

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

Closed Hearing

ODR File Number:

26678-21-22

Child's Name:

Y.T.

Date of Birth:

[redacted]

Guardian:

[redacted]

Counsel for Parent:

Pro se

Local Education Agency:

Norristown Area School District
401 N. Whitehall Road
Norristown, PA 19403

Counsel for LEA:

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

December 5, 2022

INFORMATION AND PROCEDURAL HISTORY

The student (Student) ¹ is a middle school-aged child residing in the District and is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² as well as protections under Section 504 of the Rehabilitation Act of 1973³ as a child with an autism spectrum disorder and an intellectual disability.

In the due process Complaint, the Parent, who is *pro se*, alleged the District denied the Student a free appropriate public education (FAPE) under the IDEA, Section 504, and the Americans with Disabilities Act (ADA).⁴ The Parent raised claims from the 2019-2020, 2020-2021 and 2021-2022 school years. As a remedy, the Parent sought a determination that the District failed to provide Student with a FAPE and that its actions constituted unlawful discrimination. The Parent also sought a ruling that a Complaint Investigation Report (CIR) from the Pennsylvania Department of Education (PDE) was erroneous and a determination that the District violated a March 2022 Office for Dispute Resolution (ODR) Hearing Officer Order, the

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 et seq. 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.

removal of "lies" from Student's school record, compensatory education, and other relief the Hearing Officer deemed fair and equitable.

In response, the District filed a Motion to Dismiss the Parent's Complaint to support its position that all issues were previously litigated and barred by *res judicata*.⁵ After consideration, this Hearing Officer limited the scope of the instant hearing to the claims, as recited below, related to the 2021-2022 school year.⁶ The District also maintained that its educational programming, as offered to Student, was appropriate under the applicable law and that no remedy was due.

For the reasons set forth below, the claims of the Parent are denied.

ISSUES

- 1) Did the District deny Student a free appropriate public education during the 2021-2022 school year by:
 - (a) failing to provide a one-to-one aide,
 - (b) failing to provide bus transportation with a one-to-one bus aide and behavior plan, then ultimately failing to provide any transportation,

⁵ In addition to the Complaint filed in July 2021 that resulted in the March 2022 decision, this Student was also the subject of a Complaint resolved at ODR No. 20956-18-19. The Parent also filed two Complaints with the Pennsylvania Department of Education (PDE), Bureau of Special which resulted in complaint investigation reports (CIR) in November 2019 and February 2021. In September 2022, ODR referred issues raised in the instant Complaint related to enforcement of the Hearing Officer's March 2022 Order to PDE, BSE. (S-50)

⁶ HO-1

- (c) failing to provide virtual instruction during COVID closures both before and after January 22, 2022,
- (d) failing to provide home education materials,
- (e) failing to offer 180 days of school and
- (f) forcing the Student out of the District in April 2022?

FINDINGS OF FACT

1. The Student is currently [a teenaged] resident of the District and eligible for special education supports and services under the primary disability identification of autism and secondary disability identification of intellectual disability. (S-35, pg. 20)
2. The Student has needs in the areas of speech and language, occupational therapy, physical therapy, personal care, social skills, life skills, communication, self-care, social skills, emotional, behavioral and cognitive regulation; utilizing total communication to interact with adults, peers and the environment; producing verbal output for functional communication; fading prompts to request for preferred activities using AAC and other modes of communication; identifying functional vocabulary both receptively and expressively; visual motor skills while writing; self-help and self-regulation; coordination; and lower extremity strength. The Student requires repetition of skills, routines, simple directives and verbal and physical prompts, as well as support and guidance to participate in classroom and school activities. (S-35).

