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## **Pennsylvania Special Education Due Process Hearing Officer**

### **Final Decision and Order**

**ODR No. 27294-22-23**

#### **CLOSED HEARING**

**Child's Name:**

V.F.

**Date of Birth:**

[redacted]

**Parents:**

[redacted]

**Counsel for Parents:**

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**Hearing Officer:**

Brian Jason Ford, JD, CHO

**Date of Decision:**

10/30/2023

## **Introduction**

This due process hearing concerns the special education rights of a child with disabilities (the Student). The Student's parents (the Parents) filed a due process complaint against the Student's public school district (the District), raising claims under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

The dispute spans three distinct periods of time. The first period starts on November 21, 2020, and runs through September 23, 2022. During this time, the Parents allege that the District violated the Student's IDEA right to a free, appropriate, public education by failing to provide an appropriate Individualized Education Program (IEP) to drive the Student's special education. The Parents demand compensatory education as a remedy.

The second period starts on September 23, 2022, and runs through February 7, 2023. For a portion of this time, the District unilaterally placed the Student in a 45-day interim alternative education program (IAEP). The Parents allege that the Student did not receive a FAPE while placed at the IAEP and demand compensatory education as a remedy. After the 45 days expired, the parties could not come to an agreement about the Student's programming, and the Parents retained the Student at home through February 7, 2023.

The third period starts on February 7, 2023 and runs through the present. On February 7, 2023, the Parents enrolled the Student in a Pennsylvania Public Cyber Charter School (the Cyber Charter). The parties agree that the Cyber Charter became the Student's Local Educational Agency (LEA) upon enrollment, terminating the District's FAPE obligation to the Student. However, under current case law, both parties agree that the Student is entitled to a "contingent IEP" from the District.<sup>1</sup> The parties disagree about what the contingent IEP must contain. The Parents demand the inclusion of specific types of special education and related services in the Student's contingent IEP.

Below, I further sub-divide those periods of time and find in part for the Parents and in part for the District.

## **Issues**

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<sup>1</sup> In its post hearing brief, the District argues that the Student is not entitled to a contingent IEP. The District waived that argument at the outset of this hearing. NT 45. The question before me is not whether the Student is entitled to a contingent IEP, but what the contingent IEP must contain.

Three issues are presented:

1. Did the District violate the Student's right to a FAPE while attending the District's programs from November 21, 2020, through September 23, 2022?
2. Did the District violate the Student's right to a FAPE during a period starting on September 23, 2022, when the District placed the Student in a 45-day IAES, and ending on February 7, 2023, when a cyber charter school became the Student's LEA?
3. Must the District provide a contingent IEP that includes the various types of special education and related services that the Parents demand?

To resolve these issues, I sub-divide these periods of time into smaller segments, as discussed below.

### **Prior Proceedings / Law of the Case**

The procedural history of this matter is remarkable. On November 14, 2022, the District filed a due process complaint against the Parents. I was assigned to that case, which proceeded to an expedited due process hearing as ODR No. 27284-22-23.

At the time of the District's complaint, the District had moved the Student to the 45-day IAES with the hope of conducting behavioral assessments while the Student attended that placement. The IAES was the Student's placement from a prior school year. The Parents withheld the Student from that placement, and the District was not able to evaluate the Student as planned. The District's complaint was its attempt to extend the 45-day IAES by another 45 days.

While the matter was expedited, 45-day placement ended before the hearing started. This was a function of the timing of the District's complaint, which was a function of the Parents' refusal to send the Student to the IAES. Regardless, since the Student had technically returned to the pre-removal placement (although the Student was not attending), the District pressed its claim to remove the Student to the IAES for another 45 days.

My fact-finding, analysis, and order in the prior case speak for themselves. For context, on December 14, 2022, I denied the District's request to move the Student to the IAES for another 45 days and required the District to implement the Student's IEP within the District's schools.

The current due process hearing cannot be another bite at the apple for either party. The entire record of ODR No. 27284-22-23 is incorporated into the record of this hearing. My findings of fact and conclusions of law in ODR No. 27284-22-23 constitute the law of the case in this hearing. They are incorporated herein as if set forth at length.

The District is undoubtedly frustrated by certain aspects of my prior decision. My prior holding that the District did not implement the Student's IEP with fidelity immediately prior to the 45-day IAES removal appears to be of particular concern. In some ways, portions of the District's post-hearing brief read like a motion for reconsideration of my prior holding.

To whatever extent the District's post-hearing brief must be treated as a motion for reconsideration, that motion is denied. However, my prior findings pass through a different analysis in this hearing. The question in the prior hearing was narrow: could the District move the Student to the IAES for 45 days? I did not permit the removal in large part because the District did not implement the Student's IEP with fidelity immediately before it sought the Student's removal. The question in this case is considerably broader: did the District substantively violate the Student's right to a FAPE such that compensatory education is an appropriate remedy? To answer that question, I must consider the appropriateness of the Student's IEP. Then, if the Student's IEP was appropriate, I must consider extent to which any portion of the IEP was not implemented, the duration of that breach, and the substantive educational harm – if any – that the breach created. While I will not alter my prior holding, my analysis for this case is new because the standard and burdens are different.

### **Findings of Fact**

I reviewed the record of this matter in its entirety. I make findings of fact, however, only as is necessary to resolve the issues before me. I find as follows:

#### **Background**

1. There is no dispute that the Student is a child with a disability as defined by the IDEA. At all times, the Student has been identified under the IDEA disability categories of Intellectual Disability and Autism. *Passim*. The Student's disabilities are a function of a rare genetic condition. NT 511.

2. There is no dispute that the Student has been diagnosed with Cortical Visual Impairment (CVI).
3. There is no dispute that the Student requires special education to address needs in academics, social, behavioral, communication, and adaptive skills. There is no dispute that the Student also requires special education to address sensory needs. NT 175-176, 514.
4. There is no dispute that the Student requires and benefits from movement breaks. *See, e.g.* NT 514.
5. There is no dispute that the Student requires and benefits from a structured setting with a consistent routine. NT 94.
6. There is no dispute that, historically, the Student has difficulty communicating and engages in behaviors of concern when asked to engage in or perform non-preferred activities. *See, e.g.* NT 174.

