

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 Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

25164-21-22

Child's Name

B.V.

Date of Birth

[redacted]

Parent

[redacted]

Counsel for Parent

Jennifer Lukach Bradley, Esquire
1290 Broadcasting Road – Suite 4
Wyomissing, PA 19610

Local Educational Agency

Cornwall-Lebanon School District
105 East Evergreen Road
Lebanon, PA 17042

Counsel for LEA

Shawn Lochinger, Esquire
331 East Butler Avenue
New Britain, PA 18901

Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

12/03/2021

Introduction

This special education due process hearing concerns the educational rights of B.V. ("student"), a student who resides in the Cornwall-Lebanon School District ("District").¹

The parties disagree over the educational programming of the student under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA") and the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504"), specifically as to whether the student was provided with a free, appropriate public education ("FAPE") under the terms of those statutes.²

The District counters that at all times it met its obligations to the student under IDEIA and Section 504. Accordingly, the District argues that the student and parent are not entitled to any remedy.

For reasons set forth below, I find in favor of parent on the claims brought in the complaint. There are also procedural elements related to the current/pending status of the student as a student attending the District, set forth below, which are addressed as part of this decision and order.

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

² It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818 (*see also* 22 PA Code §§14.101-14.162 ["Chapter 14"]), as well as the federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61 (*see also* 22 PA Code §§15.1-15.11 ["Chapter 15"]).

Issues

1. Did the District appropriately identify the needs of the student as a student with a disability who was eligible for special education under IDEIA/Section 504?
2. Did the District provide appropriate educational programming for the student's needs in the 2019-2020, 2020-2021, and current 2021-2022 school years?
3. To the extent that the answer to either or both of these questions is/are "no", is the student entitled to remedy?
4. What is the current/pending status of the student as a student enrolled in the District, and what, if any, impact does that status have on any remedy?

Findings of Fact

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

Prior Educational Background

1. The student resides in the District and has received special education services for multiple school years. (Parent Exhibit ["P"]-2, P-7; Notes of Testimony ["NT"] at 48-88, 91-182).

2. In March 2017, where the record in this matter surfaces, in the spring of the student's 8th grade year, the student already qualified for special education as a student with a specific learning disabilities in reading and written expression. The student also received speech and language ("S&L") support. (P-2).
3. In March 2017, the student was re-evaluated on the student's triennial evaluation schedule. (P-2).
4. The March 2017 RR recommended that the student receive special education as a student with specific learning disabilities in reading (fluency and comprehension) and written expression, as well as a student with S&L impairment. (P-2).
5. In March 2018, the spring of the student's 9th grade year, the student's individualized education program ("IEP") contained input from two teachers which indicated that the student was having, or was potentially having, difficulty in peer relationships, although other teachers reported that the student got along well with peers. The student's parent also shared concerns about the student's relationships with peers. (P-7).
6. The March 2018 IEP recommended that the student be dismissed from S&L services, and the IEP contained no S&L support, goals, or programming. (P-7).
7. In the student's 9th and 10th grade years, the student was bullied by other students in various incidents. (P-11; NT at 48-88, 91-182).
8. In approximately January 2019, midway through the student's 10th grade year, the student was severely bullied by fellow students, [redacted.] (NT at 48-88, 91-182).

9. The student dis-enrolled from the District and began to attend a local private school. School personnel, specifically a school counselor, were informed that the bullying incident was the reason for the student's dis-enrollment. Approximately six weeks later, in March 2019, the student re-enrolled in the District as the private school could not provide support for the student's needs. (NT at 48-88, 91-182).
10. In March 2019, the student returned to the District and the student's IEP team met to revise the student's IEP. There was no discussion of bullying generally, or the [redacted] incident specifically. (P-8; NT at 91-182).
11. The student's revised March 2019 IEP indicated that, to reduce contact with classmates, the student would have a split schedule, with half of the student's classes in the District's cyber program and half at the District's high school. When the student physically attended school, to avoid unwanted contact with classmates, the student was permitted to exit class on an alternative bell schedule so that the student could "pass through the hallways with less students." (P-8 generally and at page 30, P-9 generally and at page 29; School District Exhibit ["S"]-3; NT at 91-182).
12. In mid-May 2019, near the end of the student's 10th grade year, the student's IEP team met to revise the student's IEP. (S-3, S-4; NT at 91-182).
13. The May 2019 IEP continued to identify needs in reading and written expression. The IEP once again identified needs in expressive and receptive language. (S-3).

