

*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

## DECISION

Child's Name: C. B.

Date of Birth: [redacted]

Dates of Hearing: 10/1/2015, 11/17/2015, 1/11/2016, 1/12/2016 and 2/18/2016

CLOSED HEARING  
ODR File No. 16749-15-16

Parties to the Hearing:

Representative:

Parents  
Parent[s]

Parent Attorney

Local Education Agency  
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Date Record Closed:  
Date of Decision:

March 18, 2016  
April 4, 2016

Hearing Officer:

Charles W, Jelley Esq. LL.M.

## INTRODUCTION AND PROCEDURAL HISTORY

The Student, (Student)<sup>1</sup> is an elementary age student in the School District (District) who the Parties agree is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> The Student's Parents filed a due process complaint against the District asserting a denial of a Free Appropriate Public Education (FAPE) under the IDEA, its implementing regulation, the state Chapter 14 regulations implementing the IDEA, and claims of discrimination and denial of a FAPE pursuant to Section 504 of the Rehabilitation Act (Section 504).

The case proceeded to a due process hearing convening over several sessions, at which the parties presented evidence in support of their respective positions. To remedy these alleged violations the Parents now seek an Independent Education Evaluation (IEE) and, compensatory education for the 2014-2015 [and] 2015-2016 school years. Previously, this hearing officer denied the Parents' claims for a denial of a FAPE and discrimination for the 2013-2014 school year as barred by the IDEA statute of limitations. The District denied the Parents request for an IEE and as such, they accepted the burden of proof on that issue.

I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the School did provide the Student a FAPE in all areas of academic needs; however, the District failed to assess the Student's Physical Therapy (PT) needs and provide a FAPE in Physical Education. As a consequence, of the failure to fully assess the Student's unique needs and provide a FAPE I find the District violated the IDEA and also discriminated against the Student based solely upon the Student's disability. The failure to assess the Student caused the Student to be isolated and segregated from peers in violation of Section 504. Accordingly, for the reasons set forth herein, the District shall fund an IEE in Physical Education (PE) and PT; the Student is also awarded compensatory education for the failure to provide a FAPE. I also find that the remedy of compensatory education compensates the Student for any equitable relief for violations of Section 504.

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. References to the Parents are used to mean both Parents as well as when it appears that Student's mother, who at all times was acting on behalf of both Parents.

<sup>2</sup> 20 U.S.C. §§1400-1482.

## **ISSUES**

1. Whether the District provided the Student a Free Appropriate Public Education, in the Least Restrictive Environment, for the 2014-2015 school year?
2. Whether the District provided the Student a Free Appropriate Public Education, in the Least Restrictive Environment, for the 2015-2016 school year?
3. Did the District conduct a comprehensive evaluation of the Student in all areas of unique need? If not, are the Parents entitled to an Independent Education Evaluation?
4. Did the District discriminate against the Student, in violation of Section 504, during the 2014-2015 school year?
5. Did the District discriminate against the Student in violation of Section 504, during the 2015-2016 school year?
6. Did the District deny the Student a FAPE in violation of Section 504, during the 2014-2015 school year?
7. Did the District deny the Student a FAPE in violation of Section, during the 2015-2016 school year?

## **Findings of Fact**

### **Medical Concerns and the Car Accident**

1. At [a younger age], the Student was struck by a speeding motor vehicle (Complaint, p.4). The violent collision caused the Student to suffer internal bleeding, broken bones, and a Traumatic Brain Injury (TBI). To relieve the pressure on Student's brain and spine the Student's physician performed a right frontal craniotomy (Complaint, pp.4-5).
2. After a stay in a rehabilitation hospital, as a result of the violent trauma, the Student was diagnosed with a Traumatic Brain Injury (TBI), a Learning Disability (LD), Attention Deficit Hyperactivity Disorder (ADHD), Autism, a Speech and Language Disorder, a Hearing Disorder, a Visual Disorder, a Reading Comprehension Disorder, a Written Language Disorder, and, a Math Disorder (Complaint, pp.4-5). Several but not all of these above diagnoses are

disabilities within the meaning of the IDEA 20 USC §1400 *et seq.*, 34 CFR §300.1 *et seq.*

3. Several of the Student's diagnoses are disabilities also substantially limit the Student's major life functions, within the meaning of Section 504 34 CFR §104.1 *et seq.*
4. The District receives federal financial aid and does not dispute the Student's status as a person with a disability (HO#2, p.1).
5. On August 28, 2015, the Parents filed a Due Process Complaint requesting the instant due process hearing. The August 2015 Complaint alleges a 2012-2013 "child find" violation, an IDEA and Section 504 denial of a FAPE injury and a Section 504 discrimination injury (Complaint, pp.1-16). The Complaint contended the District "withheld" mandated "child find" information, that if true, would extend the date to file the 2012-2013 child find claims (Complaint, pp.1-11).
6. On December 30, 2015, the Hearing officer, granted the District's Motion to limit the Parents' 2012-2013 "child find," FAPE, and, discrimination claims, as they were filed untimely. The Ruling was previously provided to the Parties.

### **The Student enrolls in the District**

7. At the time of the car accident the Student, attended a private catholic school outside of the District (Complaint, pp.4-5). Upon discharge from a rehabilitation hospital, the Student returned to the catholic school on a part time basis (Complaint, pp.5-6). Staff at the rehabilitation hospital suggested the Student could benefit from participation in the statewide BrainSTEPS program (Complaint, pp.4-5). BrainSTEPS is a school-based program for children diagnosed with a TBI (Complaint, pp.5-6). Initially, the Parents sought help from the District and the [local] Intermediate Unit to provide BrainSTEPS support in the catholic school (Complaint, pp.5-6). Neither the District nor the Intermediate Unit would offer any support or services in the catholic school setting (Complaint, pp.5-6).
8. The Parents, in November of 2012, reluctantly enrolled the Student in the District (Complaint, pp.5-7). Upon enrollment in the District, the Parents signed a Permission to Evaluate (PTE) (Complaint, pp.5-7). At the same time, the Parents provided the District with the discharge summary from the rehabilitation hospital (P#16). Also upon enrollment the Student's physician placed Student on medical homebound instruction (Complaint, pp.5-7).

## **The Initial Evaluation**

9. On February 1, 2013, the District completed the initial IDEA eligibility Evaluation Report (ER). The ER notes the Student's preinjury First Grade Reading and Math test scores placed Student in the Below Basic to Proficient range (S#6, 6-7).
10. The Speech and Language Therapist administered the Clinical Evaluation of Language Fundamentals 4<sup>th</sup> (CELF-4) the Student's Standard Scores (SS) ranged from 81 to 91 (SD#2 p.7). The Student's CELF-4 SS were in the Below Average range (SD#2 p.7).
11. The Speech Therapist also administered the Test of Problem Solving Elementary 3 a standardized assessment that provides information on the Student's ability to solve problems and reasoning skills. The Student's SS ranges from 83 to 112 (SD#6 p.9).
12. The Speech and Language Therapist recommended the Student receive Speech Support to address the Student inability to follow single, and multi-step directions and to improve comprehension of text (SD#2, p.10)
13. The Occupational Therapist (OT) administered the Berry Buktenica Developmental Test of Visual Motor Integration 6<sup>th</sup> Edition (SD#6, p.11-12). The Student earned an Average SS of 93 (S#6, p.12). When handwriting skills were assessed, the Student scored in the Average range (S#6, p.12). Based upon the two assessments the OT concluded the Student did not require OT in the School (S#6, p.12).
14. On the Wechsler Intelligence Scale for Children 4<sup>th</sup> Edition (WICS 4), a measure of general ability, the Student earned a full scale I.Q. of a 82, placing Student in the Low Average Range; the Student's SS ranged from 74 to 96 (S#6, pp. 13-14).
15. On the Wide Range Assessment of Memory and Learning 2<sup>nd</sup> Edition (WRAML-2), a standardized test that assesses immediate and delayed memory ability, along with the acquisition of new learning, the Student SS ranged from 62 to 103 (S#6, p.15).
16. The results of the WRAML-2 indicate the Student has difficulty with concentration, organization, and is weak at identifying details from stories (S#6, pp.15-16).
17. On the Wechsler Individual Achievement Test-3<sup>rd</sup> Edition (WIAT 3), an assessment of overall achievement, the Student's Listening Comprehension, Oral Comprehension, Word Reading, and Pseudoword Decoding SS were in the Average. The Student's Oral Reading Fluency, Accuracy, and Rate SS of 81, 84, and 81 were all in the Below Average Range (SS#6, pp. 16-17).
18. Seven out of eight of the Student's WIAT 3 Written Expression SS were in the Average Range (S#6, p.18).