### **The 2020-21 School Year**

7. There is no dispute that the Student attended the District's Autistic Support Program during the 2020-21 school year. *Passim.*
8. November 21, 2020, is the beginning of the period for which the Parents seek a remedy.
9. From November 21, 2020, through the end of February 2021, the District operated in a hybrid format due to the COVID-19 pandemic. Students were in school four days per week and participated in remote instruction on Wednesdays. NT 862-863.
10. The Student's Autistic Support teacher during the 2020-21 school year has a master's degree in special education and is also a Board Certified Behavior Analyst (BCBA). The Autistic Support teacher has training in trauma-informed practices and in Safety Cares, which is a protocol to deescalate externalizing behaviors and, failing that, safely restrain students. NT 860.
11. On November 21, 2020, the Student's Autistic Support teacher received a medical accommodation to teach remotely. *See, e.g.* NT 867.

12. While teaching remotely, the Autistic Support teacher was projected into the classroom, could hear the classroom, and could work with students as a group or individually. *See, e.g.* NT 867.
13. Other District personnel regularly in the Autistic Support classroom included five teaching assistants in the morning and four teaching assistants in the afternoon. Each teaching assistant was assigned to the classroom, not to any student, and so they were all able to assist all the students. The teaching assistants were trained in Safety Cares. NT 863, 867, 869, 870-871.
14. The Student was never restrained during the 2020-21 school year. NT 210, 903.
15. In addition to the Autistic Support teacher and the teaching assistants, the District's Coordinator of Autistic Support, who is a BCBA and also a Board Certified School Psychologist, provided support in the Student's classroom and helped with IEP development. *See, e.g.* NT 136-137, 140-142, 182.
16. In addition to District personnel, the Student also had a TSS worker provided by a third-party agency. *Passim.*
17. Six students attended the classroom in the morning and four attended in the afternoon. NT 869.
18. The Autistic Support teacher's medical accommodation expired in mid-February 2021. At that point, the Autistic Support teacher took a leave of absence. NT 866.
19. In late February 2021, the District returned to five days per week of in-person instruction. NT 862.
20. In late April, 2021, the Autistic Support teacher returned from her leave of absence and taught in person. NT 866.
21. For the entirety of the 2020-21 school year, COVID-19 safety protocols, including masking, were used in the District during all in-person instruction. NT 863.
22. For all in-school days during the 2020-21 school year, the Student's schedule remained consistent regardless of whether the Autistic Support teacher was remote or in person. *See, e.g.* NT 876-877.

23. The Autistic Support classroom featured a semi-permanent structure that partly separated a corner of the classroom from the rest of the classroom. That portion of the classroom was called "Alaska," and was used as a calming space for students in the Autistic Support classroom. See, e.g. NT 876.
24. The Student would sometimes ask to go to "Alaska," and District personnel honored those requests. As it was used during the 2020-21 school year, "Alaska" had no door. At no time was the Student detained in "Alaska," and "Alaska" was never used to barricade the Student from the remainder of the classroom.<sup>2</sup>
25. In addition to receiving instruction in the Autistic Support classroom, the Student also received instruction in a general education classroom. The Student had a desk in the general education classroom like the rest of the students who attended the general education classroom. See NT 872.
26. The Student received special education during the 2020-21 school year pursuant to an IEP drafted on May 27, 2020 (the 2020 IEP). S-27.
27. The 2020 IEP included the following goals (S-27):<sup>3</sup>
  - a. "Upon departure from the classroom, [Student] will independently pack-up [] belongings with 80% accuracy across 5 consecutive data collection opportunities from a baseline of 40%.
  - b. "When in a store (e.g. Acme, Target) or restaurant (e.g. Red Robin, Applebee's), [Student] will independently stay with the group for the length of the community experience, with 80% accuracy across five consecutive community based instruction opportunities from a baseline of 40%.

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<sup>2</sup> I find testimony to the contrary is either hearsay, is not credible, or, in some instances, both. The Parent's efforts to portray "Alaska" as an enclosed, padded room used for quasi-disciplinary purposes was either grossly misinformed or willfully disingenuous. I need not resolve that distinction to resolve the issues presented in this case. Additionally, I find that the picture entered into evidence as P-18 is an accurate depiction of "Alaska" at the time it was taken – But testimony concerning how "Alaska" differed from the picture during the time that the Student attended the Autistic Support classroom was highly credible.

<sup>3</sup> I am keenly aware that the evidence in this case speaks for itself, and restating evidence is not a "finding of fact" as that term is typically used in these hearings. However, explicitly stating the Student's IEP goals, and illustrating how those goals did and did not change over time, is critical to understanding this case.

- c. "Throughout the school day, [Student] will increase [] toileting skills by staying dry for one month from a baseline of two consecutive weeks.
- d. "During a thirty minute activity, [Student] will improve [] functional communication skills by independently answering five contextually relevant WH questions pertaining to the activity and/or curriculum based lesson given no more than one verbal prompt in 4 out of 5 questions across five consecutive data collection points from a baseline of answering 3 questions.
- e. "When given a larger number of objects and a visual, [Student] will take a certain number of objects ranging from 1-5 with 80% accuracy across five consecutive data collection opportunities from a baseline of 40% accuracy.
- f. "[Student] will increase [] reading skills by receptively identify 5 grade-level high frequency words with 80% accuracy across 5 consecutive data opportunities from a baseline of 40% accuracy.
- g. "[Student] will be able to identify 5 community signs with 80% accuracy across 5 consecutive data opportunities from a baseline of 40% accuracy.
- h. "During a 20-minute activity within [] special education classroom, [Student] will follow 5 two-step directions in order to complete an activity with 80% accuracy for 5 consecutive data collection opportunities from a baseline of following 1 two-step direction during activities.
- i. "[Student] will write [first four letters of Student's first name], with visual and/or verbal prompts, 3 out of 4 tries, for 3 consecutive OT sessions. Baseline: traces [those letters] with physical assistance.
- j. "[Student] will don [a] coat with verbal prompts, and engage the zipper with minimal assistance, 3 out of 4 tries, for 3 consecutive OT sessions. Baseline: requires physical assistance to don coat and engage zipper.
- k. "When participating in the PT movement group, [Student] will achieve an average of 14/16 on the rubric for 4/5 opportunities, from a baseline of 8/16.