2020-2021 School Year

3. During the 2020-2021 school year, in response to the COVID-19 pandemic, the Student received synchronous instruction delivered

virtually with some asynchronous components expected for independent completion by the Student. (N.T. 75)

4. On September 14, 2020, the Student's physician provided an after visit summary of a medical appointment. The summary indicated that Student presented with an autism spectrum disorder, intellectual disability and mixed receptive expressive disorder. The physician recommended replacement behaviors for sensory input, provided a mask exception card and a referral to discuss lab work. The physician recommended that Student receive school based speech, PT, OT, SI, a one-to- one aide on the school bus to address safety concerns and consideration of the use of pictures or other visuals to increase face shield or mask tolerance. (P-16; N.T. 133-134, 137)
5. On November 20, 2020, the IEP team met to determine educational services for the Student. The IEP was slated to be in place until November 2021. The IEP offered full-time autistic support with .5 hours spent in the regular classroom per day, numerous goals, detailed SDI, and related services. (P-40, p. 117)
6. On March 4, 2021, the Student's physician provided an after visit summary of a medical appointment. The summary indicated that the Parent requested, and the physician agreed to provide a letter to excuse the Student from intranasal COVID testing. The physician recommended a 1:1 female bus aid to assist with safety concerns, in person, one-on-one special education instruction, and an array of supportive services. A letter to the school IEP team indicated that Student should not be compelled to undergo intranasal testing unless essential. The physician recommended that the school team develop a plan to gradually prepare the Student for intranasal testing if it was required. (P-27, P-28)

7. In June 2021, in preparation for the to return to in person instruction for the 2021-2022 school year, the Parent completed a survey disseminated by the District and indicated interest in virtual instruction for the Student. (P-38, P-39; N.T. 157)

2021-2022 School Year

8. On August 30, 2021, the District's health and safety plan took effect. The plan outlined the protocols related to masking, physical distancing, handwashing, cleaning, contact tracing, testing, accommodations for students with disabilities, and coordination with local health officials. The plan advised that meetings for students with IEPs and 504 plans would be arranged to discuss risks to students and applicable accommodations would be provided to students. The plan advised that supports and services would be provided to the greatest extent possible, and virtually if needed.⁷ (P-35)
9. During the 2021-2022 school year the District implemented three options for educational instruction. Those options included in-person instruction, enrollment in the District's online academy (OA), and synchronous-virtual programming as needed for health and safety concerns. (P-35; N.T. 94, 103-104, 122)
10. OA provides asynchronous instruction and requires participation by a self-guided, self-paced, independent learner, and uses a K-12, pre-recorded, general education curriculum. No live instruction is provided

⁷The plan was revised on June 28, 2021, effective on August 30, 2021, and last reviewed on January 12, 2022.

to students. OA requires students to independently read and complete pre-established assignments. It does not offer live or direct instruction from a teacher and requires students to complete the pre-recorded programming independently. The OA has been an option in the District for the preceding six years. (S-20; N.T. 49-50, 94, 103-104, 122)

11. Before a student with disabilities is enrolled in the OA, an IEP meeting is held to discuss the programming, and a student's needs. As a team, the District determines whether enrollment in OA offers FAPE. If the programming is deemed appropriate, the student receives special education services in a District building and returns home to complete the online programming components. OA may not be appropriate if a drastic change to programming would be required in order for a student with a disability to attend. (N.T. 104-105)
12. OA is not appropriate for students who require specialized instruction throughout the school day. In order for the student to receive their special education services, they would have to be in the building for the duration of the school day in order to receive FAPE. (N.T. 105-106)
13. On August 21, 2021, the District emailed the Student's transportation schedule to the Parent. (P-41)
14. On August 22, 2021, the Parent contacted the District to arrange a meeting to discuss accommodations available through the District's Health & Safety plan during virtual instruction. (P-42; N.T. 157-158)
15. On August 26, 2021, through email, the District advised the Parent that Student needed in person, full-day, instruction because of necessary services as a full-time special education student. The Parent advised that the Student could not wear a mask, needed virtual instruction for health and safety and a [family member] could provide PCA services in the home. (P-42)