19. In Math, the Student's Math Fluency -Addition SS of 64, was in the Low Range, the Math Fluency SS of 74, and a Numerical Operation SS of 73 were both in the Below Average Range. The Student's Math Fluency Multiplication SS of 90 and, Math Problem Solving SS of 86 were also in the Average Range (S#6, p.18).
20. On the Behavior Assessment System for Children (BASC) Second Edition, a measure of social and emotional skills, the Student scored in the Average Range (S#6, pp.19-20). On the Behavior Rating Inventory of Executive Functioning (BRIEF), a measure of emotion self-control, goal directed behavior, and organizational skill, the Student's scores were not clinically significant (S#6, p.20).
21. On the Adaptive Behavior Assessment System (ABAS) Second Edition the Student's General Adaptive Composite SS of 85 placed Student in the Below Average Range, the Conceptual SS of 74 placed Student in the Borderline Range, while the SS of 100 in Social and SS of 98 in Practical skills were Average Range (S#6, p.21).
22. The Permission to Evaluate (PTE) required the District to conduct a Physical Therapy (PT) evaluation of the Student's motor skills (S#6, p.12). The ER notes the District did not receive a physician's prescription; therefore, the PT motor skills evaluation was never completed (S#6, p.12, NT p.1248).
23. The ER evaluation team concluded that the Student qualified for special education as a Student with a Traumatic Brain Injury (TBI), with a Speech and Language Impairment, and a Hearing Impairment (S#6, p.24).
24. The ER notes the Student struggles to shift attention from task to task, and even has significant difficulty focusing on a given task in the classroom setting (S#6, p. 22).
25. Academically, the Student demonstrated average Word Reading abilities; however, the ER notes Student's Basic Reading skills were not well developed (S#6, p. 22).
26. The ER notes the Student needs to improve Witten Expression in the content areas of Focus, Organization, and Mechanics. (S#6, p.22).
27. The ER states the Student needs to improve Math facts and ability to complete problems using the required operation and problem-solving skills (S#6, p.22).
28. On February 5, 2013, the Student's concussion and head trauma specialist recommended the Student leave class or activities five minutes before other students to avoid hallway congestion and incidental contact (S#7).
29. On February 8, 2013, the Student's physician released Student to return to school with the above restrictions (S#8).
30. On February 18, 2013, an Addendum was added to the ER stating, the Student was restricted from all participation in Physical Education (PE), recess and

prohibited the Student from participating in youth sports. The Addendum also noted the Student should gradually return to a full day of school (S#10).

### **The First IEP**

31. In the spring of 3rd grade, subject to the medical restrictions, the Student returned to a full day of school (Complaint, pp.5-7).
32. On February 18, 2013, the same day the evaluation team updated the ER, the 3<sup>rd</sup> Grade Individual Education Program (IEP) team, including the Parents, a special education teacher, a regular education teacher, the Audiologist, the Speech-Language therapist, and a school administrator acting as the Local Education Administrator (LEA) developed the Student's first IEP (S#11). The IEP included Present Levels of Academic Achievement and Functional Performance (PLAAFP), listing Strengths, identified Weaknesses, set out the Student's Guided Reading levels, and the results of the Speech and Language assessment (S#11, pp 4-8).
33. The IEP included two Speech Goals, a Reading goal, a Math goal with short-term objectives, along with 25 different Program Modifications and Specially Designed Instructions (SDI). The IEP noted that Speech and Language Support would occur one time a week for 30 minutes, and Audiology Services would be provided 15 minutes a quarter (S#11, pp. 16-19). Consistent with the physician's restrictions the Student did not participate in PE. On that same day, the Parents agreed with the District's Notice of Recommended Education Placement (NOREP) providing Itinerant Learning Support consistent with the goals, SDIs and services identified in the IEP (S#11, p.26).
34. On February 18, 2013, the District gave the Parents a Permission for Consultation, to exchange records with the [local] Intermediate Unit BrainSTEPS Team (S#12, pp.1-2). The BrainSTEPS Consultation was not identified in the District's PTE, the IEP, or the ER (S#12).
35. To monitor the BrainSTEPS Consultation, the IEP team scheduled a follow up meeting for May 11, 2013 (S#12, p.1). The record does not identify if the May 11, 2013 meeting ever took place.
36. On April 3, 2013, the Parents contacted the BrainSTEPS program director to get a better understanding of what BrainSTEPS could and could not offer the Student or the IEP team (P#32 p.1).
37. On November 1, 2013, some eight months later, the District acknowledged receipt of the BrainSTEPS record release from the Parents, the Parents contend they returned the BrainSTEPS release in February of 2013 (S#12, pp.4-5).
38. On February 27, 2013, the Parents notified the school the Student would leave school during the day to attend private OT services (S#15, p.1).

39. In the Spring of 2013, on the Pennsylvania System of School Assessment (PSSA) the Student scored Basic in Math and Below Basic Reading (S#16).

### **The First IEP Progress Report**

40. Exhibit 17 summarizes the Student's progress from February 2013 of 3<sup>rd</sup> Grade to October of 2013 of 4<sup>th</sup> Grade(S#17). The Student word count per minute (WCPM) reading goal scores ranged from a low of 53 in February of 2013 to a high of 97 in October of 2013 (S#17, p.1). Although the Student did not master the WCPM reading goal, the Student's Fourth quarter 3<sup>rd</sup> Grade Progress Report notes the Student improved Student's WCPM score and achieved an accuracy average of 97% on three consecutive bi-weekly probes (S#17, p.1). When given a series of third Grade level Math Computation problems the Student scores ranged a high of 13 on two probes to a low of six on three probes (S#17, p.2).
41. The Speech and Language therapist noted the Student's ability to follow three step commands with and without visual supports and Student's ability to listen and recall improved (S #17, p.3).
42. Unlike the other services, the Progress Report lacks a progress note for Audiological Support (S#17).

### **Participation in Integrated versus Segregated Physical Education**

43. During 3<sup>rd</sup> Grade based on the physician's letter of medical restrictions, the Student did not participate in PE class (S#18, p.6, P#19, p.19).
44. It is the District wide policy when a student is excused from more than one fitness period or from one week of recess the student must provide a note from a physician stating the reason for the excuse, along with a statement of what activities are restricted and the duration of the restriction must be provided to the school nurse. Normal day-to-day physical activity cannot resume without an updated physician's statement (HO#2). Even when the student is excused from participation in the PE activity, the student must attend the fitness class unless otherwise stipulated by a physician (HO#2, pp.18-19).
45. On June 26, 2013, the Parents informed the District the Student's physician was seeking a list of activities the Student would perform in the regular PE class. The Parents' email also stated the doctor was revising the Student's 2013-2014 list of restrictions (S#18, pp.1-2).
46. On July 30, 2013, the District provided the Parents a list of nine regular education physical education skills that all students are expected to perform in 4<sup>th</sup> Grade PE class (S#18, p.2).



47. On August 27, 2013, the Parent informed the District the Student would be cleared to participate in almost all regular PE activities and Recess, but for contact sport, sports played with a ball, and no rope climbing (S#18, p.3).
48. On August 27, 2013, after reviewing the list provided by the District the Doctor cleared the Student to participate in regular PE class in jump rope, golf (putting only), and, fitness testing. The clearance to participate in PE noted the Student should not participate in sports activities with a risk of being hit in the head with a ball (S#18, p.6).
49. The physician's letter fully released the Student to participate in Recess without any restriction and the record notes the Student no longer needed to use a [protective device] in school (P#34, p.1). The physician's letter also stated the Student was cleared to walk to and from classes with other children; however, the Student should not participate in activities that have the risk of falling on Student's head, and the Student should avoid activities that create the risk of running into another child (S#18, p.6).
50. On August 28, 2013, the PE teacher emailed the physician seeking clarification of what class participation restrictions should remain in place. The PE teacher expressed a concern noting "I need to know how restricted [Student] is from getting hit with a ball" (S#18, pp.1-2).
51. When 4<sup>th</sup> Grade began with the assistance of an aide, from the Learning Support (LS) class or the LS teacher, the Student participated in the regular PE class, without a safety incident (Complaint, pp.6-8; SD #18, NT p.449, NT p. 1221).
52. On September 5, 2013, the Parents, the regular education teacher, the special education teacher, the PE teacher, the nurse, and, the Principal met to review the physician's letter (S#18, p.17).
53. On September 10, 2013, the PE teacher provided the Parents with another list of regular PE skills for the 1<sup>st</sup> quarter (S#18, pp.23-24).
54. From October 2, 2013, through December of 2013 the Parents and the District were in constant communication about the Student participating in the PE class and Recess.
55. On October 1, 2013, the physician provided the District with an Addendum stating the Student could participate in PE activities using a soft ball, similar to a Nerf-ball (P#19, p.6).
56. On November, 4, 2013, the PE teacher provided the Family with another list of six regular education activities including a soccer unit, a pillo polo unit, a volleyball skill unit, a basketball and floor scooters unit (S#18, pp.34-50).
57. On November 8, 2013, the physician provided the District with an Addendum releasing the Student to participate in jump rope, golf putting, and, physical fitness, and activities that involve the use of a soft ball, similar to a Nerf-ball (S#18, p.33). The November 8, 2013, Addendum stated the Parents should