14. The May 2019 IEP contained goals in reading fluency (with 6th grade text), reading comprehension (with 7th grade text), written expression, task focus, and organization skills. (S-3).
15. The May 2019 IEP did not contain any goals or programming in S&L. (S-3).
16. In late May 2019, due to parents' "concerns with (the student's) social functioning, and the IEP team (indicating) concerns with (the student's) social skills as well", the District sought permission to re-evaluate the student "in order to determine if (the student) qualifies for special education services as a student with Autism". (S-5 at page 1).
17. The student's parents provided permission for the re-evaluation in late July 2019. (S-5).

2019-2020 / 11th Grade

18. The May 2019 IEP was in effect in July 2019 when claims through the complaint in this matter accrued.³
19. In October 2019, the District issued its re-evaluation report ("RR"). (S-6).
20. Parental input in the October 2019 RR included concerns for the student in social interactions with peers, reading social cues, language

³ The parent is seeking remedy that, in part, includes compensatory education from July 2019. (See Complaint at page 3; NT at 23).

processing, lack of friendships, and exhibits compulsive behaviors (lining up objects). (S-6).

21. Observations and teacher input in the October 2019 RR can be characterized as a student who works at academics, although there are periods of inattention and lack of task focus. The student's comprehension of material is the largest academic deficit. The student was reported to work well with peers, with no indication of problematic socialization. (S-6).
22. On a comprehensive autism assessment in the October 2019 RR, the District evaluator identified deficits in language and communication, reciprocal social interaction, [redacted]. The evaluator concluded that the student "demonstrated a high number of behaviors indicative of an Autism Spectrum Disorder". (S-6 at page 12).
23. The October 2019 RR contained an assessment of the student's pragmatic language. The student demonstrated deficits across all areas, including initiation, listening, abstract/inferential language, perspective taking, "big picture" understanding, and humor/human relatedness. (S-6).
24. The S&L evaluator opined that the student's profile aligns with a "social presentation described as...what people classically think of as high functioning autism". The evaluator summarized the student's pragmatic language profile as follows: "(The student's) weak social radar system has not allowed (the student) to develop meaningful friendships with any... classmates and (the student) has difficulty adapting to the social behavior of...peers. (The student) tries to fit in with peers but (the student's) lack of knowledge about the social dynamics of a group [sic]. Although (the student) may think (the

student) is being included, (the student) is not able to discern what it means to be part of the group and the social contexts surrounding the group plan.” (S-6 at page 14).

25. The October 2019 RR included social/emotional/behavioral rating scales completed by one of the student’s teachers and the student’s mother. (S-6).

26. The ratings showed significant divergence between the two raters. The teacher’s ratings, across all sub-tests and composites, were within the normal range. The parent rated the student as “at risk” in the atypicality sub-scale and “clinically significant” in the withdrawal, social skills, functional communication, and leadership sub-scales, as well as the adaptive skills composite. (S-60).⁴

27. The October 2019 RR concluded that the student did not qualify under IDEIA as a student with autism, quoting the language of the Act as it defines autism: “a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three that adversely affects a child’s educational performance.” (S-6 at page 19; NT at 431-494).⁵

28. The evaluator acknowledged that the student exhibited certain behavior consistent with autism but credited the input of the student’s teachers, and the teacher’s social/emotional/behavioral ratings, and discounted the autism and pragmatic language results and the parent’s

⁴ The evaluator noted the mother’s elevated scores as either at-risk or clinically-significant; the precise breakdown between the two categories is the hearing officer’s.

⁵ 34 C.F.R. §300.8(c)(1)(i). At §300.8(c)(1)(iii), not included in the content of the October 2019 RR, is the notation that “A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (c)(1)(i) of this section are satisfied.”

social/emotional/behavioral ratings, in reaching his determination. (S-6).

29. The October 2019 RR continued to identify the student as a student with specific learning disabilities and S&L impairment. (S-6; NT at 431-494).

30. In November 2019, the student's IEP team met to revise the student's IEP. (S-8).

31. Progress monitoring in the November 2019 IEP showed that the student made progress over the period May – November 2019 on goals for task-focus, reading comprehension, and written expression. The progress monitoring showed that the student maintained baseline levels on the goal in organization. The progress monitoring showed that the student regressed on the goal in reading fluency. (S-8).

32. The present levels of academic and functional performance in the November 2019 IEP included the input of the student's teachers and the social/emotional/behavioral content from the October 2019 RR, but neglected to include the content from the comprehensive autism assessment or the pragmatic language assessment. (S-6, S-8).