16. The first day of school in the District for the 2021-2022 school year was August 30, 2021. (P-36)
17. On September 9, 2021, the team met to revise the Student's IEP and discuss educational programming. The Parent attended, participated with an advocate and requested that Student receive virtual programming because of health and safety considerations. The IEP offered numerous goals that addressed Student's significant academic and functional of needs. (P-44, S-20; N.T.55, 102, 238)
18. At the meeting, the District explained that in person learning or the OA were the educational options available for students during the 2021-2022 school year. During the meeting, the District explained that OA was a completely asynchronous online program and students with IEPs that elect this option must receive special education services in a school building. The team also discussed the barriers to Student's mask wearing, the development of a plan to increase mask tolerance throughout the school day and alternative masking options. (S-20, p. 20-21)
19. At the meeting, the team determined that Student's enrollment in the OA was not appropriate because the full-time, special education services needed were offered only in the school and a full day of attendance was needed to access those services. (S-20; N.T. 55, 100-101, 107, 160-161, 219)
20. On September 10, 2021, the District emailed documentation to the Parent to complete a reevaluation of the Student. (P-50)
21. On September 17, 2021, through a NOREP the District proposed that Student receive full-time autistic support, in a self-contained classroom with 30 minutes of speech and language support, three times a week, physical therapy twice a week for 30 minutes, physical

therapy two times a week for 30 minutes a session, a personal care assistant (PCA) for 6.25 hours per day, five days a week, and curb to curb transportation with a bus aide two times a day, five days a week. (P-52, S-21; N.T. 55-57, 108-109)

22. Through the NOREP, the District rejected the Parent's request that Student attend the District's online academy. The team determined that as a full-time autistic support student, educational services needed to be provided, in person, during the school day. (P-52, S-21, p. 2; N.T. 55-56, 74, 106-107)
23. On September 21, 2021, the District school psychologist contacted the Parent about the proposed RR. The Parent advised the psychologist that Student was supposed to receive services in the home and requested options for testing locations. The psychologist advised that testing had to occur in person. (P-53, S-22, S-24)
24. On September 27, 2021, through the NOREP, the Parent requested mediation. On October 1, 2021, ODR advised the Parent that the District declined to participate in mediation. (P-52, P-54, P-55; N.T. 85)
25. After the Student missed many days of school, the District scheduled a student attendance improvement plan meeting (SAIP) with the Parent. The Parent did not attend the meeting. (P-56, P-80, P-102, S-23; N.T. 65, 109-110)
26. On October 25, 2021, the District issued its reevaluation (RR) of the Student. Although the team determined additional testing was needed, it could not be completed because Student had not attended school and attempts to schedule appointments with the Parent for testing were unsuccessful.

27. For inclusion in the RR, the special education teacher completed the BASC , BRIEF-2, GARS, and Vineland rating scales. The Parent returned one out of the four rating scales provided. The teacher was unable to administer the VB-MAPP assessment because Student did not attend school. (S-25, S-29; N.T. 60-61)
28. On October 27 and November 9, 2021, the District issued prior written notice to Parent to reevaluate the Student. (S-26, S-27)
29. On November 8, 14, and 17, 2021, the District sent an invitation to the Parent for a November 18, 2021, SAIP meeting. (P-57, S-32)
30. On November 18, 2021, the Parent contacted the District and expressed discomfort with attending a SAIP meeting because a due process hearing decision was pending, and the mediation request was rejected. (P-56, p. 2, P-57, S-28; N.T. 66, 224)
31. On November 18, 2021, the Parent returned an Autism rating scale to the school psychologist. That same day the Parent acknowledged receipt of the RR and requested a mailed hardcopy and an electronic version of the permission to evaluate. (P-53, P-58)
32. On November 19, 2021, the District issued prior written notice to the Parent to reevaluate the Student. (S-30)
33. On November 21, 2021, the IEP team met to discuss educational programing. The Parent did not attend the meeting. On November 28, the District issued a NOREP that proposed that the Student receive full time autistic support, speech and language services three times a week for 30 minutes a session, physical therapy two times a week for 30 minutes a session, occupational therapy two times a week for 30 minutes a session, a (PCA) for 6.25 hours per day/ five days a week

and transportation two times per day for 5 days a week, curb to curb with a bus aide and ESY. (S-29, p. 115)