- “actively participate in deciding what activities are appropriate for the patient,” (S#10, p.6).
58. At some point between October 2, 2013, and November 19, 2013, the special education teacher and the aide stopped attending the regular physical education class. None of the witnesses were certain who directed the aide and the teacher to provide support in the Physical Education class and none of the witnesses could testify as to who directed the staff to stop attending the PE class. The decision to provide and discontinue the supplemental support services of the aide or the teacher in regular PE class was not made by the IEP team (NT pp.1282-1284).
  59. The Parents removed the Student from school to attend private therapies and to avoid any further entanglement with the District each school year at issue (S#50, S#59, NT pp. 123-124, NT p.233, P#28, P#46).
  60. On August 31, 2015, the Student’s physician provided the District with a letter stating the Student was fully cleared to participate in PE class (P#19, p.8).
  61. On September 4, 2015, the Student’s physician provided the District with a letter stating the Student was fully cleared to participate in soccer class (P#19, p.8).
  62. On September 11, 2015, the Student’s physician provided the District with a letter stating the Student was fully cleared to participate in all activities listed for 6<sup>th</sup> Grade PE class for the 2015-2016 school year (P#19, p.8).
  63. Although the District received the letter from the physician releasing the Student to participate in regular PE, on September 11, 2015, the Student was removed from regular PE and placed in a typing class (S#53).
  64. Although, in 6<sup>th</sup> Grade the Student was cleared to participate in regular PE class the District never held an IEP meeting to modify the SDIs, or issued a NOREP to discuss the change in placement or review progress in the APE class (P#19, S#60, S#40, S#47, S#51, S#53)
  65. On January 28, 2016, January 29, 2016, and February 1, 2016, the Student was denied an opportunity to participate in indoor recess in violation of the IDEA and Section 504 (S#61).
  66. The BrainSTEPS program does not assist schools in developing APE programs (NT 407).

### **The Second IEP in 4<sup>th</sup> Grade**

67. On February 17, 2014, the IEP Team met to develop the Student’s 4<sup>th</sup> Grade-5<sup>th</sup> Grade IEP. The PLAAFP noted when the Student was now using 4<sup>th</sup> Grade materials (S#21, p.8).
68. The Student’s local benchmarks scores, from the Fountas and Pinnell Reading level were at Level Q, Level Q represents mid-4<sup>th</sup> Grade Reading levels. The

- PLAAFP stated the Student could read 73 Words per Minute (WPM), with a 97% accuracy level; however, the Student's Comprehension was limited. Typical Students in 4<sup>th</sup> Grade are expected to read 110 WPM (S#21, p.8).
69. The IEP provided anecdotal information about the Student's Writing level and the Student's participation in the co-taught Math class (S#21, p. 8).
  70. The PLAAFP noted improvement in Speech and Language skills (S#21, p.9).
  71. The 4<sup>th</sup> Grade IEP included two Speech goals, one 3<sup>rd</sup> Grade level reading WPM goal, noting baseline to be determined (S#21, p.17). A 4<sup>th</sup> Grade level Math goal, noting baseline to be determined, a 4<sup>th</sup> Grade level Math Concepts and Applications goal, a Writing goal, and, a Reading passage Comprehension goal (S#21, pp.18-19). The IEP listed 30 SDIs and Modifications with Adapted Physical Education (APE) as an SDI (S#21, pp.22-23). Speech-Language and Audiology Services remained at the same levels (S#21, p.23).
  72. On November 19, 2013, the District agreed to provide special education, SDIs and an APE class to meet the Student "physical education needs" once a week for 40 minutes. The 40-minute APE class was scheduled to be provided on either Tuesday or Thursday, during the Student's homeroom period (S#19, pp.1-2, S#19, p.17, S#19, p.19). Next, the District offered to provide additional Math Intervention support four days a week for 20 minutes. The IEP increased the Student's Learning Support class from 40 to 140 minutes a week, and, added daily Math Instruction in a co-taught setting along with a modified curriculum and adapted assignments (S#19, pp.1-2). The District also agreed to provide Speech Support for 30 minutes a week, consultative Hearing Support 15 minutes a quarter, a Reading Intervention Support class four days a week for 40 minutes (S#19, pp.1-2).
  73. The 4<sup>th</sup> Grade IEP Team updated the IEP to address the Student's academic needs in Reading Comprehension/Fluency, Math Fact Fluency, Math Concepts Math Application, Written Expression (S#19, pp-6.5). The Math goal was revised to reflect 4<sup>th</sup> grade level Math Concepts and Applications. For the first time a Writing Goal was added, along with a Reading goal to address Reading Comprehension skill development as opposed to just measuring the existing Reading WCPM goal (S#19, pp.7-8). The Parents approved the revisions when they executed the NOREP (S#19, p.15, S#21, p. 31).
  74. The IEP identified the APE class as an SDI (S#19, p.9). The staff testified that APE was a modification to the curriculum (NT pp.440-441).
  75. Neither the first IEP nor the initial ER noted that the physical education teacher ever assessed the Student's fundamental motor patterns or skills, the Student's physical fitness levels, or identified the Student's present levels in the regular PE curriculum (NT p.480, S#19).
  76. The Student's regular physical education class met for 40 minutes once a week. The PE teacher testified that contrary to the IEP the Student's APE class met

- for 20 minutes one time per week and the Student was removed from regular education classwork to participate in PE class ( NT p.486).
77. The Student described the APE class as “solitary” (NT p.85).
78. When asked to recall why the aide and the LS teacher stopped attending regular PE with the Student, the PE teacher testified “I think that is what my memory recalls from what that is, is we can't keep pulling people from lunches, which is against contract and other responsibilities that they currently have and are scheduled for.” (NT pp.440-441).
79. None of the District witnesses could explain who made the decision to reduce the Student’s previous regular PE class participation time from 40 to 20 minutes per week, or who made the decision to remove the Student from homeroom. Neither the reduction in APE class time nor the removal from homeroom was recommended by the IEP team or the physician (S#19, NT pp.486-488).
80. The Parents and the Student both wanted the Student to participate in the regular physical education class with typical peers (NT pp.461-463).
81. Although the PE teacher has 13 years of teaching experience, he never provided services to a child with a TBI. The PE teacher testified he was not aware of several common APE assessment protocols (NT p.407, NT p.437).
82. The IEP team did not seek input from a PT about the Student’s present levels, the appropriateness of the APE activities, or how the IEP should modify, the PE class with supplemental aids or services (NT pp.1180-1181).
83. The IEP does not include baseline data, goals, objectives SDI’s or a schedule for progress monitoring for the time the Student was placed in the one-on-one APE class (S#11, p.2, S#19, pp.5-6, NT p.1179).

### **The Second Progress Monitoring Report**

84. School District Exhibit 20 summarizes the Student’s progress monitoring from October of 2013 of 4<sup>th</sup> Grade to December of 2013 of 4<sup>th</sup> Grade (S#20). The Report notes the Student’s baseline scores improved. Unlike Exhibit 17, the 4<sup>th</sup> Grade Progress Monitoring did not report Speech-Language progress.

### **The Student’s Independent Education Evaluation**

85. On February 19, 2014, the Student participated in an Independent Education Evaluation (IEE) at [a Medical] Center (S#23). On the Wechsler Abbreviated Scale of Intelligence Second Edition (WASI II) the Student earned a Full Scale I.Q. of 86 (S#23, p.7). The evaluator noted that the Student’s verbal and non-verbal reasoning skills were impacted by the TBI (S#21, p.7).

86. On the Woodcock Johnson Achievement Test Third Edition, the Student earned a SS of 82 in Broad Reading, a SS of 82 in Broad Written Language, a SS of 88 in Mathematical Calculations. On the Rey Complex Figure Test, the Student scored in the 1<sup>st</sup> percentile. On the Berry-Buktenica Developmental Test of Visual-Motor Integration (VMI), the Student scored in the 5<sup>th</sup> percentile and on the VMI-Visual Perception Test, the Student scored at the 81<sup>st</sup> percentile, in the High Average Range. The evaluator suggested the Student's scores reflect the Student has a visual-motor integration weakness rather than a simple-visual processing weakness (S#22, pp.7-9).
87. On May 11, 2014, some six months after the acknowledged receipt of the Parents' consent, the District received the BrainSTEPS input into the Student's 4<sup>th</sup> Grade program. Rather than administer any assessments or conduct, a direct observation of the Student the consultant relied upon a Brain Injury Observation Form Teacher checklist scored by a third party. The BrainSTEPS letter summarized common difficulties for persons with a TBI and provided "general suggestions" that "MAY"(emphasis in original) be implemented for working with the Student (S#24, p.6).
88. On May 22, 2014, the IEP team met to review the BrainSTEPS report and the Parents IEE. After reviewing the IEE standardized test results and the BrainSTEPS letter the IEP team added additional SDIs into the Student's IEP (S#26, pp.19-24). The IEP stated that beginning in 5<sup>th</sup> Grade, the Student would receive an additional 20 minutes of Reading Support daily and would continue in the co-taught classroom for Math, Reading and Writing instruction (S#26, p.26).