- l. “When given a choice of 3-5 pictures against increasingly complex backgrounds, [Student] will sort pictures by requested features 3 out of 4 times over 3 consecutive monthly data collections points. Baseline: [Student] is able to visually attend to pictures.
  - m. “During a 20-minute activity within [an] inclusion classroom, [Student] will follow 5 two-step directions in order to complete an activity with 80% accuracy for 5 consecutive data collection opportunities from a baseline of following 1 two-step direction during activities.”
- 28. The 2020 IEP included numerous Specially Designed Instruction (SDI) and program modifications, including Physical Therapy (PT), Occupational Therapy (OT), and Community Based Instruction (CBI). S-27.
- 29. The District was unable to implement the CBI portions of the Student’s IEP as planned during the 2020-21 school year as a result of the COVID-19 pandemic. However, the District provided similar instruction and experiences in school. See, e.g. NT 217.
- 30. During the 2020-21 school year, the Student had no behavioral goals. The “Special Considerations” section of the 2020 IEP indicated that the Student did not exhibit behavior that interfered with the Student’s education or that of others. However, the “Needs” section of the Present Levels in the 2020 IEP stated that the Student needed to “[d]ecrease inappropriate behavior.” S-27.
- 31. More specifically, the 2020 IEP stated, “[Student] displays behaviors throughout the day to gain attention, gain access, and avoid tasks/directions. [Student] has been observed engaging in the following behaviors: aggression (hair pulling, pinching, hitting, scratching), dropping (in classrooms, hallways, community) followed by rolling on the floor, throwing/clearing of materials in front of [Student] on a desk or table, yelling, and disrobing.” S-27.
- 32. The 2020 IEP did not include a Positive Behavior Support Plan (PBSP) or any other similar document. S-27. *Passim*.
- 33. On September 1, 2020, the Student’s IEP team revised the 2020 IEP to include a class-wide positive behavior support plan that was used in the Autistic Support classroom. S-25

34. Throughout the 2020-21 school year, the District personnel who worked with the Student got a sense of what demands would trigger the Student's behaviors and worked proactively to mitigate those behaviors. *See, e.g.* NT 200, 900-903, S-28. However, the Student's behaviors were not always predictable and could escalate quickly at times. *See, e.g.* NT 901.
35. As a whole, District personnel perceived the Student's behaviors as improving throughout the 2020-21 school year. *See, e.g.* NT 201-203, 722, 903. However, the District did not systematically collect data regarding the Student's behaviors during the 2020-21 school year. *Passim.*
36. On May 4, 2021, the Student's IEP team reconvened and revised the 2020 IEP to form a new, annual IEP for the Student (the 2021 IEP). S-28.
37. The 2021 IEP included the same amount of OT, PT, and group Speech Therapy as the 2020 IEP. The total amount of individual Speech Therapy was reduced by half as the duration of sessions decreased from 30 to 15 minutes. The total amount of Vision Therapy remained the same, but was to be provided over a larger number of shorter sessions. *C/f* S-25, S-28.
38. The 2021 IEP maintained the Student's placement in the same Autistic Support program, including the same Autistic Support classroom. *C/f* S-25, S-28.
39. The goal in the 2020 IEP for the Student to pack up independently at the end of the day was not mastered, but it was removed from the 2021 IEP. *C/f* S-25, S-28.
40. The Student mastered the CBI "stay with the group" goal in the 2020 IEP. This was not mastered in the community, as there were no community outings, but rather was mastered with functionally similar activities in school. The goal was removed. *C/f* S-25, S-28.
41. The Student mastered the toileting goal in the 2020 IEP by staying dry for four consecutive weeks, although the Student did have accidents during the 2020-21 school year. The goal was repeated in the 2021 IEP with a more challenging mastery level of five consecutive weeks. *C/f* S-25, S-28.

42. The Student mastered the communication goal answer WH questions. The goal was not repeated. *C/f S-25, S-28.*
43. The Student mastered the goal to take an amount of objects from a larger set. A version of this goal with a more challenging mastery condition was included in the 2021 IEP. *C/f S-25, S-28.*
44. The Student's progress towards the goal of identifying high frequency words was variable. The Student's accuracy ranged from 20% to 100% on different probes. The goal, however, called for consistent mastery over five probes and the Student did not reach that level. The goal was not mastered, but it was removed. *C/f S-25, S-28.*
45. The Student's progress was similarly variable on the goal to recognize community signs. The goal was not mastered, but it was removed. *C/f S-25, S-28.*
46. The Student mastered the goal to request objects to complete an activity in February 2021. The goal was removed. *C/f S-25, S-28.*
47. The Student mastered the goal to follow five 2-step directions in January 2021. The goal was removed. *C/f S-25, S-28.*
48. No progress was reported on either of the Student's OT goals. The goal for the Student to write the first four letters of the Student's first name was replaced with a goal for the Student to do the same using typing or speech-to-text software. There is no dispute that the Occupational Therapist worked with the Student on zippering, using a zipper that was not attached to any clothing, to help the Student don a coat.<sup>4</sup> That goal was modified into the 2021 IEP (see below). *C/f S-25, S-28.*
49. The Student regressed in Physical Therapy as measured by the PT movement group rubric. The goal continued into the 2021 IEP. *C/f S-25, S-28.*
50. The 2021 IEP included several new goals as well. The goals in the 2021 IEP were (S-28):
  - a. "During vision support sessions after direct instruction in the salient features of an object, animal or person, when presented with embedded pictures in a book, worksheet, or other classroom activities, [Student] will locate by pointing or marking

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<sup>4</sup> The parties dispute the efficacy of this approach.

the requested item in 4/5 opportunities, from a baseline of being able to locate familiar items or pictures in a visually complex environment.

- b. “[Student] will, when presented with a picture and told, “Go here,” follow the picture direction, for a total of 5 locations, with 80% accuracy, for 5 consecutive data collection opportunities.
- c. “[Student] will, when given a number of objects (up to 10) and a visual representation of a number and told, “take \_ (quantity)” take the specified number of objects, with 80% accuracy across 5 consecutive data collection opportunities. Baseline – can take objects 1-5.
- d. “[Student] will, when scheduled and provided with adult gestural prompting, complete 5 different classroom jobs (mail, Swiffer, clean tables, shredding, return library books) with 80% accuracy for each job across 5 consecutive data collection opportunities. Baseline: [Student] currently takes the lunch count to the cafeteria each morning.
- e. “[Student] will, when asked by an adult to identify [] last name and full name in writing, receptively identify [] last name with 80% accuracy, across 5 consecutive data collection opportunities. Baseline: [] can receptively and expressively identify [] first name.
- f. “[Student] will, when scheduled or directed by an adult to engage in a 5-minute turn taking game with a peer, will calmly wait for and take a turn, for 80% of turns, for 5 consecutive data collection opportunities. Baseline: 30 seconds
- g. “[Student] will, when provided with adult prompting and a recreation/leisure picture book containing three different activities, open the book, identify the activity, gather materials, and participate in the activity for 2 minutes, for each of 3 activities, with 80% accuracy, for 5 consecutive data collection opportunities. Baseline: [Student] will play/watch a short video on the iPad for 2 minutes.
- h. “[Student] will, when commenting, requesting help from an adult, or when gaining the attention of others, use a complete sentence to include the use of subjective personal pronouns (i.e. I, you, me) given no more than one verbal prompt with 80%

accuracy across three consecutive data collection opportunities.  
Baseline: adult model needed.

