

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve the 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 No. 29330-23-24**

**Child's Name:**

N.K.

**Date of Birth:**

[redacted]

**Parents:**

[redacted]

**Counsel for Parents:**

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**Hearing Officer:**

Cheryl Cutrona, J.D.

**Date of Decision:**

July 24, 2024

## **INTRODUCTION**

The Student<sup>1</sup> resides with Parents and siblings within the boundaries of the Southern York County School District (hereafter "District"). The Student has attended the neighborhood school since starting Kindergarten. The District proposed a change of placement to supplemental life skills at a District school farther away from the Student's home. On March 5, 2024, the Parents filed a Complaint pursuant to the Individuals with Disabilities Education Act ("IDEA"), Section of 504 of the Rehabilitation Act ("Section 504"), and Pennsylvania Title 22, Chapters 14 and 15. The Complaint alleges that the District failed to provide the Student with a Free Appropriate Public Education ("FAPE") and that the District's proposed change of placement denies the Student's right to a Least Restrictive Environment ("LRE"). The Parents seek compensatory education, an Independent Educational Evaluation ("IEE"), and an order requiring the District to develop an appropriate program in the Student's neighborhood elementary school, with the implementation of research-based instruction in all of the Student's academic areas of need.

The Complaint proceeded to an in-person due process hearing convened at the District offices on May 22, 23 and 24, 2024.

For the reasons set forth below, the Parent's Complaint is upheld in part and denied in part.

## **ISSUE**

1. Did the District provide the Student with a FAPE?
2. Is the District's proposed placement appropriate?

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including the details on the cover page, will be redacted prior to the decision's posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

3. If not, what are the appropriate remedies?

## **FINDINGS OF FACT**

1. The District is a local educational agency ("LEA") within the meaning of 20 USC § 1401(15), 34 CFR § 300.28, 22 Pa. Code 14.102(a) (2)(vii) and a recipient of federal funds within the meaning of the IDEA, 20 USC § 1401 and Section 504, 29 USC § 794(b)(2)(B).
2. All evidence, including the exhibits admitted to the record and transcripts of the testimony, was considered by the Hearing Officer.<sup>2</sup> The only findings of fact cited herein are those needed to explain the ruling. All exhibits and all aspects of each witness's testimony are not explicitly referenced below.

### **The Student's Background**

3. The Student was born prematurely with complications that resulted in cerebral palsy and delayed visual perceptual skills. The Student is currently diagnosed with left hemiplegic spastic cerebral palsy, Attention Deficit Hyperactivity Disorder ("ADHD"), and executive function deficits (P-12, p. 1, N.T., p. 397).
4. The Student was evaluated for [redacted] services by the Intermediate Unit ("IU") and issued a [redacted] Individualized Education Program ("IEP") with multiple related service goals on September 19, 2016. Annual reviews took place on September 22, 2017, May 25, 2018, and May 24, 2019 (P-1, pp. 2-17).
5. During that time, the Student received IU services that focused on cognitive development, communication, social skills, and motor skills. The Student showed progress in all areas (P-1, pp. 6-17)

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<sup>2</sup> References to the record throughout this decision will be to the Notes of Testimony (N.T.), School Exhibit (S-) and/or Parent Exhibit (P-) followed by the Exhibit number and page number.

6. The Student's [redacted] services included: Occupational Therapy ("OT"), Physical Therapy and ("PT"), Speech and Language Therapy ("SLT"), and vision services. The Student was socially aware and motivated, had difficulty working independently, and benefitted from working in small groups with positive role models (P-1, pp. 6, 42-44).

### **[redacted], 2019-2020 School Year**

7. The Student was enrolled in [redacted] at the neighborhood school on May 16, 2019 and a Notice of Recommended Educational Placement ("NOREP") was issued. The NOREP offered itinerant learning support with SLT, OT, PT and vision support as related services. The Mother signed this NOREP on May 20, 2019 (P-2, pp. 1-5).
8. On August 2, 2019, an informational IEP meeting was held to discuss classroom accommodations (P-3, p. 4). The Student's balance issues necessitated adaptations to safely integrate the Student in the classroom and facilitate learning (N.T., p. 400-401).
9. On October 7, 2019, an IEP meeting was held, a new school-age IEP was issued (P-3, pp. 9-27), and the Parents signed the NOREP (P-3, p. 29). The IEP did not indicate a need for assistive technology devices and/or services (P-3, p. 11). The IEP placement was Itinerant Learning Support with the Student in the regular education classroom for 91 percent of the school day, and SLT, OT, PT and vision support as related services (P-3, p. 24, 27).
10. On November 20, 2019, the District held an IEP revision meeting to add a Personal Care Assistant ("PCA") to aid with the Student's personal safety, especially in the areas of orientation and mobility (P-4, p. 2; N.T., p. 401).
11. Due to the COVID-19 pandemic, most of the Spring 2020 semester of the Student's [redacted] year was limited to remote instruction, which

was challenging due to the Student's attention deficits (N.T., pp. 401-402).

12. The Student did not receive any services from the District during the summer of 2020. (N.T., p. 402).
13. The Parents believed that the Student had, in effect, missed [redacted] due to the Student's inability to access online education. The District declined the Parents' request for the Student to repeat [redacted] based on the District's research regarding grade retention (N.T., p. 404).