### **The 5<sup>th</sup> Grade IEP 2015-2016**

89. On September 17, 2015, the IEP team met to develop the 5<sup>th</sup> Grade IEP. The PLAAFP included results from the District wide 4sight Reading testing, which placed the Student at the Below Basic level (S#37, p.7). In the District Reading curriculum, however, the Student advanced to 5<sup>th</sup> Grade level material with an expected level of performance of 99% accuracy with a baseline rate of 85 wpm Comprehension rate (S#37, p.8). The expected Reading rate for same age 5<sup>th</sup> Grade peers is 118 wpm. The 4<sup>th</sup> Grade Reading Comprehension goal was reported as mastered (S#37, p.8).
90. In Writing the PLAAFP notes, with the use of a graphic organizer, the Student can write a piece with a beginning, a middle and an end sentences (S#37, p.8).
91. In Math, the PLAAFP reported that the Student failed to meet standards in the following areas: Place Value, Patterns, using Symbols and Words with Math problems, and, using Operations to solve problems (S#37, p.8).

92. The Speech Therapist reported progress in sequencing, and, in following multi-step directions (S#37, p.8). Two new goals were targeted to address deficits in multiple word meanings, idioms and figurative language (S#37, p.9).
93. The 5<sup>th</sup> grade IEP included a 4<sup>th</sup> Grade WPM Reading goal, a 5<sup>th</sup> grade Comprehension goal, a Writing goal, a 4<sup>th</sup> Grade Math Computation goal, a 5<sup>th</sup> grade Math Concepts and Applications goal, 4 Speech goals, and, a Written Expression goal to learn how to produce a narrative, an informational or a persuasive writing piece (S#37, pp.19-24). The IEP identified 45 SDIs or Modification (S#37, pp. 25-30)
94. The IEP team increased Math Support, an additional 20 minutes each day, Reading Support for 20 minutes daily, along with an additional 40 minutes a week of Reading Support, APE was scheduled for one time per week, and, 30 minutes of Speech and Language Support per week (S#37, p.32). The IEP notes Math and Language Arts are in a co-taught classroom. The Parents disagreed with the NOREP noting a Due Process Hearing was in progress (S#37, p.40).
95. The Student's Reading Comprehension improved to the point that Student could work on 5<sup>th</sup> grade materials (S#40, p.6). In the area of Writing, the Student improved the ability to organize Student's thoughts to tell a story (S#40, p.6). The IEP notes that the Student should improve Students spelling skills (S#40, p.6).
96. In Math, using a multiplication chart, the Student met all standards for 5<sup>th</sup> Grade Math, and demonstrated improvement in Math Concepts and Applications (S#40, p.7).
97. The 5<sup>th</sup> Grade IEP included a 5<sup>th</sup> Grade Reading goal, two Math goals, a Writing goal, a Reading Comprehension goal, and, three Speech goals (S#40, pp.19-23). The IEP lists 37 SDIs and Modifications (S#40, pp.24-28). The Student continued to receive 20 minutes a day of Reading and Math support (S#40, p.30), and, 30 minutes of Speech Support per week (S#40, p.30). The 40 minutes per week of additional, Reading Support was eliminated (S#40, p.30). The Parents later approved the NOREP on February 13, 2015 (S#40, p.39).
98. Dissatisfied with the APE program, rather than take APE in 5<sup>th</sup> grade, the Parents asked the physician to recommend the Student be exempted from PE class (NT p.97, NT p.470). Rather than take APE, the Parents regularly came to the school to take the Student to outside OT therapy (S#50, S#60).

### **The Third Progress Report**

99. School District 43 summarizes the Student's progress from February of 2014, in 4<sup>th</sup> Grade to February of 2015 in 5<sup>th</sup> Grade. The Progress reports note improvement in Reading, 4<sup>th</sup> Grade Math Computation, Grade Level Math Concepts and Applications, Writing, 4<sup>th</sup> Grade Reading Comprehension and

Speech (S#43). The Student's raw scores or percentage scores improved in all of the above content areas (S#43).

### **The Permission to Reevaluate**

100. On February 24, 2015, the District issued a Permission to Reevaluate (PTRE) (S#42). On March 2, 2015, the Parents consented to the PTRE (S#42, p.4).
101. In March of 2015, the Parents provided the District with a Pediatric Ophthalmology Report noting the Student "skip lines while reading or while copying text" and displays trouble with 'spatial relations' (S#44, p. 2-4).
102. On May 29, 2015, the District and the Parents met to review the results of the District RR. On the WJ IV the Student's SS ranged from 78 to 94 (S#46, p.5). When the Speech Therapist administered the CELF-5, the Student scored in the Average Range with a SS range of 80 to 100 (S#46, p.6). On the Language Processing Test-3 Elementary, the Student SS ranged from 78 to 118 (S#46, p.8). In six out of seven Language Processing Test-3 subtests, the Student scored in the Average range (S#46, p.8). However, the Student's Association subtest, SS of 78 was considered Below Average for Student's age in sound symbol association and supplying correct answers within the classroom (S#46, p.8).
103. The RR included classroom based assessments from the LS teacher in Reading, Math, and, Written Expression. The RR noted the Student received Proficient Reading and Math scores on the 4sight Reading testing, and similar Proficient scores in Reading and Math using the Fountas and Pinnell measurement. On the statewide PSSA testing, the Student scored in the Basic range in Reading, Math, and Science. The RR included an observation by the Learning Support teacher and the school psychologist (S#46, pp.13-17).
104. To assess the Student's general ability level, the school psychologist administered the WISC IV, the Student earned a full scale I.Q. of 98 (S#46, p.17).
105. On the WIAT Third Edition achievement testing, the Student SS ranged from 80 to 109 (S#46, p.19). On the WIAT, the Student earned a Below Average SS of 80 for Sentence Completion, a Below Average SS of 81 in Math-Fluency, a Below Average score of 81 in Numerical Operations and, a Below average SS of 80 in Math Problem Solving (S#46, p.7).
106. On the Wide Range Achievement Test of Memory and Learning Second Edition the Student earned one High Average score of 114 in Verbal Memory, a Low Average SS of 82 in Visual Memory, and Average SS of 94 in Attention/Concentration, and a SS of 95 in General Memory (S#44, p.22).
107. To assess the Student's emotional and behavioral functioning the Parent and the teachers completed a Behavior Assessment System for Children –Second

- Edition (BASC-2) rating scale. The results indicate that the teachers and the Parents agree the Student has Functional Communication concerns (S#46, p.23).
108. On the Behavior Rating Inventory of Executive Functioning (BRIEF) an assessment of how a person manages, plans, organizes and shifts focus, both teachers rated the Student's Executive Functioning skills within normal limits, noting concerns with Self-Monitoring and Shifting Focus (S#46, p.24). The Parent on the other hand ranked Global Executive Functioning as a Clinically Significant elevated score (S#46, p.23).
109. On May 29, 2015, the IEP team met to develop an IEP for the remainder of 5<sup>th</sup> Grade and 6<sup>th</sup> Grade. The PLAAFP includes scores from the Fountas and Pinnell series, noting the Student reached a Level T reading placement, which is consider a 2<sup>nd</sup> quarter of 5<sup>th</sup> grade reading level (S#54). For the first time the District identified Level U, a 5<sup>th</sup> Grade 3<sup>rd</sup> quarter level of performance, as the Student's Reading Frustration Level (S#47, p.5).
110. The Student's PLAAFP reports the Student moved from Fountas and Pinnell at Level S, in November of 2014, to level T by March of 2015 (S#47, p.5). Although the Student's Reading Comprehension goal was mastered, the teacher concluded the Student still needed direct Reading instruction (S#47, p.5).
111. In Reading, the Student continued to need assistance in identifying the main idea, and in working with concepts like compare and contrast (S#47, p.6). When given a Writing prompt the Student earned a score of 9, which is the highest score rated, in 2 out of the 5 writing samples (S#47, p.7).
112. In 5<sup>th</sup> grade Math, when given a series of computation probes and no time limit the Student scored Below grade level (S#47, p.7). In Math Concepts and Applications, the Student performed inconsistently and continued to struggle with word problems (S#47, p.7).
113. In Speech, the Therapist reported the Student was now displaying Average Language Processing skills (S#47, p.9). When the Student's Social Language skills were probed, the Therapist reported that problem solving and understanding social situations that have more than one interpretation should be added to the goals (S#47, p.9).
114. The IEP included a 6<sup>th</sup> Grade Reading goal to read 145 WCPM, with a baseline of 126 WCPM (S#47, p.20). The Reading Comprehension and the Writing goal included objective measures of success and baseline data (S#47, p.20). The six Speech goals focused on listening, demonstrating understanding of word relationships and word replacement strategies (S#47, pp.23-26). The IEP included 36 SDIs and Modifications (S#47, pp.26-30).
115. For the first time, the IEP team proposed ending the 15 minutes, a quarter, of Audiological-Hearing Support, and instead proposed a three page Communication Plan. Instead, the Hearing Support would be provided in the



form of SDIs and modifications. The Communication Plan noted background noise in the hallways and in the classroom created a difficulty for the Student, in hearing peers in the hallway, the cafeteria and during group work (S#47, p. 36). The Parents disapproved the NOREP and requested a due process hearing (S#47, p.41).