34. On November 27, 2021, the Parent emailed the District and refused the NOREP and consent to the RR. (P-58, S-31)
35. On December 6, 2021, the District contacted the Parent to schedule an IEP meeting. The Parent did not reply. (S-32; N.T. 68)
36. On December 8, 2021, the Parent disapproved the recommendation made in the November 2021 NOREP and requested a due process hearing. No Complaint was filed with ODR. (S-29, p. 116)
37. On January 3, 2022, in response to health and safety concerns, the District's schools offered synchronous virtual instruction to its students from January 4 through January 28, 2022. The Student participated in the instruction. (P-60, P-67, P-68, P-71, P-72, S-33, S-36; N.T. 76-77, 205, 220)
38. On January 18, 2022, the District invited the Parent to participate in a meeting to discuss Student's transition planning, the RR and IEP. The January RR reported that Student had not attended school in since December 31, 2021. The Parent did not respond to the meeting invitation. (S-34, S-35; N.T. 69-70, 77)
39. On January 18, January 28, February 14 and February 17, 2022, the District contacted the Parent to invite to an IEP meeting scheduled for February 17, 2022. The Parent did not attend the February 17, 2022, IEP meeting. (S-40)
40. On February 27, 2022, the District issued a NOREP that proposed that the Student receive full time autistic support, speech and language services three times a week for 30 minutes a session, physical therapy two times a week for 30 minutes a session, occupational therapy two

times a week for 30 minutes a session, a (PCA) for 6.25 hours per day/ five days a week and transportation two times per day for 5 days a week, curb to curb with a bus aide and ESY. The Parent did not respond to the NOREP. (S-41; N.T. 70, 115, 118)

41. In March 2022, an ODR Hearing Officer concluded that the District violated the Student's right to a FAPE. After a consideration of what was characterized as the Parent's unreasonable actions and inactions, the Hearing Officer awarded the Student some compensatory education and Ordered the District to issue a permission to evaluate the Student. (P-74, P-75, P-76, S-43, S-45, S-46, S-47; N.T. 113)
42. From August 23, 2021, until April 4, 2022, the special education teacher sent messages to the Parent through the District's app used for communication. The Parent did not reply. (S-18, N.T. 54)
43. During the 2021-2022 school year, the District initiated curb-to-curb transportation in a small van with a female aide, for the Student. After weeks of non-attendance in school, consistent with District policy, transportation was not sent to the Student's home. After transportation ceased, the Parent had no communication with the District. After Student's participation in live virtual instruction in January 2022, the District resumed transportation. After two school weeks of non-attendance, the District stopped the transportation. (P-90, P-96; N.T. 261, 267-305).
44. On April 6, 2022, the Parent disenrolled the Student from the District. A District special education teacher or psychologist granted approval for the proposed program. The District home education policy and documentation provided to the Parent indicated the District may loan planned courses, textbooks, and materials to the supervisor of home education. The District does not typically loan materials to students for

home education and did not supply the Parent with materials . (P-77, P-78, P-79, P-86, S-44; N.T. 112, 119-121)

45. On April 8, April 18, and April 28, 2022, consistent with the Hearing Officer Order of March 2022, the District issued prior written notice to Parent to reevaluate the Student. The Parent did not respond. (P-74, P-75, P-76, S-45, S-46, S-47; N.T. 113)
46. During the 2021-2022 school year, the Parent provided no medical documentation or notes to excuse the Student's absences from school. (N.T. 257)
47. During the 2021-2022 school year, the Student did not attend school in the District, except during January 2022, when virtual-live instruction was provided to all students for health and safety reasons. (N.T. 48-50, 100-101)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

The Burden of Proof

The burden of proof consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing

Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 199 (3d Cir. 2004). In this case, the Parent is the party seeking relief and must bear the burden of persuasion.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. See, *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). See also, generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

I find that all witnesses testified credibly and shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. To the extent that witnesses recall events differently or draw different conclusions from the same information, genuine differences in recollection or opinion explain the contradictions. This does not mean that I assign equal weight to all testimony. Hearsay, no matter how fervently believed by the witness, cannot form the basis of this decision. Further, in this case, portions of the Parent's testimony were speculative in nature. The

contradictions between the Parent's testimony and the testimony of District employees were notable. To the extent that my findings of fact are derived from testimony alone (as opposed to documentary evidence or a combination of both), the weight that I assign to each witness's testimony is reflected in my findings of fact.