33. The list of the student's needs in the November 2019 was more detailed than in the May 2019 IEP, including continued recognition of needs in reading fluency, reading comprehension, written expression, task-focus, and organization. The recognized needs also newly included needs in aspects of "social cognition". (S-8).

34. The November 2019 IEP contained academic goals in reading fluency, reading comprehension, and written expression. The goals in task-focus and organization were removed. (S-8).

35. The November 2019 IEP added a S&L goal. In its entirety, the goal reads as follows: "(The student) will demonstrate an understanding of who and their relationships, where and the context, and describe what's happening with score of 2 on a teacher made rubric in 3/4 data probes." (S-8 at page 26).
36. The November 2019 IEP included individual S&L therapy as a related service, 135 minutes per month. No District witness testified to the S&L services, and the subsequent IEP developed in November 2020 (see Finding of Fact 48 below) indicated that progress monitoring on the S&L goal was collected only over November 2019-2020. On this record, one cannot find as a fact that S&L services were delivered to the student in the 2019-2020 school year. (S-8, S-12).
37. Under the terms of the November 2019 IEP, the student remained in a half-day cyber, half-day live-instruction program. With the addition of S&L services, the student spent slightly more time, on a weekly calculation, in the special education classroom. (S-8).
38. The student's parents approved the implementation of the program and placement outlined in the November 2019 IEP. (S-9).
39. The student was bullied by fellow sports team members during the 11th grade year. (NT at 48-88, 91-182).
40. As with every student in the Commonwealth, the student's education in the spring of 2020 was interrupted by the statewide school closure in March 2020, although schooling continued thereafter as the District adjusted to online learning. (NT at 91-182, 317-384).

41. The student's final grades for 11th grade were quite varied, ranging from one A-, three Bs, two B- grades, one C+, two D+ grades, and two Ds. (S-10).
42. At some point in the summer of 2020, the District acquiesced in parent's request for an independent educational evaluation ("IEE") at public expense. (S-15; NT at 91-182).⁶

2020-2021 / 12th Grade

43. The November 2019 IEP was in effect at the outset of the 2020-2021 school year, the student's 12th grade year. (S-8).
44. In August 2020, shortly before the school year began, the student's reading fluency goal was removed from the student's IEP. No IEP meeting was held to consider the revision, and parent was not provided with data to explain the revision. The parent was simply informed by email that the goal would be removed. (P-12; NT at 91-182, 317-384).
45. Upon a returning for the 2020-2021 school year, there was no IEP team meeting for, or consideration of, any need for Covid compensatory services. (NT at 91-182, 192-278).
46. In November 2020, the student's IEP team met to revise the student's IEP. (S-12).

⁶ The exact date of the parents' request for an IEE was not established on this record. issuance date of the IEE is December 14, 2020. The IEE indicates, at page 1, that testing took place in early August 2020.

47. Progress monitoring in the November 2020 IEP showed that the student made progress on the reading comprehension goal over the period November 2019 – January 2020 and regressed on the goal over the period January – March 2020. Due to the school closure, progress monitoring was not collected over the period March – June 2020. The student reversed the regression over the period September – November 2020. (S-12).
48. Progress monitoring in the November 2020 IEP showed that the student regressed on the reading fluency goal over the period November 2019 – January 2020 and regressed further over the period January – March 2020. Due to the school closure, progress monitoring was not collected over the period March – June 2020. As indicated above, the reading fluency goal was unilaterally removed by the District in August 2020. (S-12).
49. The progress monitoring in the November 2020 IEP on the S&L goal is incomplete. It was a new goal in the November 2019 IEP so baseline data was collected only over November 2019 – January 2020. Thereafter, there was no progress monitoring over the period January – March 2020 or September – November 2020. (S-12).
50. The student’s S&L services were delivered through virtual instruction. The November 2020 IEP indicates that there were multiple missed S&L sessions in the fall of 2020 through late October 2020, when the District S&L therapist left the District. (S-12 at page 11).
51. Progress monitoring in the November 2020 IEP showed that the student made slight progress on the written expression goal over the period November 2019 – January 2020 and then regressed on the goal over the period January – March 2020. Due to the school closure,

progress monitoring was not collected over the period March – June 2020. The regression continued over the period September – November 2020. (S-12).