### **The Fourth Progress Report**

116. School District Exhibit 49 summarizes the Student's progress in Writing, Reading, Math, and Speech from February of 2015, 5<sup>th</sup> Grade, to 5<sup>th</sup> Grade in May of 2015 (S#49). The Student's Reading goal, 5<sup>th</sup> Grade Math Concepts and Application goal, Writing goal, and Reading Comprehension performance improved from the previous school year (S#49, pp.1, 3-7).
117. School District Exhibit 56 summarizes the Student's progress from September of 2015 to January of 2016 of 6<sup>th</sup> Grade, in the Student's Reading WCPM goal, 6<sup>th</sup> Grade Reading Comprehension, 5<sup>th</sup> Grade Math Computations, Writing, and 6<sup>th</sup> Grade Math Concepts and Applications (S#56). The slope of the trend line in each graph for each goal notes improvement (S#56).
118. On December 7, 2015, the District notified the Parents the Student mastered the 5<sup>th</sup> Grade Math Computation Goal, upon receipt of the NOREP the Parents asked for an IEP meeting to review the 5<sup>th</sup> Grade Math Computation Goal data (S#60, p.8). The District is now proposing a measurable 6<sup>th</sup> Grade level Math Concepts and Applications Goal (S#60 p.13).

### **Applicable Legal Principals**

#### **Burden of Proof**

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise," then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>d</sup> Cir. 2012). In this case, the Parents asked for the hearing and thus bore the burden of proof. The outcome, in this is much more frequently determined by which party has presented preponderant evidence in support of its position. When the District denied the Parents request for an IEE the District assumed the burden of persuasion on the appropriateness of its evaluation (34 CFR §300.502, NT p.54, NT p.69).

## Credibility

During a due process hearing the Hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion, and conclusions of law. Hearing officers have the plenary responsibility to 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).<sup>3</sup> All witnesses appeared to be testifying honestly and to the best of their recollections.

There were no instances of conflicting testimony where a credibility determination was needed to establish a fact. Some witnesses were however more persuasive on some points, than others.

The Parents testified, about removing the Student from school for private OT services during the school day. They also testified about the basis for requesting the letter, from the physician, about excusing the Student from PE in 5<sup>th</sup> grade. In each instance, they testified that the early dismissal request was premised upon the Student’s negative statements about the APE placement. The District did not offer any testimony to rebut the testimony, and in fact, produced exhibits with the dates and the times of the early dismissals as evidence as of the number of times the Parent withdrew the child to explain the child’s progress. Therefore, based upon my observation of the witnesses, and, after reviewing the record as a whole, I accord substantial weight to Parent’s testimony, as to the reason for the Student’s early dismissal as my findings of fact attest. Both Parents demeanor and manner of answering questions on the early dismissal topic gave every reason to find each credible, candid and sincere. On balance, I find that Parents’ testimony represents their best recollection of events these factors affect the persuasive weight that I accord to Parents’ testimony. The record is clear that the Parents’ credibility was fully tested by vigorous cross-examination; it also leaves a record that is preponderant to the extent that I give weight to Parent’s testimony on this particular topic. Thus, all of the above findings are based upon a preponderance of the evidence. While some of the material evidence is circumstantial, none of the other witnesses contradicted the Parents, on that particular point, in the record. I conclude therefore that I can derive inferences of fact from the Parents’ restatement of Student’s school years combined with the evidence submitted by the District. In drawing inferences, I remain mindful that the Parents and to some extent the Student’s summary of events is given only

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<sup>3</sup> *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)

from their perspective of loving Parents trying to cope with the sudden educational, medical, and, life-style changes after experiencing the events of a violent [accident]. I am also mindful of a young person trying to adjust to a new way of learning, playing and living as a person with a disability.

## **IDEA Evaluations, Reevaluations, and Independent Educational Evaluations**

IDEA evaluations must meet the procedural requirements set out in the IDEA regulations at 34 CFR §300.301 through 34 CFR §300.311. The IDEA regulations contain provisions governing the initial evaluations 34 CFR §300.301, evaluation procedures 34 CFR §300.304, determination of needed evaluation data 34 CFR §300.305, determination of eligibility 34 CFR §300.306 (a)-(b), procedures for placement 34 CFR §300.306 (c), and, procedures for reevaluations 34 CFR §300.303.

The initial evaluation procedures at 34 CFR §300.301 through 34 CFR §300.305 differ slightly from the reevaluation procedures at 34 CFR §300.303 and the independent educational evaluation procedures of 34 CFR §300.502.

The evaluation and reevaluation regulations require districts to use a variety of assessment tools, and, strategies to gather relevant functional, developmental, and, academic data, about the child, in all areas of unique need, including information provided by the parent. The evaluation data will assist in determining: (1) whether the child is a child with a disability under 34 CFR §300.8, and (2) assist in developing the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum 34 CFR §300.320(4)(ii). The IDEA specifically prohibits the use of a one-test assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. 34 CFR §300.304 (b)(2).

Legally sufficient evaluations and reevaluations do not discriminate based on race or culture. 34 CFR §300.304 (c)(1)(i). Legally sufficient evaluations and reevaluations are administered in the student's native language in a way that will provide accurate information on what the child knows and can do academically, developmentally, and, functionally. 34 CFR §300.304 (c)(1)(ii). The assessment and other evaluation protocols are implemented in the way in which they were intended by the test maker, and administered by trained and knowledgeable personnel. 34 CFR §300.304 (c)(1)(iii) through 34 CFR §300.304 (c)(1)(v). The assessments tools and other evaluation protocols are tailored to address specific areas of educational need. 34 CFR §300.304 (c)(2). Assessment and evaluation protocols are selected and administered to ensure that if an assessment is administered to a student with impaired sensory, manual, or speaking skills, the assessment results accurately reflect

the students aptitude or achievement level or whatever other factors the test purports to measure. 34 CFR §300.304(c)(3).

The assessment of a suspected disability may include measures, if appropriate, of health, vision, hearing, social and emotional status, general intelligence, academic performance, achievement testing, communication skills, and motor abilities. 34 CFR §300.304 (c)(4). An evaluation or reevaluation must be sufficiently comprehensive to identify all of the student's special education and related service needs. 34 CFR §300.304 (c)(6). The assessment tools and strategies must provide relevant functional information that assists the IEP team in determining the educational and instructional needs of the student. 34 CFR §300.304 (c)(7). Test instruments must be technically sound to assess the relative contribution of cognitive behavioral factors, in addition to physical or developmental factors. 34 CFR §300.304 (b)(3). The evaluation or reevaluation report must include all existing evaluation data, classroom observations, and information provided by the parent. 34 CFR §300.305.

An IDEA reevaluation must meet the same requirements as an initial evaluation above; although, a reevaluation need not use identical evaluations or assessments included in the initial evaluation. A reevaluation, like an evaluation, must be tailored and individualized to the child. A reevaluation, like an evaluation, must take into account the student's then-current present levels, strengths, weaknesses, and functional present levels, and unique needs, thereby at times requiring the district to use different assessment and evaluation procedures. *Letter to Shaver*, 17 IDELR 356 (OSERS 1990).

Once identified as an eligible student under IDEA, the student must be re-evaluated periodically to make sure the student's IEP addresses the student's then current unique needs, strengths, weaknesses, and needs, at a minimum once every three years. (34 C.F.R. §300.303; 22 PA Code §§14.102(a)(2)(xxv); 14.124).

When the family of a student disagrees with the evaluation process, the evaluation report, or the reevaluation issued by a school district, the family may request an IEE at public expense. 34 C.F.R. §§300.502(a)-(b); 22 PA Code §14.102(a)(2)(xxix). When faced with a request for an IEE at public expense, the school district must either (a) provide the IEE at public expense or (b) file a special education due process complaint in defense of its evaluation. 34 C.F.R. §§300.502(b)(1)-(2); 22 PA Code §14.102(a)(2)(xxix). The District in this action has chosen the latter option to defend its evaluations within the context of the Parents' due process Complaint. Accordingly, the District assumes the burden of proof on the evaluation issue as an affirmative defense.

## IDEA Free Appropriate Public Education

The IDEA requires that a state receiving federal education funding provide a FAPE to disabled children. 20 USC §1412(a)(1); 20 USC §1401(9). FAPE is “special education and related services” at public expense, that meet state standards 20 USC §1401(9).

School districts must provide a FAPE by designing, implementing and administering a program of individualized instruction that is set forth in an IEP. 20 USC §1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” and “significant learning” in light of the student's “intellectual potential.” *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). In order to provide a FAPE, the child’s IEP must specify and provide specially designed instruction to meet the child’s unique needs and must be accompanied by such supplemental or related services as are necessary to permit the child to benefit from the instruction. *Board of Education v. Rowley*, 458 U.S. 176, 181-182 (1982). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3d Cir. 1996).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. *Ridley Sch. Dist. v. MR*, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program, aide, or service that parents desire for their child. *Ibid.* Rather, an IEP must provide a “basic floor of opportunity” for the child. *Mary Courtney T., v. School District of Philadelphia*, 575 F.3d at 251; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995).