General IDEA Principles: Substantive FAPE

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "reasonably calculated to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. The United States Supreme Court in *Endrew F. v. Douglas Cnty* confirmed this long-standing Third Circuit standard. *Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew* decision was the Court's first consideration of the substantive FAPE standard since the *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982). In *Rowley*, the Court found that a LEA satisfied its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id.* The Third Circuit consistently interpreted *Rowley* to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. See *T.R. v. Kingwood Township Board of*

Education, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew* decision is no different. A school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. See *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), cert. denied, 488 U.S. 925 (1988). However, the meaningful benefit standard requires LEAs to provide more than "trivial" or "de minimis" benefit. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), cert. denied 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome or a specific level of achievement. See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). In *Endrew*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than de minimis" standard, holding that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

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 might warrant a remedy if they resulted in a “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). In order to establish a violation of § 504 of the Rehabilitation Act, the filing party must prove that (1) she is “disabled” as defined by the Act; (2) she is “otherwise qualified” to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) she 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 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*. Further, the substantive standards for evaluating claims under Section 504 and the ADA are essentially identical. *See, e.g., Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those two statutes, particularly when considered with claims under the IDEA. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child’s educational program is not appropriate or that they are receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy.

Parent’s Claims

For many years, this Parent has advocated for the rights and needs of this Student, as evidenced by the complaints filed with ODR and PDE.⁸

⁸ (S-1, S-13, S-43, S-48)

However, during the 2021-2022 school year, except for a brief period in January 2022 when the District provided synchronous-virtual programming to all students, this Student did not attend school. The Parent disenrolled the Student from the District in April 2022. The current dispute and all attendant claims stemmed from the District's offer of FAPE for the 2021-2022 school year that refused the Parent's request that the District provide the Student with full-time synchronous, remote educational programming. The operative IEPs raised no other concerns regarding appropriateness. The denial of enrollment in the OA by the District because Student required full-time special education with services only available in the assigned building, gave rise to several issues presented by the Parent that now need disposition. Based on the evidence adduced at this hearing, the Parent has failed to establish by a preponderance of the evidence that the District denied Student a FAPE.

The Parent contended that the District's refusal to provide the requested remote instruction to the Student during the 2021-2022 school year, although its operations resumed in person, constituted a denial of FAPE. In support of this contention, the Parent introduced the District's health and safety policy, a completed District survey expressing a preference for Student to receive remote as opposed to in-person instruction, and summaries from Student's medical appointments. Although the District adopted a policy to meet the needs of its students through in-person and remote instruction, this in no way obligated the District to guarantee that the Parent's preference for in the home, synchronous, special education instruction would be heeded. Consistent with its health and safety plan, early in the school year, a meeting occurred with the Parent to address programming for the 2021-2022 school year. At the IEP meeting, the Parent was present, with an advocate, and the request was discussed along with the intended structure of the online academy (OA). OA, as offered and implemented, was fully asynchronous, unlike the synchronous

instruction that occurred the previous school year and slated for unique periods where health or safety conditions necessitated District closure. Through the OA, no live instruction was provided to students, and independent completion of academic requirements was expected. Special education students that elected OA received IEP-mandated special education services at a District building and then returned home for the remainder of educational programming. Because of profound communication, self-care, social, emotional, behavioral and cognitive regulation needs, this Student required full-time autistic support with intensive instruction and support throughout the entire school day. This Student was unable to participate in OA as structured and delivered. The implementation of programming through OA would result in Student missing all special education services since they were provided in the assigned school building. As structured and implemented was not appropriate for the Student.