- i. "When participating in the PT movement group, [Student] will achieve an average of 14/16 on the rubric for 4/5 opportunities, from a baseline of 8/16.
  - j. "[Student] will engage the zipper on [Student's] coat/jacket with minimal assistance, 2 out of 3 times, for 3 consecutive OT sessions. Baseline: requires full physical assistance to engage zipper, and then zips up independently.
  - k. "Using [a] Chromebook, [Student] will type or use speech-to-text to "write" [the first four letters of Student's first name] with verbal and/or visual prompts after initial set-up, 2 out of 3 times, for 3 consecutive data points. Baseline: requires full physical assistance.
  - l. "Throughout the school day, [Student] will increase [] toileting skills by staying dry for five weeks. Baseline: 3 weeks."
51. The 2021 IEP included numerous SDI and program modifications, mostly similar to the 2021 IEP. S-28.
52. The 2021 IEP included a Student-specific PBSP. The PBSP specified two unwanted behaviors: noncompliance and disruptive behavior. The PBSP included operational definitions of both behaviors, a very brief description of when those behaviors tend to occur, and a proactive plan to decrease those behaviors (focusing on teaching replacement behaviors and adaptive skills), reinforcement for positive replacement behaviors, contingencies for unwanted behaviors, and a requirement that all teachers who work with the Student collect behavioral data at all times. S-28.

### **The 2021-22 School Year**

53. The Student attended the same Autistic Support program, with the same Autistic Support classroom, during the 2021-22 school year. *Passsim.*
54. The Student's Autistic Support teacher changed. The new Autistic Support teacher was trained in ABA strategies and Safety Cares. NT 1007.

55. As in the prior year, five teaching assistants were assigned to the Autistic Support classroom. All were trained in Safety Cares. All were available to all students in that classroom. See NT 1009-1010.
56. Similar to the prior year, there were five total students in the Autistic Support classroom. NT 1009.
57. The Student's daily schedule during the 2021-22 school year was substantively similar to the Student's schedule in the prior school year. The same is true for the Student's participation in general education classrooms and the use of "Alaska" in the Autistic Support classroom. See NT 1011, 1014-23.
58. The Autistic Support teacher and the Parents communicated frequently in a communications book. S-38.
59. The District was able to implement CBI that was truly community-based during the 2021-22 school year. See, e.g. NT 167, 1041.
60. By the end of the 2021-22 school year, the Student had made progress towards the 2021 IEP goals as follows (see S-37):
  - a. The Student had mastered one objective in the "go here" goal, but had not mastered the goal itself. The goal was continued into the next IEP (see below).
  - b. The Student had mastered the "taking objects" goal.
  - c. The Student had not mastered the "classroom jobs" goal, but the goal was not continued into the next IEP (see below).
  - d. The Student had not mastered the "name identification" goal but had made progress and achieved several short-term objectives associated with the goal. The goal was not continued into the next IEP (see below).
  - e. The Student had not mastered the "taking turns" goal but had made progress and achieved some short-term objectives associated with the goal. The goal was not continued into the next IEP (see below).
  - f. The Student had not mastered the "recreation/leisure picture book" goal but had made progress and achieved some short-

term objectives associated with the goal. The goal was not continued into the next IEP (see below).

- g. The Student had not mastered the “complete sentences” goal but had made progress and achieved most short-term objectives associated with the goal.
  - h. The Student had not mastered the movement group “rubric” goal, but had made progress as measured by the rubric.
  - i. The Student had not mastered the “coat” goal and progress was not objectively reported. Narrative reports tend to suggest that the Student was in the same spot as at the end of the prior school year. The Student could not engage the zipper but could pull it up once engaged.
  - j. Progress reporting is ambiguous as to whether the Student achieved the name writing goal by typing or voice to text. Progress data is not reported and narrative progress reports are, for the most part, not tied to the goal itself.
  - k. The Student did not master the toileting goal. While no data is reported, the report says “in progress” for each marking period.
  - l. The Student did not master the vision therapy goal, but made progress. The Student’s progress was variable, and the Student was more successful with familiar or preferred materials.
61. While data was highly variable day-to-day, instances of the Student’s noncompliant behavior decreased during the 2021-22 school year. However, it is impossible to tell how much, if any, of the decrease was attributable to the District’s interventions, a change in the Student’s medication, or a combination of both. Moreover, the Student’s noncompliant behaviors remained problematic throughout the entirety of the school year, albeit at decreased levels. S-32.

### **Summer 2022**

62. In the summer of 2022, during a series of meetings with the District, the Parents expressed numerous concerns about the Student’s placement in the Autistic Support classroom and made it clear to the District that they would no longer support that placement in the 2022-

23 school year. Rather, they demanded placement in the Student's neighborhood elementary school (NES). *Passim*, see e.g. NT 659.<sup>5</sup>

63. Upon learning of the Parent's position, District personnel continued to believe that the same Autistic Support placement that the Student attended the prior two school years was appropriate for the Student, but did not offer that placement because District personnel believed that the Parents would reject any placement outside of the NES. See NT 678, 681.<sup>6</sup>
64. On August 24, 2022, the District proposed a Life Skills program in a different school building (neither the prior building nor the NES). S-3
65. On August 29, 2022, the Parents withheld consent for the Life Skills placement. S-3.
66. Also on August 29, 2022, the Parents requested an Independent Educational Evaluation (IEE) at the District's expense. The District agreed to fund the IEE and provided a list of evaluators. See, e.g. NT 705.
67. Some time after August 29, 2022, and the start of the 2022-23 school year, District personnel promised the Parents that the Student would receive "Inclusion Autistic Support" in the NES. See S-42 at 1.