52. The November 2020 IEP included goals in written expression, reading comprehension, and problem-solving/conflict-resolution. (S-12).
53. The November IEP continued to provide 135 minutes of individual S&L instruction monthly as part of pragmatic language instruction. Instruction through these sessions were supposed to address the problem-solving/conflict-resolution goal. After the District S&L therapist left the District, it is unclear who delivered those S&L services until these services were placed on the caseload of a District special education teacher in December 2020. (S-12, S-20; NT 284-312).
54. Under the terms of the November 2020 IEP, the student remained in a half-day cyber, half-day live-instruction program. The weekly calculation of the time the student spent in a special education classroom remained the same. (S-12).
55. The student's mother approved the program and placement. The student's father did not approve the program and placement and requested an informal meeting for further discussions. (S-13).⁷
56. The student was bullied by fellow sports team members during the 12th grade year. (NT at 48-88, 91-182).
57. The student had been employed part-time [in the community]. At the time of the November 2020 IEP meeting, the student's

⁷ [redacted]

educational program was adapted to include this community-based experience as part of the student's programming. (S-30; NT at 317-384, 394-425).

58. In December 2020, the independent evaluator issued the IEE. (S-15).
59. The December 2020 IEE included a broad array of assessments, including cognitive testing, achievement testing, a reading assessment, social/emotional/behavioral assessments, language and phonological processing assessments, a memory and learning assessment, executive functioning assessments, a visual-motor integration assessment, an anxiety and depression assessment, auditory processing assessments, and an autism rating scales assessment. The IEE also included parent input, teacher input, as well as direct observations by the evaluator. (S-15).
60. In the December 2020 IEE, the independent evaluator recommended that the student be identified as a student with specific learning disabilities in oral expression, listening comprehension, reading fluency, and reading comprehension. The evaluator also recommended that the student be identified as a student with autism. The evaluator deferred to a S&L evaluator as to concrete needs and programming for S&L needs. (S-15).
61. In addition to the formal identification of these specific learning disabilities in the December 2020 IEE, the evaluator identified areas of need for support in the following areas: certain cognitive functions (cognitive expression, processing speed, conceptualization), auditory processing, phonological processing, and sensory-motor skills. (S-15).

62. In terms of the identification of the student as a student with autism in the December 2020 IEE, the independent evaluator recommended that the student receive direct instruction in social skills (as well as counselor support), an evaluation in sensory processing, and programming that incorporates the principles of applied behavior analysis. (S-15).
63. In addition to the needs related to the specific learning disabilities in the December 2020 IEE, the independent evaluator recommended support and programming recommendations in math calculation, continuing the student's support in written expression, and again addressing the student's task-focus, attention, and self-advocacy skills. (S-15).
64. On the autism rating assessment (particularly the social/communication, peer socialization, social/emotional reciprocity, sensory sensitivity, and total-score scales), a behavior rating assessment (particularly the peer relations scale), and a social skills assessment (particularly the assertion and self-control sub-scales, and the social skills and academic competence scales) submitted by the student's special education teacher, the assessments could not be scored because she omitted too many items. (S-16; NT at 317-384, 499-589).
65. Upon receiving the IEE, in early January 2021, the District requested permission to re-evaluate the student, permission which the parents granted in mid-January. (S-16).
66. As part of the job-based experience program [in the community], the student was evaluated monthly. The evaluations were performed by the student's job-site supervisor and reported to the

District through an intermediate unit employee. The evaluation rubric was scored across 22 measures on a scale of 0-5, with 5 representing (“completes the skill without any prompts” to 4 (completes the skill with 1 verbal prompt and no physical prompt) to 3 (completes the skill with 2-3 verbal prompts and/or 1 physical prompt), etc. with the score decreasing as the need for prompting increases, to 0 (refusal). (S-19, S-26, S-27, S-28; NT at 394-425).

67. In December 2020, the student scored 4s and 5s in all categories except tone/volume/content when speaking and communicates clearly, where the student received 3s. (S-26; NT at 394-425).
68. In January 2021, the student 4s and 5s in all categories except tone/volume/content when speaking, accepts feedback, and communicates clearly, where the student received 3s. (S-27; NT at 394-425).
69. In February 2021, the student scored 4s and 5s in all categories except communicates clearly, where the student received 3. (S-28; NT at 394-425).
70. In March 2021, the student scored 4s and 5s in all categories except communicates clearly, where the student received 3. (S-19; NT at 394-425).
71. In April 2021, the student 4s and 5s in all categories except attends when scheduled and accepts feedback, where the student received 3s. (S-29; NT at 394-425).
72. In April 2021, the District issued its RR. (S-20).