Through testimony and evidence, the Parent appears to contend that the District had an obligation to provide the Student with the same type of synchronous remote programming delivered during COVID closures in a previous school year and for a few weeks in January 2022. That programming consisted of live educational instruction and services, followed by periods of independent work to be completed by a student. The Parent's insinuation that obtained mask and COVID testing exemptions created a responsibility for the District to continue to offer remote instruction were not supported by the evidence. The Parent presented no updated medical evidence or persuasive testimony to support this claim. The medical documentation from 2020 merely indicated a mask exemption was available to the Student and provided no further information or detail. Although the 2021 note strongly cautioned against intranasal testing, it also suggested that, if necessary, testing should be introduced gradually. Neither of the notes suggested that Student could not attend school in person, needed

remote instruction or recommended an alternate educational setting. On the contrary, the physician's notes made recommendations for in-person, school-based services.

Furthermore, synchronous remote instruction was not a programming option available on demand to District residents. Adjusting the OA program to meet the Parent's request required a change to the program's design from asynchronous to synchronous, necessitating a fundamental alteration and resulting in an entirely new program with different staffing, structure, mode of instruction, and instructional materials. The District's refusal to create and deliver new programming to the Student unavailable to other students was not a denial of FAPE. 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). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Instead, the law demands services are reasonable and appropriate in light of a child's unique circumstances and not necessarily those that their "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).

On numerous occasions, after it offered in-person educational programming, the District attempted to reevaluate the Student, schedule meetings with the Parent to address attendance issues and maintain open lines of communication, all in vain. The last offered IEP was slated to provide a full school day PCA, curb-to-curb transportation with a bus aide to assist the Student, and responsive educational programming, with an array of related services. The Parent's decision to withhold the Student from school,

and disenroll at the end of the school year cannot be attributed to the actions of the District.

Concerning the other claims raised in the Complaint, the Parent has failed to establish by a preponderance of the evidence that the District failed to offer a FAPE to enable Student meaningful participation in educational activities and access to education benefits. *Ridley Sch. Dist. v. M.R.*, 680 F.3d at 280-81 (3d Cir. 2012). All operative IEPs for the 2021-2022 school year included a 1:1 aide or “PCA” for 6.25 hours per day daily. The Parent presented no evidence that indicated that a 1:1 was not provided or readily available for support pursuant to Student’s IEP during the school year. The District offered and made available appropriate transportation as outlined in the Student’s IEPs. However, the Student did not attend a single day of in person instruction, culminating in dis-enrollment by the Parent. Last, although the Parent received approval to home-school the Student, the District’s refusal to provide the requested educational materials was not a denial of a FAPE.

Finally, the Parent alleged that the District intentionally discriminated against the Student in violation of Section 504 of the Rehabilitation Act. This record does not support that claim. As noted above, this claim requires a showing of a deliberate choice. The evidence does not suggest that the educators involved with this matter consciously chose to deprive Student of disability-related protections. The District did not discriminate against the Student on the basis of disability.

CONCLUSION

The Parent wants to maximize the child's opportunity to succeed. That desire is admirable. As noted above, however, a school district is not required to provide the "best" program, but one that is appropriate in light of a child's unique circumstances. *Andrew F., supra; Ridley, supra; Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989) (observing that the law demands "provision of an education that is 'appropriate,' not one that provides everything that might be thought desirable by "loving parents."") (Citations omitted.)

ORDER

In accordance with the findings of fact and conclusions of law as set forth above, the District met its obligations to provide or to propose special education programming that provided a free appropriate public education to the Student in the 2021-2022 school year. This District did not discriminate against the Student on the basis of disability. Any claim not explicitly addressed in this decision and order is denied and dismissed.

Joy Waters Fleming, Esq.

Joy Waters Fleming, Esq.
Special Education Hearing Officer

December 5, 2022