### **The 2022-23 School Year**

68. The agreed-to school building did not have an Autistic Support program similar to the program that the Student attended the prior two school years. Rather, in general, the program at the agreed-to

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<sup>5</sup> There is considerable evidence in the record that the Parents, especially the Student's mother, were pleased with the Student's program and the Student's progress during the 2021-22 school year until they announced their concerns in the summer of 2022. There is also evidence that their concerns flowed from a desire for the Student's program to be more like the program that another student in the District was receiving, and a desire for the Student to attend the same school as the Student's sibling. The Parents' approval of or satisfaction with the Student's special education is not outcome determinative. As explained below, if the Parents approved and praised an inappropriate program, the District still violated the Student's right to a FAPE. Since the Parents' attitude towards the Student's program as perceived by the District and as written by the Parents in contemporaneous documentation is not an element of the claims presented, I make no explicit findings in this regard except as necessary to provide context.

<sup>6</sup> Just as parental approval of an inappropriate placement yields a violation of a child's rights, withholding an appropriate placement because parents will reject it also yields a violation of a child's rights – no matter how well founded the belief in parental rejection may be. It is, of course, possible that multiple placements can be appropriate for a student, and it is wise for schools and parents to discuss all appropriate placement options. But 'we did not offer a FAPE because we knew parents would say no' is no defense at all in an IDEA case.



school building served children who needed less support than the Student; children who spent the majority of each day learning in general education classrooms. *Passim*.

69. For the 2022-2023 school year, the District assigned the Student to a regular education classroom with approximately 22 students, which was co-taught with a regular education teacher and a special education teacher. NT 214; S-42.
70. Ultimately, as the 2022-23 school year was starting, the District offered and the Parents accepted a new IEP for the Student (the 2022 IEP). *Passim*, see also ODR No. 27284-2223-KE.
71. Findings of fact 8 through 36 in the decision at ODR No. 27284-22-23 are incorporated herein as if set forth at length. While those findings speak for themselves, I note for context that they describe the 2022 IEP, a PBSP that was not attached to the 2022 IEP, the Student's need for 1:1 support and the District's difficulty staffing that position, services that the Student received, significant behavioral issues that started almost immediately during the 2022-23 school year. Of note:
  - a. On September 16, 2022, the Student injured classroom staff.
  - b. On September 23, 2022, the District convened a manifestation determination meeting and found that the disciplinary behavior was caused by, or had a substantial relationship to, the Student's disability.
  - c. At the same meeting, the District also found that the disciplinary behavior was a direct result of the District's failure to implement the Student's IEP.
  - d. Despite the above findings, the District determined that the injuries constituted "serious bodily injury" and, therefore, unilaterally removed the Student to a Interim Alternative Educational Setting (IAES) for 45 days.
72. Regarding the September 16, 2022, incident, the Student struck a 1:1 paraprofessional on the head with closed fists, driving the paraprofessional's hearing aid into her ear and causing a concussion. The paraprofessional was medically diagnosed with a concussion and was placed on work restrictions through September 21, 2022. Those restrictions were extended, and the paraprofessional was referred to and seen by a neurologist on October 13, 2022. The paraprofessional

was then cleared and attempted to return to work on October 17, 2022, but was unable to do so as a result of her injuries. The Paraprofessional then received an MRI, and continued treatment with a neurologist, and continued to experience concussion-related symptoms. The paraprofessional was unable to work for the remainder of the 2022-23 school year. NT 109-113, 163-164, 754, 818.

73. The IAES selected by the District was the Autistic Support placement that the Student attended during the 2020-21 and 2021-22 school years. The District's intention was to reevaluate the Student while attending that placement. The Parents withheld the Student from that placement, and so the District did not evaluate as planned. *Passim*.
74. On October 4, 2022, the IEE was complete and the parties received an IEE report. S-48.
75. The IEE included a review of records and new testing sufficient for the evaluator to make diagnoses and educational recommendations. S-48.
76. The evaluator diagnosed the Student with Autism Spectrum Disorder, Level 3, Associated with a Known Genetic Condition ... with Accompanying Intellectual and Language Impairment, and History of Childhood Apraxia of Speech. S-48.
77. Recommendations included (S-48 at 11):
  - a. completion of an FBA by a BCBA,
  - b. placement in a "highly structured setting with a small student to staff ratio and ongoing, full-time 1:1 support from a paraprofessional,"
  - c. occupational therapy goals [to] continue to address [Student's] adaptive functioning weaknesses and other daily living/self-care areas,
  - d. a highly routine, consistent, structured environment, and
  - e. consistent praise for efforts, as opposed to results.
78. The Parents did not return the Student to school in the District at any point after the September 23, 2022, manifestation determination. *Passim*.

79. On November 14, 2022, the District filed a due process complaint resulting in the decision at ODR No. 27284-22-23.
80. On November 21, 2022, the Parents filed a due process complaint initiating this matter.
81. By the time that the hearing for ODR No. 27284-22-23 convened, the 45-day placement had expired, and the District moved forward on the theory that maintaining the Student's placement in the NES was likely to result in injury. See ODR No. 27284-22-23.
82. On December 14, 2022, I issued a final decision and order in ODR No. 27284-22-23. While the order speaks for itself, I denied the District's demand and ordered the District to maintain the Student's placement at the NES and implement the 2022 IEP with fidelity. See ODR No. 27284-22-23.
83. On December 19, 2022, the parties and their attorneys participated in a five-hour, facilitated IEP team meeting. NT 309, 415, 757.
84. After the facilitated IEP team meeting, the District proposed an IEP with a PBSP (the December 2022 IEP). S-42.
85. The December 2022 IEP offered an Autistic Support placement at the school that the Student attended during the 2020-21 and 2021-22 school years, albeit at an itinerant level. S-42.
86. The December 2022 IEP includes updated present educational levels for the Student. S-42.
87. The December 2022 IEP includes the following goals (S-42):
  - a. "Given direct instruction in number recognition and 1:1 correspondence skills, [Student] will receptively identify numbers 1-5 from a choice of 3 numbers with 80% accuracy 4/5 times from a baseline that will be determined by [January 2023].
  - b. "Given direction instruction in 1:1 correspondence skills, [Student] will count numbers to 5 using 1:1 correspondence skills on 4/5 trials with 80% from a baseline of counting to 1.
  - c. "Given direct instruction in beginning letter sounds, [Student] will receptively identify 19 beginning letter sounds from a choice

of 4 on 4/5 trials with 80% accuracy from a baseline to be determined [in January 2023].