73. The April 2021 RR included updated information about the student's academic performance since the implementation of the November 2020 IEP. Over the period November 2020 – January 2021, the student regressed on the reading comprehension goal and showed progress on the written expression goal. (S-20).
74. The special education teacher working on the problem-solving/conflict-resolution goal in the S&L sessions reported progress, but there is no baseline data for this goal in the November 2020 IEP or in the April 2021 RR. (S-20; NT at 284-312).
75. The student's special education teacher reiterated input that had been largely the same as her input over the 2019-2020 and 2020-2021 RRs and IEPs. (S-20).
76. The April 2021 RR contained elements of the December 2020 IEE although, given the latter's comprehensive content, it was not reproduced in its entirety. (S-20).
77. The April 2021 RR concluded that the student qualified under the terms of the IDEIA as a student with specific learning disabilities and a S&L impairment but did not qualify as a student with autism. (S-20).
78. In May 2021, the student's IEP team met to revise the student's IEP in light of the December 2020 IEE and the April 2021 RR. (S-22).
79. The May 2021 IEP is largely the same as the November 2020 IEP. (S-12, S-22).
80. At the May 2021 IEP meeting, the IEP team discussed the student's potential graduation from high school and exit from special education, or potentially staying at the District for a "13th year" for continuing education. (S-23; NT at 48-88, 91-182, 192-278).

81. In May 2021, the student obtained a new job with a trucking company, a job which ostensibly would become a full-time position when the student graduated from high school. This position replaced the job-based experience position which the student held with the supermarket. On the only evaluation submitted for this new position, the student received all 4s and 5s, except for an evaluation of 3 for "takes initiative". (S-31, S-32; NT at 48-88, 91-182, 394-425).
82. Throughout the spring of 2021, in discussions with teachers, the student indicated that graduation was an exciting prospect, and the student was looking forward to life beyond schooling at the District. (NT at 48-88, 284-312, 394-425).
83. In June 2021, as the 2020-2021 school year came to its end, the District issued a NOREP recommending that the student exit from special education, graduate from the District, and take a diploma. (S-23, S-24, S-25).
84. Parents did not return the June 2020 NOREP, so there was little clarity around whether the student would exit from special education and take a diploma, or return to the District for a 13th year. (S-23; NT at 91-182, 590-607).
85. The student participated in the District's graduation ceremony and took a diploma. But the diploma was returned, and at the hearing, the student indicated that returning to the District for instruction was a possibility. The student's demeanor and affect in that regard, however, cannot be described as enthusiastic. (NT at 48-88, 91-182).
86. The District takes a neutral position on the issue of the student's status in the current 2021-2022 school year. On one hand, it stands by its June 2021 NOREP, prepared to exit the student from special

education and to issue a diploma to the student. On the other hand, to the extent that this process yields an order that necessitates additional schooling of the student at the District, the “13th year”, the District is willing to provide that instruction. (NT at 590-607).

Discussion

IDEIA/Denial-of-FAPE

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

The dispute between the parties, which has been in the mind of the parent for some time, may appear to some to be a “label” dispute. Is it relevant that the student was not, and through the date of this decision has not been, explicitly identified by the District as *a student with autism*? In most circumstances, the explicit labeling of a disability is not necessarily a fatal flaw. So long as the school district has a comprehensive and accurate sense of a student’s needs and proposes/implements appropriate

programming, the exact term to capture that disability profile and response is not, as a matter of semantics, necessarily a denial of FAPE.⁸

Here, the record fully supports a conclusion that the student is a student with autism and should have been identified by the District as a student with autism. The record also clearly shows that the District did not comprehensively or accurately understand the student's needs related to autism and that the District's special education programming was inappropriate.

A review of this record shows that early on in the student's high school years, teachers could see and reported—including fellow students as well—that the student was struggling socially and bullying was impacting the student. Ultimately, the student was dis-enrolled from the District solely and directly as a result of bullying. The District, through at least one school counselor, was aware of this. And when the student was re-enrolled shortly thereafter, the student's placement removed the student from the school building for half the school day and made sure that the student was not in the halls, at all or at least as long, when other students were circulating between classes. This is entirely incongruous with the student that the District describes through the RRs and IEPs.

It is true that, upon returning to the District, the educators who began to work with the student were new to the student's situation. They themselves may not have had direct knowledge of the events and affect that the student exhibited over 9th and 10th grades. But this cannot carry the day given the fact that District educators recorded significant concerns with the student's social skills and that they knew that the student had literally been driven from the District by bullying.