The appropriateness of the program is judged prospectively; therefore, the lack of progress does not in and of itself render an IEP inappropriate. Its appropriateness must be determined as of the time at which it was made, and the reasonableness of the program should be judged only on the basis of the data either known or should have known to the school district at the time at which the offer was made. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *D.C. v. Mount Olive Twp. Bd. Of Educ.*, 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014). The IDEA requires each IEP to include a statement of the special education, related services, supplementary aids and services, along with a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance

appropriately toward attaining the annual goals. 34 CFR §300.320 (a)(4). The IEP must state the projected date for the beginning of the services and modifications described in 34 CFR §300.320 (a)(4), along with the anticipated frequency, location, and duration of those services and modifications. 34 CFR §300.329(a)(7).

## **Legally Required Elements of an IEP**

The IEP is the blueprint that describes the Student's strengths, the parent's concerns for advancing the education of their child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and, functional needs of the child. 34 CFR 300.324 (a)(1). Each IEP must contain: "A statement of the child's present levels of academic achievement and functional performance, including (i) how the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) 34 CFR §300.320(a)(1).

The IEP must contain individual measurable goal statements, in all areas of unique need, that address the student's academic and functional skills. Measurable goals enable the child to progress in the general education curriculum. The goals must also meet the child's other unique educational needs that result from the child's disability 34 CFR §300.320 (a)(2). Annual goals describe what a child can reasonably be expected to accomplish within a 12-month period. *Letter to Butler*, 213 IDELR 118 (OSERS 1988). IEP teams must write goals in a way that allows for an objective measurement of the child's progress toward achieving the annual goals. 71 Fed. Reg. 46,662 (2006). The description of annual goals should be specific enough to allow the district to determine whether the student made meaningful progress, and at the same time clearly describe what specific skills the child must learn in order to achieve those goals. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); 64 Fed. Reg. 12,471 (1999).

The IDEA requires each IEP to include a statement of the special education, specially designed instruction, related services, supplementary aids, and services, along with a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals. 34 CFR §300.320 (a)(4). The IEP must state the projected date for the beginning of the services along with the anticipated frequency, location, and duration of those services and modifications. 34 CFR §300.329(a)(7); 34 CFR §300.320 (a)(4)

## Essential Legal Elements of Progress Monitoring

Each IEP must include a description of (i) how the child's progress toward meeting the annual goals ... will be measured; and (ii) when periodic reports on the progress the child is making toward meeting the annual goals either through the use of quarterly or other periodic reports, at the same time the District issues report cards 34 CFR §300.320 (a)(3). Progress monitoring of the acquisition of the goal is critical when determining whether the Student is receiving meaningful educational benefit 34 CFR §300.320 (a)(3). The IDEA directs IEP teams to review and revise the student's IEP whenever it believes that a change in the IEP may be necessary in order to ensure FAPE. *Notice of Interpretation*, Appendix A to 34 CFR Part 300, Question 20 (1999 regulations). When a student with a disability is participating in the general curriculum, good report card grades may suggest an inference that the student has received a FAPE. *Rowley*, 458 U.S. 181-182.

## Special Education, Physical Education, and Adapted Physical Education

Special education means “specially designed instruction,” provided at no cost to the parents, that is intended to meet the unique needs of a child with a disability, including: (1) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (2) instruction in physical education. 34 CFR §§300.39 (a)(1). *Specially Designed Instruction* (SDI), on the other hand, is the strategic process of adapting the delivery of direct or differentiated instruction, as appropriate to the needs of an eligible student. SDIs can, include modifying the content, delivery, instructional environment, instructional equipment, or methodology of instruction to meet the unique needs of the child. SDIs ensure the child is provided access to the general education and, when necessary, the special education curriculum, thereby, enabling the child, to meet the educational standards that otherwise apply to all children. 34 CFR §300.30(b)(3).

The IDEA definition of “special education” includes a definition of Physical Education (PE). The IDEA defines PE as “(i) the development of (A) Physical and motor fitness;(B) Fundamental motor skills and patterns; and(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports); and,(ii) Includes special physical education, adapted physical education, movement education, and, motor development.” 34 CFR §300.39(2)

Adaptive Physical Education (APE) or Special Physical Education (SPE) is specially designed instruction for students whose disabilities prevent safe or successful participation in regular PE. 34 CFR §300.39 (a)(1); 34 CFR §300.39 (b)(3). The failure to provide SPE, APE or an equal opportunity to participate in regular PE may result in a denial of FAPE. *In re Educational Assignment of L. C.*, Spec.Ed.Op. No. 877 (February 12, 1999)(failure to provide special physical program denied the student a FAPE); *Diaz-Fonseca v. Commonwealth of Puerto Rico*, 45 IDELR 268 (1st Cir. 2006); *Foley Pub. Sch. Dist. #051*, 110 LRP 73222 (SEA MN 07/22/10); *Robbinsdale Indep. Sch. Dist. #281*, 106 LRP 47869 (SEA MN 07/28/06); and *Plainfield Cmty. Sch. Corp.*, 114 LRP 33089 (SEA IN 2014). Students with disabilities who can participate in regular PE, with or without supplementary aids and services, must be provided an equal opportunity to participate. *Letter to Irby*, 55 IDELR 231 (OSEP 2010); 34 CFR §§300.108 (b). Similarly, the Section 504 regulations also requires districts to provide eligible students with an equal opportunity to participate in a regular PE instruction in the LRE. 34 CFR 104.37(c). *Hemet (CA) Unified Sch. Dist.*, 54 IDELR 32 (OCR 2009), 34 CFR 104.37.

The IEP team, not a physician, is charged with the responsibility to determine, if and when, a student needs an APE, SPE or a regular PE program, with supplemental aids and supports, in the LRE. *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 54 IDELR 307 (7th Cir. 2010); *Merrill v. Enlarged City Sch. Dist. of Troy*, 61 IDELR 111 (N.Y. Sup. Ct. 2013) (*unpublished*), *Worthington City Schs.*, 66 IDELR 235 (SEA OH 2015). SDIs in PE class can include providing modifications like, wearing protective equipment, changing the rules, substituting walking for running, providing supplemental aids and services like an aide, modifying the size of equipment used, changing the size of the playing field or the extending the time limits. *Richard Springs Indep. Sch. Dist.*, 51 IDELR 144 (SEA TX 2008); *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 54 IDELR 307 (7th Cir. 2010); *City of Chicago Sch. Dist. 299*, 58 IDELR 148 (SEA IL 2011); *Plainfield Cmty. Sch. Corp.*, 114 LRP 33089 (SEA IN 04/09/14).

## **Section 504's Nondiscrimination Standards**

Section 504 states, in relevant part, “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. §794(a). The statute defines “program or activity” to include all of the operations of “local educational agency.” 29 U.S.C. §794(b)(2)(B). To prevail on a Section 504 discrimination claim parents must show the Student has a disability, is otherwise qualified to participate in a school program, and was denied the benefits of



the program or otherwise subject to discrimination because of their disability. *C.G. v. Pa. Dep't of Educ.*, 735 F.3d 229, 235 (3d Cir. 2013)

The IDEA on one hand governs the LEA's affirmative duty to provide a FAPE to disabled students, while Section 504 establishes a negative prohibition against depriving disabled students, based upon a disability a FAPE. *W.B. v. Matula*, 67 F.3d 484, 492-93 (3d Cir. 1995). The IDEA provides a remedy for "inappropriate educational placement decisions, regardless of discrimination," while Section 504 prohibits and provides a remedy for discrimination. *Hornstine v. Twp. of Moorestown*, 263 F. Supp. 2d 887, 901 (D.N.J. 2003) (although the student received a FAPE, the district's policy denying her valedictorian status was nonetheless discriminatory under Section 504).

### **Section 504 Denial of a FAPE and LRE Requirements**

The Section 504's implementing regulations provide a detailed scheme for fashioning a FAPE for students with a qualifying Section 504 disability. 34 C.F.R. §104.30-104.36. Similar to the IDEA requirements, Section 504 requires districts to conduct a comprehensive evaluation of the student needs 34 CFR 104.33, provide a FAPE, including regular and special education, in the least restrictive educational environment 34 CFR 104.34, and, procedural safeguards 34 CFR 104.36, when the parties disagree about the provision of a FAPE.<sup>4</sup> The Section 504 regulations provide that the implementation of an IEP under the IDEA may also meet the substantive FAPE requirement of Section 504, but not necessarily all of Section 504 FAPE requirements of 34 CFR 104.33 (b)(1)(ii) and 34 CFR 104.33 (b)(2).