- d. "Given multi-step activities, [Student] will independently follow a 1-2 step direction on 4 out of 5 trials without prompting from a baseline that will be determined by [January 2023].
- e. "Given direct instruction in sight word recognition, [Student] will receptively identify 40 Dolch pre-primer sight words from a choice of 4 on 4 out of 5 trials with 80% accuracy from a baseline to be determined [in January 2023].
- f. "Student will increase the display of on-task behavior from a year-to-date average of 56% of intervals scored to a daily average of 65% of intervals scored over the course of two consecutive marking periods. [The goal goes on to incorporate definitions of on-task behavior an not on-task behavior.]
- g. "[Student] will increase the display of speaking respectfully from a year-to-date average of 53% of intervals scored to a daily average of 60% of intervals scored over the course of two consecutive marking periods. [The goal goes on to incorporate definitions of speaking respectfully.]
- h. "[Student] will increase the display of respecting property from a year-to-date average of 51% of intervals scored to a daily average of 60% of intervals scored over the course of two consecutive marking periods. [The goal goes on to incorporate definitions of respecting property.]
- i. "[Student] will increase the display of keeping [] hands and feet to [self] from a year-to-date average of 67% of intervals scored to a daily average of 80% of intervals scored over the course of two consecutive marking periods. [The goal goes on to incorporate definitions of keeping hands and feet to self].
- j. "[Student] will increase the display of staying in [Student's own] area from a year-to-date average of 53% of intervals scored to a daily average of 62% of intervals scored over the course of two consecutive marking periods. [The goal goes on to incorporate definitions of staying in Student's own area]."

- k. “[Student] will independently zipper a coat with gestural prompts in 1 of 3 trials over 2 consecutive attempts/days. Baseline: [Student] is unable to zipper a coat.
  - l. “After listening to a short story [Student] will correctly answer basic comprehension questions such as who, where, when using voice to text technology 80% of the time across 5 consecutive data points. Baseline to be determined by [January 2023].
  - m. “When participating in a social activity/game, [Student] will demonstrate improvement in reciprocal social interactions (taking/skipping a turn and waiting/allowing others to finish their turn) by achieving an average of 3.5 out of 4 across one marking period on the social rubric from a baseline to be determined in January, 2023.”
88. The December 2022 IEP includes a significant amount of student and IEP-specific SDI and modifications, all of which are directly linked to the Student’s identified needs and IEP goals. S-42.
89. On January 3, 2023, the Parents obtained a private CVI assessment of the Student. The CVI assessment consisted of single assessment, conducted by the person who developed that assessment. The resulting report included little to no actionable information for the Student’s IEP team. To the extent that actionable recommendations are included, they are fairly consistent with services and accommodations that the District had offered. See P-1.<sup>7</sup>
90. On February 2, 2023, the District offered an IEP that is best viewed as a revision to the December 2022 IEP. S-49. The two IEPs are nearly identical in substance. *C/f* S-42, S-49. The February 2023 IEP includes several additional SDI that do little more than clarify how other SDI would be implemented. See S-49 at 54-56.
91. On February 4, 2023, the Parents disenrolled the Student from the District and sent the Student to a parochial school for one day Sometime thereafter, the Parents enrolled the Student in a Pennsylvania public cyber charter school. NT 207, 258, 260, 322-23, 784.

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<sup>7</sup> Substantial controversy surrounds both the individual who completed the CVI assessment and the particular assessment itself. I need not resolve that controversy to resolve this case.

92. The record does reveal the exact date that the Student enrolled in the cyber charter school. I take judicial notice that February 4, 2023, was a Saturday, and the record supports a finding that the Student attended the parochial school for one day. With no better evidence, I find that the Student enrolled in the cyber charter school on February 7, 2023.

### **Witness Credibility**

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

Except as noted, I find that all witnesses testified credibly in that all witnesses candidly shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. To the extent that witnesses recall events differently or draw different conclusions from the same information, genuine differences in recollection or opinion explain the difference.

I decline to make an explicit credibility concerning the evaluator who conducted the private CVI assessment. Resolving an ongoing dispute between that individual, the medical community, and the special education community while, at the same time, drawing conclusions about what constitutes standardization and peer-review in multiple fields of study goes well beyond the scope of this hearing. Rather, in terms of actionable, concrete educational recommendations, I find that report unremarkable.

Further, the Parents called a different witness to give opinion testimony about psychology self-regulation, and services for children with Autism. While that witness had significant expertise in those fields, the witness had

never met the Student, never observed the Student, knew nothing about the District's programs, and could say almost nothing specific to the Student. While this witness's testimony triggered and adverse "qualitative determination" about credibility, in a case that is about the individual Student, I cannot give this witness's testimony any weight.

## **Applicable Laws and Regulations**

### **The Burden of Proof**

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the District is the party seeking relief and must bear the burden of persuasion.

### **Free Appropriate Public Education (FAPE)**

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id* at 3015.

Third Circuit consistently interpreted *Rowley* to mean that the “benefits” to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child’s potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Andrew F.* decision is no different.

A school district is not required to maximize a child’s opportunity; it must provide a basic floor of opportunity. See, *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than “trivial” or “de minimis” benefit. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Andrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a “merely more than *de minimis*” standard, holding instead that the “IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be “appropriately ambitious in light of [the child’s] circumstances.” *Id.* at 1000. In terms of academic progress, grade-to-grade advancement may be “appropriately ambitious” for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress. Rather, I must consider the totality of a child’s circumstances to determine whether the LEA offered the child a FAPE.

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student’s circumstances.

### **Compensatory Education**



Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

The hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). In *Reid*, the court concluded that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. *Reid* remains the leading case on this method of calculating compensatory education.

The more nuanced *Reid* method was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also embraced the *Reid* method in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid* to explain that compensatory education "should aim to place disabled children in the same position that the child would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the *Reid* method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the *Reid* or "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

"... the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout

that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

*Jana K. v. Annville-Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 608 (M.D. Pa. 2014).

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) are warranted. Such awards are fitting if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 609 (M.D. Pa. 2014). See also *Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, \*7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, \*9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence establishing the position that the student would be in but for the denial, or evidence establishing the amount and type of compensatory education needed for remediation, the hour-for-hour approach is a necessary default. Alternatively, full-day compensatory education can also be an appropriate remedy if the full-day standard is met. In all cases, however, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

## **Contingent IEPs**

Contingent IEPs are a function of Third Circuit case law holding that, in some circumstances, students may be entitled to an IEP from a school district even when the school district has no FAPE obligation to the student. See, *I.H. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 771 (M.D. Pa. 2012); *L.T. v. N. Penn Sch. Dist.*, 342 F. Supp. 3d 610 (E.D. Pa. 2018).