⁸ Clearly, given the numerous protections and statutorily-explicit/regulatorily-explicit provisions that apply to a student who is identified as a student with an intellectual disability, this approach and reasoning would not hold. Identification of a student *as a student with an intellectual disability* is a critical exception to this approach and reasoning.

Most significantly, once the student had returned to the District and the parent related concerns about socialization, communications skills, and potential autism, the District re-evaluated the student. The October 2019 RR lays a firm foundation, through the comprehensive autism assessment and the S&L assessment, that the student clearly has autism. There are countervailing indications from teachers' input. But the District evaluator relied on that, seemingly exclusively, even though those specialized assessments clearly indicate the types of communication, socialization, cuing, and pragmatics issues that are at the core of autism spectrum disorder (in addition to the "ordering" and compulsion-related behavior that those assessors witnessed and reported). Given what this record shows about the student's past and recent issues with peer relationships and bullying, parents' input and concerns, the dis-enrollment/re-enrollment in the spring of the prior school year, and the exclusionary placement and accommodations along with those specialized assessments, it is clear that as of October 2019, the District knew or should have known that the student was a student with autism who required goals, specially-designed instruction, and modifications to address significant social, communication, and pragmatics needs.

The IEPs in November 2019 and November 2020 are inappropriate to meet those needs. First, the S&L goal in the November 2019 IEP that ostensibly addresses communication and pragmatics needs (Finding of Fact 35) is inappropriate. Bluntly, reading that goal, one cannot conceive of what is being addressed in terms of communication/socialization/pragmatics. And this hearing officer has no confidence that services were provided to the student in addressing those needs. Second, the S&L goal in the November 2020 IEP ostensibly addressing communication and pragmatics needs is more well-written (the problem-solving/conflict-resolution goal), but it is flawed in that it does not address social skills and pragmatics in light of

interaction and socialization. And like the goal in the previous IEP, what little instruction on this goal that can be verified did not begin until January 2021.

Neither goal addresses in any way what is at the core of the student's needs: gaining insight into and skills in social and pragmatic interactions, especially with peers. This instruction—to the extent it took place at all—also is not reasonably calculated to yield meaningful education benefit. For a student who has significant and longstanding needs in peer-to-peer social skills and pragmatic communication, individual instruction with an adult through a virtual platform is inappropriate.

And the student's communication needs, though importantly centered on peer communication, are not exclusively with peers. The evaluation by the student's position supervisor at the supermarket in the job-related experience through the District consistently rated the student's communication in that position as the lowest of the student's evaluation metrics. Taken all together, then, this student has significant and broad-ranging social, communication, and pragmatics needs which the District, with the record taken as a whole, did not comprehensively and accurately understand or failed to acknowledge and, ultimately, failed to address.

In terms of considering denial-of-FAPE, it must also be noted that the student's special education teacher unilaterally removed that student's reading fluency goal from the IEP. While her testimony on the issue at the hearing makes some degree of sense (NT at 337-338), an explanation of why this might be done should come in the context of an IEP team's deliberations or, at least, after consultation with parents and not as a *fait accompli* in an email message. This is especially important where the student has failed to make progress on the goal, and even showed some regression. That instance is inarguably a matter for the IEP team to consider, and it didn't happen here.

Finally, the District's declining to identify the student as a student with autism is based on the fact that while they recognize needs in pragmatic language, District educators working with the student did not provide input from their experiences with the student that supported such an identification. Even if one accepts that this might be the case, that position could move beyond anecdotal reflection and could be translated into more concrete/quantitative understandings in the behavior and autism assessments that the independent evaluator employed. What might formalized assessment reveal from an educator's perspective in terms of the student's behavior, potential autism traits, and social skills? On this record that question cannot be answered, as the student's special education teacher omitted answers on those assessments, thereby negating any sense of understanding her perspectives through that instrumentation on the student's behavior, potential autism, and social skills. While this is not, perhaps, strictly a denial-of-FAPE, it further hollows out the District's position on a potential autism identification.

Accordingly, the District denied the student FAPE, and compensatory education will be awarded. And through the order below, the student will be formally identified as a student with autism under the terms of the IDEIA.

Another issue that must be addressed through this order is how the parties might come to a position where they have a concrete understanding between themselves of the student's status as an alumnus of the District, having been exited from special education and taken a diploma, or as a student continuing to be enrolled at the District and eligible for special education programming. A process to place the parties in such a position will be addressed in the order. As set forth below in the *Compensatory Education* section, in the mind of this hearing officer, the indeterminate status of the

student within the District has an impact on the compensatory education remedy.