Section 504, like its counterpart the IDEA requires districts to place students in the regular education environment unless the district can show that the student cannot be educated in the regular education environment with the use of supplementary aids. *M.R. v. Ridley Sch. Dist.*, 744 F.3d 112 (3d Cir. Pa. 2014) the court held that Section 504 requires districts to "reasonably accommodate" the needs of students with disabilities. Later in *Ridley*, the court developed the Section 504 FAPE standard stating, "We have explained that this means a school district must reasonably accommodate the needs of the handicapped child so as to ensure meaningful participation in educational activities and meaningful access to educational benefits. However, Section 504 does not mandate 'substantial' changes to the school's

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<sup>4</sup> . 34 CFR 104.34 (a), *Letter to Williams*, 21 IDELR 73 (OSEP 1994) (Section 504 requires districts to educate students with disabilities in the LRE), *In re: Student with a Disability*, 113 LRP 42334 (SEA NY 2013) (concluding that a violation of Section 504's LRE requirement at 34 CFR 104.34, requiring comparable services and activities, is not analogous to any IDEA regulations).

programs, and courts ‘should be mindful of the need to strike a balance between the rights of the student and [his or her] parents and the legitimate financial and administrative concerns of the [s]chool [d]istrict.’ *Ridley*, 680 F.3d at 280-81 (internal citation omitted). Later the court went on to explain, “On the other hand, mere administrative or fiscal convenience does not constitute a sufficient justification for providing separate or different services to a handicapped child.” citing *Ridley*, 680 F.3d at 281 (citing *Helen L. v. DiDario*, 46 F.3d 325, 338 (3d Cir. 1995)).

### **Compensatory Education**

It is well settled that compensatory education is an equitable remedy where a school district knows, or should have known, that a child's educational program is not appropriately addressing his or her disability, or that the child is receiving only trivial educational benefit, and the district fails to remedy the violation. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). At times, such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* In addition to this “hour for hour” approach, some courts have endorsed a scheme that awards the “amount of compensatory education reasonably calculated to bring the child to the position that he would have occupied but for the school district’s failure to provide a FAPE. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education “should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.”). In *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015) the court endorsed a “make whole” remedy that provides appropriate relief “to whatever extent necessary to make up for the child’s lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation.”

### **Analysis and Conclusions of Law**

#### **The Initial Evaluation Report was Fatally Flawed**

In February of 2013, the District completed its first comprehensive evaluation of the Student’s academic needs. The evaluation included a variety of assessments of the Student’s ability, achievement, academic, and Speech needs. The evaluation noted the Student’s pre-accident scores on several measures of achievement. The assessment of the Student’s academic, achievement, and functional performance levels was comprehensive; included parent input, an observation of the Student, and used a variety of academic, Speech and OT assessment tools.

Regrettably, however, the evaluation was incomplete, insufficient, and inappropriate as it failed to evaluate the Student's motor skills or Student's need for a SPE, APE, or PE in the regular class, with supplemental aids and services, in the LRE. The PTE, issued by the District and consented to by the Parents, called for an assessment of the Student's PT and motor skill needs. The ER notes the PT form was not returned therefore, the District never completed the full assessment of all areas of unique needs in the regular education curriculum. The failure to complete this particular type of assessment, for this particular Student, with a recent TBI, was a fundamental error. Accordingly, the District failed to conduct a comprehensive assessment in all areas of unique need.

### **The First Academic IEP Provided a FAPE in the LRE**

The Student's complete IEP team met in February of 2013, when the Student was in 3<sup>rd</sup> Grade. The IEP team included the Parent, the special education teacher, a regular education teacher, an LEA, and, a Speech Therapist. The IEP included PLAAFP, strengths, weaknesses, and baseline measures in Speech, Math, and Reading.

The present levels included, benchmark assessments, curriculum based assessments, and diagnostic assessments, providing data about the Student's Reading, and Math needs. The IEP noted the Student's need for supervision on the playground, the Student's need to travel to and from class before peers during class changes, and the physician's medical exemption from PE and recess. Overall, the goals were measurable, and quarterly progress reports were timely provided in compliance with the IDEA. The first Progress Report spans from February 2013 of 3<sup>rd</sup> Grade to October of 2013 of 4<sup>th</sup> Grade. The Progress Report describes improvement in Speech, Reading, and Math. Overall, the IEP provided the Student with an equal access to participate in the academic regular education curriculum, in the LRE.

### **The 4<sup>th</sup> Grade Academic IEP Provided a FAPE**

The 4<sup>th</sup> Grade IEP summarized the Student's academic performance in the curriculum, using diagnostic assessments, benchmark skills testing, Speech assessments. Academic gains were documented in Recalling and Speech. The Student, however, continued to underperform in Math. The IEPs contained measurable goals and a detailed schedule for monitoring progress. The Student earned passing grades and was promoted to 5<sup>th</sup> Grade. Accordingly, the Student received a FAPE in all areas of academic skills. However, the District did not provide the student with a FAPE in PE.

### **The 5<sup>th</sup> Grade Academic IEP Provided a FAPE**

The 5<sup>th</sup> Grade IEP PLAAFP reports the Student was beginning to use 5<sup>th</sup> Grade level material, an improvement from the 3<sup>rd</sup> and 4<sup>th</sup> Grade baseline levels. The Student's Comprehension level of performance improved to 99% accuracy with a baseline rate of 85 wpm (S#37, p.8). The PLAAFP also reports the Student mastered the 4<sup>th</sup> Grade Reading Comprehension goal (S#37, p.8). In Writing, the PLAAFP stated how, with the use of a graphic organizer, the Student was able to produce a sentence with a beginning, a middle and an end (S#37, p.8). In Math, however, the PLAAFP reports the Student did not meet expected standards in Place Values, Patterns, using Symbols, Math problems, and, using Operations to solve problems (S#37, p.8). The Speech Therapist reported the Student made gains in sequencing, and following multi-step directions (S#37, p.8). Two new Speech needs targeted unmet needs (S#37, p.9). The IEP also included multiple SDIs and Modifications (S#37, pp. 25-30). The IEP team increased the Student's Math Support to an additional 20 minutes each day, in addition to 40 minutes a week of Reading Support. The IEP also provided the Student with Math and Language Arts instructions in a co-taught classroom. In the area of Writing, the Student improved Student's ability to organize Student's thoughts to tell a story (S#40, p.6). Accordingly, the Student's IEP was reasonably was provided with a FAPE.

### **The 4<sup>th</sup> and 5<sup>th</sup> Grade APE IEPs were fundamentally flawed**

This hearing officer is concerned the District after promising to assess the Student's need for PT services never completed the assessment. When the District did not receive the PT form from the physician the District should have issued a new PTE to conduct a medical related services evaluation to determine if the Student's TBI disability resulted in a need for the related service of PT. 34 CFR §300.34(c)(5)<sup>5</sup>. Next, this hearing officer is puzzled by the District's mistaken impression that APE, is an SDI and not a direct service. The IDEA definition of special education includes PE, APE, and, SPE are mandated direct services. 34 CFR 300.39. Pursuant to 22 Pa Code Chapter 4.27 PE is a mandated course of study, like math and reading. The decision to remove the Student from regular PE class was made without the benefit of an evaluation of the Student's present levels of functional motor skills and was therefore a fundamental error.

At the beginning of 4<sup>th</sup> Grade, but for participation in contact sports or ball-oriented sports, the Student's physician released Student to participate in the same regular education PE classroom activities, as Student's peers. Although cleared to participate in the regular PE activities, the Student was placed in a predetermined

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<sup>5</sup> 34 CFR §300.34(c)(5) "Medical services means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

segregated APE program. Assuming *arguendo*, the APE placement was somehow appropriate, no one could explain why the District failed to provide a legally sufficient IEP including goals, objectives, or a schedule to assess and monitor progress in PE. The District witnesses could not satisfactorily explain why the Student was provided less instructional time than set forth in the IEP. Likewise, contrary to the IDEA and Section 504 regulations, none of the District witnesses could explain what other modifications, adaptations, supplemental aids or strategies were discussed, or attempted prior to placing the Student in the segregated placement. The decision to exclude the Student like the decision to provide less instructional time was impermissibly based on the nature of Student's TBI disability. In certain situations, the failure to comply with Section 504 can amount to a denial of a FAPE. *Mansfield (AR) Pub. Schs.* 59 IDELR 265 (OCR 2012) (failure to implement agreed upon accommodations is denial of a FAPE).

In *Ridgewood* the court held "the failure to provide a free appropriate public education violates IDEA and therefore could violate §504." When commenting on the liability standard, the court noted, "a plaintiff need not prove that defendants' discrimination was intentional." *Id.* Later in *S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248, 262 (3d Cir. Pa. 2013) the court explained that "claims for compensatory damages under §504 of the RA and §202 of the ADA require a finding of intentional discrimination." The *S.H.* court then opined,

"*Ridgewood* does not alter our analysis. Our statement in *Ridgewood*, that 'a plaintiff need not prove that defendants' discrimination was intentional' referred only to liability, and not damages; it was intended to address the requirements for showing a violation of §504, not the requirements for particular remedies. Our statement, thus, is inconsequential to whether a plaintiff seeking compensatory damages must allege intentional discrimination." *Id.*

Here the Parents, unlike the parents in *SH*. are seeking the equitable remedy of compensatory education not legal relief in the form of compensatory damages. Accordingly, deliberate indifference is not the applicable liability standard for equitable relief. Assuming *arguendo*, deliberate indifference is the applicable standard for equitable relief; here the District's conduct rises to the level of deliberate indifference. In this instance, the District was aware of the Student's right to be free from discrimination and a FAPE in the LRE; yet they made a conscious choice to isolate the Student, which resulted in the Student being excluded from participation in, and, denied the benefits of a FAPE, in the LRE.