In this case, I need not resolve the question of whether the Student is owed a contingent IEP. The District has conceded that point. The question concerns the content of the contingent IEP.

By definition, contingent IEPs are not implemented at the time they are offered. Rather, they might be implemented at some unknowable point in time in the future. Even so, courts have instructed to judge the appropriateness of a contingent IEP at the time it is offered. See, e.g. *S.M. v. Chichester Sch. Dist.*, No. 21-4266, 2022 U.S. Dist. LEXIS 52872 (E.D. Pa. Mar. 24, 2022).

## **Discussion**

The voluminous record of this case (both relative to the Student's age and to special education due process hearings in general) and the intense acrimony between the parties masks the straightforwardness of the FAPE analysis that must be applied to this case. That analysis makes the most sense when looking at each discrete period of time. I sub-divide those periods somewhat differently than the parties suggest, but the result is the same.

### ***November 21, 2020, Through the End of the 2020-21 School Year***

The first period I will consider is November 21, 2020, through the end of the 2020-21 school year. This is the most straightforward segment. The Student's IEP was necessary but insufficient during this period of time. Necessary in that I find no flaw with any of the IEP's components or any of the services that the District provided to the Student. Insufficient in that the Student clearly had significant and concerning behavioral needs that were identified in the IEP itself, but were not addressed through the IEP. The complete absence of behavioral goals, a Student-specific PBSP, or anything that would require the objective collection of behavioral data is clearly inappropriate when this absence is compared to the behavioral needs drafted into the same document. While the IEP was appropriate in every other way, this omission constitutes a substantive violation of the Student's right to a FAPE.

The record is concerningly silent as to what behavioral supports the Student should have received and how the Student's behaviors manifested during this time. I find, however, that the Student's behaviors were problematic during this time. The Student's behavioral difficulties were documented at the end of the prior school year and were documented again at the end of the 2020-21 school year when a new IEP was drafted. The new IEP continued to acknowledge the Student's ongoing behavioral problems and included a class-wide behavior plan. While I recognize that it is the Parents' burden to establish entitlement to a compensatory education award, the absence of data that can be used to craft such an award is attributable to the District's failure to address the Student's behavior through the Student's IEP. I will not punish the Student for what the District did not do. At the same time, nothing in the record supports a full-day compensatory education award for this time.

With this lack of evidence, I find it equitable to award one hour for each day that the District was open for in person instruction between November 21, 2020 and the end of the 2020-21 school year.

None of the Parents' other claims concerning this period of time are supported by preponderant evidence.

### ***The 2021-22 School Year***

I find no violation of the Student's right to a FAPE during the 2021-22 school year. The program that the Student received during the 2021-22 school year was essentially the same as in the 2020-21 school year. The key difference, however, is that the District added a behavior plan to the Student's IEP and regularly collected objective behavioral data.

As described above, multiple factors likely contributed to the Student's behavioral presentation during the 2021-22 school year. These include, but are not limited to, medication changes. To that extent, behavioral data collected during the 2021-22 school year does not prove that the PBSP was appropriate. The same data, by itself, does not prove a FAPE violation for the same reason (ignoring the impermissible 20/20 hindsight that analysis would require). It is the Parents' burden to show both that the Student required behavioral interventions that were different from what was offered in the PBSP, and that such a need was known at the time that the IEP was drafted. There is no preponderant evidence in the record proving that the Student needed more than what the PBSP offered, or that such a need was known at the time the IEP was drafted. The IEP in place during the 2021-22 school

year was reasonably calculated to provide a meaningful educational benefit to the Student at the time it was drafted.

Actual progress data cannot be used to second guess what was known to an IEP team when an IEP is drafted. Actual progress data can show whether an IEP that was reasonably calculated to confer a FAPE when it was drafted is working as planned. Nothing in the data that the District collected during the 2021-22 school year (behavioral or otherwise) signaled a need to review or revise the 2021 IEP mid-year.

The Parents' claims concerning the 2021-22 school year are not supported by preponderant evidence and, therefore, are denied.

### ***The 2022-23 School Year – Start Through September 23, 2022***

The District's intention to work cooperatively with the Parents is not a defense for offering a placement that it knew to be inappropriate. While it is not relevant in the strictest sense, I agree with the District that the Parents more than likely would have rejected anything but what the District ultimately offered. Such placation is no excuse for a blatant violation of the Student's substantive right to a FAPE.

With little to no preparation, the District moved the Student from a small, highly structured Autistic Support program featuring a specialized Autistic Support classroom to a general education program with Autistic Supports. The Student went from a specialized class of five with a 1:1 adult to student ratio to a generalized class of 20 with inconsistent 1:1 support. There was no transition planning to acclimate the Student. There was no continuation of behavioral supports that seemed to be helping the Student regulate behaviors. All objective data weighed against this placement, as did the subjective impressions of nearly all District personnel at that time.

The District might not have been able to foresee the disaster that followed. However, the Student's placement for the start of the 2022-23 school year was not, and could not have been, reasonably calculated to confer a meaningful educational benefit to the Student. The sad series of events that began with the 2022-23 school year is directly linked to the District's decision to promote unsupported parental preferences over its own sound, data-informed educational judgement.

Evidence is preponderant that the starting 2022-23 school year placement was not reasonably calculated to confer a meaningful educational benefit to the Student. It was foreseeable that the Student would derive no educational benefit from that placement, which is exactly what happened. Full days of

compensatory education are an appropriate remedy under these circumstances. I award one hour of compensatory education to the Student for each hour that school was in session from the start of the 2022-23 school year to September 23, 2022.

***September 23, 2022 through November 7, 2022***

From September 23, 2022 through November 7, 2022, the Student was placed back in the prior Autistic Support program as a 45-day IAES. The Parents did not send the Student to school during this time.

A surface-level threshold issue is whether the District was permitted to unilaterally change the Student's placement at this time. If the injury to the paraprofessional constituted "serious bodily injury," the District was permitted to change the Student's placement.<sup>8</sup> I find that this distinction, as applied in this case, is a red herring. Under the truly unique facts of this case, the question of whether the paraprofessional sustained a serious bodily injury (SBI) is irrelevant.

Assume the paraprofessional sustained an SBI. The District was entitled to unilaterally move the Student to the Autistic Support program. The question of the Student's entitlement to compensatory education is then resolved by considering the appropriateness of the Autistic Support program.