Section 504/Denial-of-FAPE

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1).⁹ The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (*See generally P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

As outlined above, the District denied the student FAPE under the terms of Section 504 in failing to identify the student as a student with autism and in failing to design and to implement appropriate programming in light of the student's needs.

Compensatory Education

Where a school district has denied FAPE to a student under the terms of IDEIA, and by analogy under the terms of Section 504, compensatory education is an equitable remedy that is available to a student. (*Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *Big Beaver Falls Area Sch. Dist. v. Jackson*, 615 A.2d 910 (Pa. Commonw. 1992)).

⁹ Pennsylvania's Chapter 14, at 22 PA Code §14.101, utilizes the term "student with a disability" for a student who qualifies under IDEIA/Chapter 14. Chapter 15, at 22 PA Code §15.2, utilizes the term "protected handicapped student" for a student who qualifies under Section 504/Chapter 15. For clarity and consistency in the decision, the term "student with a disability" will be used in the discussion of both statutory/regulatory frameworks

The evidentiary scope of claims, which is not a point of contention in this matter, and the nature of compensatory education awards—which does need to be addressed here— were addressed in G.L. v. Ligonier Valley School Authority, 801 F.3d 602 (3d Cir. 2015) The G.L. court recognized two methods by which a compensatory education remedy may be calculated. One method, the more prevalent method to devise compensatory education, is the quantitative/hour-for-hour calculation, where, having proven a denial of FAPE, the compensatory education remedy is calculated based on a quantitative calculation given the period of deprivation. In most cases, it is equitable in nature, but the award is a numeric award of hours as remedy. The second method, a rarer method to devise compensatory education, is the qualitative/make-whole calculation, where, having proven a denial of FAPE, the compensatory education remedy is calculated based on a qualitative determination where the compensatory education remedy is gauged to place the student in the place where he/she would have been absent the denial of FAPE. It, too, is equitable in nature, but the award is based on services, or some future accomplishment or goal-mastery by the student, rather than being numeric in nature.

Both calculations are a matter of proof. The quantitative/hour-for-hour approach is normally a matter of evidence based on IEPs or other documentary evidence that provides insight into the quantitative nature of the proven deprivation. The qualitative/make-whole approach normally requires testimony from someone with expertise to provide evidence as to where the student might have been, or should have been, educationally but for the proven deprivation, often with a sense of what the make-whole services, or future student accomplishment/goal-mastery, might look like from a remedial perspective.

In this case, the District denied the student FAPE, as set forth above, and compensatory education will be awarded. In her complaint, the parent

requested compensatory education, which was clarified in opening statements to be a request for qualitative/make-whole compensatory education. (See Complaint at page 3; NT at 28-30).

The award of compensatory education below, however, will be an equitable quantitative/hour-for-hour award of compensatory education for three reasons. First, there is no evidence in the record offered by parent as to what an equitable make-whole remedy of services and/or accomplishment and/or goal-mastery might look like. (A hearing officer must base make-whole compensatory education on some type of evidence rather than inserting himself or herself, as with a crystal ball, into what the future educational trajectory of a remedy should look like.) Second, even in closing argument, the parent has cast the request for compensatory education as a matter of quantitative/hour-for-hour compensatory education rather than qualitative/make-whole compensatory education (“(T)he parents submit the student is entitled to an amount of compensatory that exceeds **full days** for two years....”; Parents Closing Statement at page 22, emphasis added).

Third, and most importantly, the student’s current status within the District is in flux. This situation will be addressed in the order below. But it creates a bit of a conundrum, as does any qualitative/make-whole compensatory education remedy, as the services that might be ordered (or the accomplishment and/or goal-mastery) will potentially run parallel with District programming, should the student return to the District for a “13th year”. How might those services mesh with District services? How would those services be designed around District services, where the student has voiced on the record (NT at 48-88) that maintaining employment and customizing education around a work schedule is of paramount importance? Without a clear sense even of what those services, or accomplishment, or goal-mastery might look like, is a qualitative/make-whole remedy for this

student, given the student's age, preferences, and near-term employment, the wisest course of action?

It is this hearing officer's position that qualitative/make-whole compensatory education, notwithstanding the paucity of evidence geared to such a remedy, would not serve this student well. What is required between the parties is clarity: Has this student taken a diploma? If not, what must the IEP team do to craft an appropriate IEP for the student in the current 2021-2022 school year? And when/how might those special education and related services be delivered? An award of quantitative/hour-for-hour compensatory education will, at least, put an end-point as to the dispute between the parties and provide to the student an equitable award of compensatory education for the student's use. Both parties are well-served by such clarity, the student most of all.