The District's rigid segregated APE position is inconsistent with the IDEA and Section 504's mandate to educate disabled children, alongside of their nondisabled peers, to the maximum extent appropriate, in alignment with an established priority on placements in the LRE *Oberti v. Board of Education.*, 995 F.2d 1204 (3rdCir. 1993).

The Student's integrated placement in regular PE curiously stopped when someone decided the teachers' "contract rights" trumped the Student's IDEA and Section 504 rights. Somehow, the IEP team ignored the otherwise obvious safety modification of having the Student wear [a protective device], like the one Student wore at the beginning of 3<sup>rd</sup> Grade. (P#34, p.1). The segregated APE placement also denied the Student the benefits of participation in an integrated Homeroom class with peers. To the extent, the District argues that 20 minutes of one-on-one instruction is equal to 40 minutes in a group, the argument is misplaced when the record is reviewed as a whole. The PE teacher was not aware of the IDEA or Section 504 PE requirements. Furthermore, the PE teacher was not aware of regularly used APE or PE assessments tools. The removal of the Student from an integrated Homeroom class and placement into the segregated APE class also denied the Student the benefit of participation in an integrated Homeroom class. Accordingly, the District failed to provide the Student with a FAPE.

The District's secondary argument, that the Student's participation in regular PE required a fundamental alteration of the PE program is equally unpersuasive.<sup>6</sup> It is axiomatic when a child receives a legally sufficient appropriate IEP, with special education and SDIs; then by operation of law, the IEP providing a FAPE is not a fundamental alteration. The limited use of a protective [device] in PE class, when balls were in use, along with SDIs like walking instead of running, changes to the size or type of ball, or rule modification should have been used to provide the Student with equal access to an integrated classroom. These SDIs would also meet the District's requirement to provide the Student with a full educational opportunity goal (FEOG) in the LRE. 34 CFR §300.19.

Even assuming *arguendo*, that fundamental alteration is a viable Section 504 FAPE defense, such a defense is not proper under the IDEA. None of the Staff testified the Student could not be educated in the LRE or for that matter that the Student was unsafe when the aide was present. The District's medical excuse policy though well intended was applied in disparate fashion that denied the Student an

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<sup>6</sup> *Letter to Zirkel*, 20 IDELR 134 (OCR 1993) (OCR does not read a "reasonable accommodation" standard or other similar limitations into the Section 504 FAPE requirement); *Mark H. v. Lemabien*, 49 IDELR 91 (9th Cir. 2008), (Section 504 FAPE standard is a comparative standard distinct from the affirmative duty found in the IDEA.), *Lance v. Lewisville Indep. Sch. Dist.*, 62 IDELR 282 (5th Cir. 2014) (Section 504 and the IDEA define FAPE differently). *In re: Student with a Disability*, 113 LRP 42334 (SEA NY 2013) (concluding that a violation of Section 504's LRE requirement at 34 CFR 104.34 requiring comparable services and activities, was not analogous to any IDEA regulation).

equal opportunity to achieve the same benefits and level of participation otherwise provided to nondisabled peers. It is axiomatic, that once the physician released the Student to participate in the regular PE activities, the Student was an otherwise qualified person with a disability, whose individual unique needs should have been met in the LRE. The District staff lost sight of the LRE mandate when they became caught up with the “legality” of the situation. The LEA also let the teachers’ “contract rights” trump the Student’s FAPE, LRE, and FEOG rights. 34 CFR §300.19.

Therefore, I find the District was deliberately indifferent when it failed to provide the Student with a FAPE in PE, in violation of Section 504. I also find the failure to provide an appropriate PE program, in the LRE was discrimination within the meaning of Section 504.

### **Independent Educational Evaluation**

The final issue is the Parent’s request for an independent evaluation of Student. When parents disagree with a school district’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). Ordinarily, when a parent requests an IEE, the LEA must either file a request for a due process hearing to establish that its evaluation or reevaluation is appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. §300.502(b)(2).

After careful consideration, this Hearing officer concludes that ordering the requested IEE would provide the parties with an objective and impartial assessment of Student’s strengths; weakness and needs together with recommendations for programming that should assist the parties in moving forward with collaborative IEP development. The IEE must include a comprehensive PT and PE assessment and a recommendation for special education and SDIs that each private evaluator determines are necessary to understand the Student’s unique and complex profile. The parties are directed to convene a meeting of Student’s IEP team after the Parents selection of the IEE evaluator gets underway and again after the evaluator has concluded with reports issued.

### **Compensatory Education**

“Appropriate remedies under the IDEA are determined on a case by case basis.” *D.F. v. Collingswood Borough Board of Education*, 694 F.3d 4888, 498 (3d Cir. 2012). It is well settled that compensatory education is an appropriate remedy where a school district knows, or should have known, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district makes a choice not to remedy the problem. *M.C. v. Central Regional School*

*District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id. Compare B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Cmwlth. 2006) (rejecting the *M.C.* standard for compensatory education, and holding that “where there is a finding that a student is denied a FAPE and ... an award of compensatory education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district’s failure to provide a FAPE.”); *Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005). Compensatory education is an equitable remedy *Lester H. v. Gilbool*, 916 F.2d 865 (3d Cir. 1990). As such, hearing officers, like courts, have broad discretion in fashioning such relief. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712 (3d Cir. 2010).

Having found that the District denied a FAPE to the Student in its PE program, compensatory education is warranted. Also, having found that the District discriminated against the Student in violation of Section 504 when they removed the Student from the integrated Homeroom classroom.

There was no clear evidence presented from which one could arrive at an award that would place Student in the exact same position the Student would be in absent a denial of a FAPE. This hearing officer concludes that the remedy must therefore encompass the entire 2014-15 and the 2015-2016 school years. Thus, despite a difficulty in quantifying an hour for hour award, as discussed below, that will be the basis for the relief.

Based on the record as a whole, this hearing officer equitably estimates that the Student should be provided a FAPE remedy equal to the time the Student should have received an appropriate PE or APE class. Based upon the record, as a whole, the Student was scheduled to attend PE or APE class once a week, for 36 weeks, each class was scheduled for 40 minutes totaling 24 hours a year. Accordingly, the District shall provide a total of 48 hours of compensatory education for the two school years at issue.

Next, this hearing officer equitably estimates that the Student should be provided a remedy equal to the time missed in the regular education homeroom, recess, and other regular education classes when Student was placed in the segregated APE class or when the Parents removed the Student from school to remedy the denial of a FAPE. The Student is also awarded 75 hours of compensatory education, for two school years, to compensate Student for the time lost in the integrated regular education class. *See Keystone Cent. School 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).

The hours of compensatory education are subject to the following conditions and limitations. Student's Parent may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product or device that furthers Student's educational needs and related service needs. 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 IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age twenty-one (21). The District is also Ordered to pay the actual costs for the time the Student participates in the above compensatory education service.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The Parents' claim of a denial of a FAPE and compensatory education for the 2014-2015 school year academic IEP is denied.
2. The Parents' claim of a denial of a FAPE and compensatory education for the 2015-2016 school year academic IEP is denied.
3. The 2014-2015 and the 2015-2016 APE IEPs, denied the Student a FAPE, in the LRE, in violation of the IDEA and Section 504. The Student is awarded a total of 48 hours of compensatory education for the two school years at issue.
4. The Parents' claim of discrimination in the 2014-2015 school year is granted. The Student is awarded 75 hours of compensatory education.
5. The Parents' claim of discrimination for the 2015-2016 school year is granted. The District is Ordered to provide the Student with 24 hours of compensatory education.
6. The District's academic ER and RR, of the Student, were comprehensive and appropriate. The Parents claim for an academic IEE is denied.
7. The District's ER and RR failed to assess the Student's PT and PE needs for special education, related services, and, SDIs in the LRE.

8. The Parents claim for an IEE is granted. Pursuant to 34 CFR §300.502(a)(2), the District within 10 days of this Order, will provide the Parents with the names of and the location of where the Parents may obtain an IEE and the criteria applicable for a PE and PT IEE.
9. The District is Ordered to pay the full costs of a private PE and PT IEE, including the cost of any direct observation of the Student needed to complete each IEE.
10. The private PT and PE IEEs must be completed within 90 calendar days from this Order.
11. Once the District receives the PT and PE IEEs, the District will provide the Parents with an RR within 60 school days.
12. The District will also fund the cost of the PT and PE IEE evaluators' participation, by phone or in person, in the development and review of the RR. The District is directed to fund the cost of the PT and PE IEE evaluators' attendance, at all IEP meetings, or any other meeting, when the Parent is invited to discuss the content of either the IEE, RR, or the IEP for the 2016-2017 school year.
13. The timelines set forth above may be extended, in writing, by mutual agreement of the Parties. Any extensions will be reported to the Pennsylvania Department of Education Division of Compliance.
14. It is **FURTHER ORDERED** that any claims, affirmative or equitable defenses not otherwise specifically addressed by this Decision and Order are denied and dismissed.

Dated: April 4, 2016

[Charles W. Jelley Esq. LL.M.](#)  
Charles W. Jelley Esq. LL.M.  
HEARING OFFICER