Assume the paraprofessional did not sustain an SBI. The District was not entitled to unilaterally move the Student to the Autistic Support program. But, since the Parents demand compensatory education and raise no claim concerning meaningful parental participation, the question is still whether the change to the Student's program resulted in substantive educational harm. That question is answered by considering the appropriateness of the Autistic Support program.

Analysis to determine the Student's entitlement to compensatory education is identical, regardless of whether the paraprofessional sustained a SBI.

There is no preponderant evidence in the record that the Autistic Support program – which had worked well for the Student for years – was inappropriate for the Student in September 2022. In fact, the record overwhelmingly supports a finding that the Student should have started the 2022-23 school year in that Autistic Support program. The District's decision to remove the Student from that program forms the basis of a compensatory

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<sup>8</sup> A discussion of the definition of serious bodily injury, injury, and the laws concerning unilateral changes of placement is found in the prior decision. See ODR No. 27284-22-23.

education award for the prior period of time. Regardless of whether the District's effort to move the Student back into that appropriate program constitutes a procedural violation of the Parent's rights, there is no substantive violation resulting in educational harm for which compensatory education is owed during the 45-day unilateral placement.

***November 8, 2022, through December 19, 2022***

The 45-day unilateral placement ended on November 7, 2022, and then the Student's placement reverted to the 2022-23 school year starting placement. The Parents continued to withhold the Student from school, and the District filed a due process complaint to return the Student to the Autistic Support program on an emergent basis. Under the applicable laws, I could not grant the District the relief it demanded, and so the Student's placement continued to be the starting 2022-23 school year placement.

By this point, the District had clearly recognized its error and was actively trying to fix it – so much so that it requested a due process hearing and then engaged in a marathon facilitated IEP team meeting. While this effort was admirable correction, the law is clear: The Student's placement from November 8 (which would have been the Student's first day back from the 45-day placement) through December 19, 2022 (when the District offered a new IEP) remained inappropriate for all the reasons discussed above.

The Parents' withholding the Student from school does not mitigate against a compensatory education during this period. The Student would have returned to a clearly inappropriate and likely dangerous placement. As that was the only placement available to the Student, the Parent's decision was justified. In terms of compensatory education, the Student would not have derived a meaningful education benefit at school and was safer at home.

For all the same reasons described above, I award one hour of compensatory education to the Student for each hour that school was in session from November 8, 2022, through December 19, 2022.

***December 19, 2022 through February 7, 2023***

The District offered a new IEP on December 19, 2022. That IEP was reasonably calculated to confer a meaningful educational benefit at the time it was offered. It is a return to a program that is obviously better for the Student. In fact, it is a return to a program that matches recommendations from the Parent's own experts. Moreover, it is a more robust version of that

program, offering a larger number of refined, targeted goals with SDI and modifications clearly designed to enable the Student to obtain those goals.<sup>9</sup>

Taken from the other direction, there is no preponderant evidence in the record that the December 19, 2022 IEP, was *not* reasonably calculated to confer a FAPE to the Student at the time it was offered. I reject the Parents' claims to the contrary.

### ***The Contingent IEP – February 7, 2023 and Onward***

The District continued to be the Student's LEA until the Student's enrollment in the cyber charter school on February 7, 2023. At that point, the District's FAPE obligation to the Student ended and the Student's entitlement to a contingent IEP started.

I find as a mixed question of fact and law that the IEP of February 3, 2023, is a contingent IEP. That IEP was offered just as the Student started parochial school (albeit for one day) and then enrolled in the cyber charter school. At no point did the District revoke its offer of the February 7, 2023, IEP. Were the Student to immediately return to the District for programming, the February 3, 2023, IEP is the offer on the table.<sup>10</sup>

Above, I find that the February 3, 2023, IEP is a refinement of the December 19, 2022, IEP, and not a substantive change to that document. Above, I also find that the December 19, 2022, IEP was appropriate at the time it was written. No preponderant evidence establishes that the Student's need changed between December 19, 2022, and February 3, 2023. Consequently, under the standards established by case law, I find that the District offered a contingent IEP, and that the contingent IEP is appropriate.

### **ORDER**

Now, October 30, 2023, it is hereby **ORDERED** as follows:

1. The District violated the Student's substantive right to FAPE by failing to provide appropriate behavioral interventions in the Student's IEP from November 21, 2020, to the last day of the 2020-21 school year. One hour of compensatory education is awarded to the Student for

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<sup>9</sup> The February 3, 2023, IEP does not change this analysis.

<sup>10</sup> The IDEA and Pennsylvania law include special rules for intra-state transfers. Those laws would apply were the Student to transfer from one Pennsylvania LEA to another – which is what would happen if the Student returned to the District from a cyber charter school. Case law has yet to resolve whether those laws, or a contingent IEP, should control the Student's placement in the event of a return to the District. In this case, that choice would likely have a substantial impact on what services the Student should receive, but that question is beyond the scope of this case.



each day that the District was open for in-person instruction during this period of time. All other claims pertaining to this period of time are denied.

2. The District did not violate the Student's substantive right to a FAPE during the 2021-22 school year. All claims pertaining to this period of time are denied.
3. The District violated the Student's substantive right to a FAPE by offering an entirely inappropriate placement to the Student from the start of the 2022-23 school year through September 23, 2022. One hour of compensatory education is awarded to the Student for each hour that the District was in session during this period of time.
4. The District did not violate the Student's substantive right to a FAPE from September 23, 2022, through November 7, 2022. All claims pertaining to this period of time are denied.
5. The District violated the Student's substantive right to a FAPE when, through operation of law, it maintained an entirely inappropriate placement for the Student from November 8, 2022, through December 19, 2022. One hour of compensatory education is awarded to the Student for each hour that the District was in session during this period of time.
6. The District did not violate the Student's substantive right to a FAPE from December 19, 2022, through February 7, 2023. All claims pertaining to this period of time are denied.
7. The IEP of February 3, 2023, is a contingent IEP. That IEP was appropriate at the time it was issued.
8. Regarding the use of compensatory education, it is ordered as follows:
  - a. The Parents may direct the use of all compensatory awarded herein for any appropriate developmental, remedial, or enriching educational service, product, or device that furthers the Student's educational and related services needs.
  - b. Such compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation.
  - c. Until the Student graduates or ages out of special education eligibility, the compensatory education shall be in addition to,

and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent.

- d. Any unused compensatory education is forfeited.
- e. Services and products obtained with compensatory education may not exceed market rates for the same or similar services and products in the District's geographical area.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford  
HEARING OFFICER