In this matter, the October 2019 RR was issued on October 16, 2019. With the issuance of this report, the District knew or should have known that the student qualified under the terms of IDEIA as a student with autism. An appropriate IEP should have been crafted as a result of this RR and been in place, at the latest, approximately one month later. So the compensatory education award will accrue as of mid-November 2019. The subsequent IEPs proposed and implemented by the District are inappropriate, including the most-recent IEP of May 2020, so the award of compensatory education continues through the date of this order.

A secondary school student, such as the student here, should receive 990 hours of schooling in a school year. (22 PA Code §11.3(a)). On a nine-month school year, this equates to 110 hours of schooling per month; over 180 school days, this equates to 5.5 hours per day.

Now, having come to the point where the District has been found to have denied the student FAPE and is entitled to compensatory education, it must be pointed out that the student has not been entirely deprived of

educational services, nor has the District's programming failed to provide, in certain regards, meaningful education benefit. Thus, an award that is tantamount to an entirety of school years would not be equitable.

Balanced against this sense that the student made progress in certain regards is the fact that the District failed to comprehensively and accurately understand the student's needs and failed to provide appropriate programming. These failures touched on the fundamental disability-related needs of the student—social, communication, and pragmatics needs related to the student's autism. And, importantly, as the student enters adulthood, the evaluations from the job-related experiences of the student over November 2020 – June 2021 show that communication issues, at least, might impact the student's employment performance. This is obviously a concern where a compensatory education remedy might play a role in assisting the student.

Across this mosaic of compensatory education considerations, it is the opinion of this hearing officer that the student should be awarded 4 hours of compensatory education per school day, or 80 hours per school month, or 720 hours per school year. Therefore, the student will be awarded 720 hours of compensatory education for the period mid-November 2019 to mid-November 2020; awarded 480 hours for the six school months from mid-November 2020 through mid-May 2021; awarded 60 hours for the fifteen school days from mid-May through the first week of June 2021; and awarded 240 hours for the three school months over September – November 2021 in the current school year. Accordingly, as a matter of equity, the student will be awarded 1500 hours of compensatory education.

As for the nature of the compensatory education award, because the student is well beyond the age of majority and there is no indication that the student lacks the competence to make decisions about the use of the award, the student will decide in the student's sole discretion how the hours should

be spent so long as those hours take the form of appropriate developmental, remedial, or enriching instruction or services related to the IDEIA identifications in the December 2020 IEE and/or that address the needs of the student as outlined in the IEE. The compensatory education shall be available to the student through the date of the student's 25th birthday. Obviously, the student may seek the advice and counsel of anyone, including the student's parents, as to how the student wishes to utilize the compensatory education. Nothing in this paragraph, however, should be read to limit the student's and District's ability to agree in writing mutually and otherwise as to the use of the compensatory education hours.

•

ORDER

In accord with the findings of fact and conclusions of law as set forth above, under the terms of the IDEIA and Chapter 14, the student qualifies as a student requiring special education as the result of autism, specific learning disabilities, and speech and language impairment.

The student is awarded 1500 hours of compensatory education as remedy for any claims accruing through the date of this order.

Within 10 calendar days of the date of this order, the student's IEP team shall convene in person, with the student in attendance. To the extent that this meeting needs to take place to accommodate the student's work schedule, it shall be so scheduled. At that IEP meeting, the student shall inform the IEP team whether the student wishes to be exited from special education at the Cornwall-Lebanon School District and be awarded a diploma from the school district, or whether the student wishes to continue to receive special education and related services from the school district.

If the student wishes to exit special education and be awarded a diploma from the school district, a NOREP indicating this status shall be available at the IEP meeting for the student to sign. If the student wishes to continue receiving special education and related services from the school district, this course of action need not be memorialized with a NOREP as the student's IEP team, including the student, shall schedule a subsequent IEP meeting to discuss a draft IEP, based on the December 2020 IEE, to be held within thirty calendar days after the date of the IEP meeting held within the 10-day window. To the extent that this subsequent IEP meeting needs to take place at such a time or in such a manner to accommodate the student's work schedule, it shall be so scheduled.

Finally, if the student elects to continue receiving special education and related services from the school district, the deliberations of the student's IEP team in designing the student's IEP shall explicitly account for providing special education and related services through the IEP in such a way that the student's work schedule can be reasonably accommodated.

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

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

12/03/2021