hearing does not establish a procedural or substantive FAPE violation on this ground.<sup>16</sup>

## **Additional Remedies**

### **Compensatory Education**

Compensatory education may be an appropriate form of relief 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. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). 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).

The Parents suggest that full days of compensatory education are warranted, which is appropriate in some cases. *See Keystone Central School*

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<sup>16</sup> Student's Section 504 claims have been addressed and need not be discussed separately.

*District v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education, affirming an award of full days). However, the remedy must be equitable under the circumstances and, here, must also consider that Student did not exhibit seizure-related or other inattention at school to a significant degree during the time period in question.

Using the estimate of two seizures per day with several minutes after each to resume activities, an award of one hour of compensatory education per week for each week that school was in session over the 2018-19 school year from the date of the November 2018 Section 504 Plan through the end of that school year, and each week that school was in session from the start of the 2019-20 school year through the mandatory school closures in March 2020<sup>17</sup> shall be made. This award recognizes that not all of Student's seizures occur during the school day.

The 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,

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<sup>17</sup> No claim for relief resulting from the COVID-19 restrictions was explicitly raised. The parties must, however, be afforded the opportunity to comply with PDE guidance to IEP teams for such questions at the start of the 2020-21 school year.

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 eighteen (18). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. 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.

### **Prospective Relief**

The Parents further seek an order directing the IEP team to reconvene and revise Student's IEP. Here, the IEP team now has an IEE that, as noted above, provides meaningful and noteworthy information to supplement the other evaluations in the record. The District shall be directed to reconvene the IEP team to incorporate appropriate revisions to include, at a minimum, scheduled weekly school-based counseling;<sup>18</sup> access to a school counselor, emotional support teacher, or other trusted adult; and, unless the team agrees otherwise, all of the currently proposed program modifications/specially designed instruction and related services. The District shall also be required to provide training on absence seizures to all staff members in the school building including documentation of all occurrences and regular reporting to the Parents, and revise the IHP to provide accurate information. The team will not, however, be directed to consider an out-of-District placement for Student since the record does not at all support a conclusion that Student cannot be satisfactorily educated in the regular education setting with appropriate supplementary aids and services even with some percentage of time outside of that environment.

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<sup>18</sup> Student clearly does also need more intensive mental health services that the Parents reportedly are actively seeking to arrange if they have not done so already.

## **ORDER**

AND NOW, this 25<sup>th</sup> day of August, 2020, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The Parents' claims prior to January 2018 are barred by the statute of limitations.
2. The District did deny Student FAPE relating to Student's seizure disorder during the 2018-19 schools year from the date of the November 2018 Section 504 Plan through the end of the school year, and from the start of the 2019-20 school year through the date of the COVID-19 school closures. The District did not deny Student FAPE procedurally or substantively in any other respect.
3. Student is awarded one (1) hour of compensatory education for each week identified in ¶ 2 hereof in order to remedy the denial of FAPE. 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. The District shall convene a meeting of Student's IEP team to include the Parents within ten calendar days of the date of this order to develop a new IEP for Student that includes, at a minimum, all of the following: weekly school-based counseling; access to a school counselor, emotional support teacher, or other trusted adult throughout the school day as needed; a revised IHP; annual training at the beginning of each school year in which Student is enrolled in the District on absence seizures of all staff in Student's school building by an experienced school nurse; and a process for documenting in writing all occurrences of

absence seizures by Student and promptly communicating same to the Parents.

5. Within thirty calendar days after receipt of all invoices and/or receipts for the IEE issued in February 2020 by the private psychologist, the District shall reimburse the Parents for the entire cost.
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

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Cathy A. Skidmore  
HEARING OFFICER  
ODR File No. 23213-19-20