### **[redacted], 2020-2021 School Year**

14. The District developed a hybrid model for the Student's [redacted] grade school year that was different from most other students. This model was designed to provide the repetition required by the Student to aid in retention, and to limit the time spent in virtual instruction. Most students attended the brick-and-mortar school two days a week, with one cohort attending on Mondays and Tuesdays, and the second cohort receiving similar two-day instruction on Thursdays and Fridays. The Student attended school four days per week to benefit from the additional instructional time, spending only Wednesdays at home (N.T., pp. 642-644).
15. An IEP meeting was held on September 30, 2020. The Student demonstrated progress in SLT, OT, and PT (P-6, p. 7). In addition to the goals related to physical strength and stamina needs, academic goals were added for letter/sound/number recognition (P-6, p. 44) with a corresponding Specially Designed Instruction ("SDI") for small group or one-on-one instruction (P-6, p. 48). The Student was again placed in itinerant learning support inside the regular classroom for 91 percent of the day (P-6, pp. 52; 54).
16. At an IEP data review meeting on February 3, 2021, the team reviewed the Student's record in preparation for an upcoming triannual

reevaluation, and discussed COVID Compensatory Services, and Extended School Year ("ESY") (P-7, p. 1). While the Special Education Teacher noted that the Student was more confident and showing more consistency recognizing letters and numbers, the Parent expressed concerns about the Student being behind academically. The Student demonstrated progress in SLT, OT and PT (P-7, pp. 6-26). Academically, the Student's curriculum-based assessment results were in the Intensive Range in both reading and math (P-7, pp. 8-10).

17. On February 26, 2021, the District sent the Parents a Prior Written Notice for a Reevaluation and Request for Consent forms seeking permission to conduct a Speech and Language Evaluation, which was approved by the Parents on March 4, 2021 (P-8, p. 1-3).
18. At a March 4, 2021 IEP meeting, the team discussed returning to full-time, in-person instruction, and determined the Student qualified for ESY and COVID Compensatory Services. (P-9, pp. 1-4; 11).
19. The March 26, 2021 IEP progress report showed the Student had made progress on all IEP goals (P-10, pp. 1-27, 31).
20. The results in the April 21, 2021 Reevaluation Report ("RR") showed the Student's Present Levels were well below grade level, while cognitive abilities were adequate for a student of that age (P-8, p. 30), articulation skills were to be added as a need (P-8, p. 28), and that the Student needed SDI commensurate with levels of achievement (P-8, p.29). The School Psychologist identified the Student to have a primary learning disability of Specific Learning Disability ("SLD") and a secondary learning disability of Speech and Language Impairment ("SLI") (P-8, p. 28).
21. At a May 4, 2021 IEP meeting, one reading goal and one number identification goal were included (P-11, p. 48). The IEP provided for a continuum of supports within and outside of the regular education classroom in intervention groups (P-11, p. 60). The IEP also contained the

SDI regarding Small group and one-on-one instruction (P-11, p. 52). The Student's current placement in Itinerant Learning Support inside the regular classroom for 91 percent of the day was continued (P-11, p. 62). Two ESY goals were included: a goal for reading through identifying letters and "consonant – vowel – consonant" ("CVC") words, and a number identification math goal. ESY was held for three hours, three days per week for four weeks (P-11, p. 58).

### **2021 Private Neuropsychological Evaluation**

22. A private neuropsychological evaluation was obtained by the Parents. The July 14, 2021 evaluation report indicated that the neuropsychologist's testing resulted in a diagnosis of Borderline Intellectual Function that required a great deal of repetition when learning new information with support when adapting skills and strategies to new problems and situations (P-12, p. 12). The neuropsychologist predicted that as the Student matures, the Student is "at high risk for delays" in adaptive functioning or daily living skills, which also placed the Student 'at high risk for a later diagnosis of intellectual disability" (P-12, p. 12).
23. Recommendations to maximize learning included: (1) adapted curriculum delivered at a significantly slower pace of learning and a high level of support within the classroom setting; (2) individualized learning and small class sizes; (3) information presented in small amounts and in a simple visual format with few words to read or pictures and diagrams; and (4) information presented in a simplified, auditory format; and (5) repetition (P-12, p. 12-13).
24. Recommendations to support attention and concentration included: (1) presenting information using simple language in a way that is not overwhelming; (2) establishing eye contact; (3) asking the Student to

repeat instructions given; (4) periodic breaks; (5) limited distractions; and (6) limited screen time (P-12, pp. 13).

25. The Parents provided the neuropsychological evaluation to the District (N.T., p. 405).

### **[redacted], 2021-2022 School Year**

26. At the start of [redacted] grade, the Student did not know all [redacted] letters or letter sounds (N.T., p. 187).

27. On October 29, 2021, a Functional Behavior Assessment ("FBA") was completed that reported aggressive behaviors toward others and self-injurious behaviors (P-14, p. 2). A Board-Certified Behavioral Analyst ("BCBA") was not consulted (N.T., pp. 181-182).

28. On November 1, 2021, the regular education teacher referred the Student to the Student Support Team ("SST"). The SST process was typically used for students without IEP (N.T., p. 115). The teacher's primary areas of concern were defiant behaviors and reading (J-1, p. 1).

29. An internal SST meeting was held on November 15, 2021 (J-1, 4). The Parents were not notified about this process (N.T., p. 414). The SST made several recommendations: (1) provide the Student a "choice board," which is a menu of activities offered to students giving them a choice of activity; (2) pair the Student with a preferred peer; and (3) continue trying areas of interest (e.g., cars and trucks) (J-1, p. 3). For academics, the SST made specific recommendations to reinforce the Student's reading goals regarding phonics and sight words, decodable readers, and nonsense words (J-1, p. 5-6).

30. Progress reports were issued on January 14, 2022 and March 23, 2022 (P-15). By March 2022, the Student could identify all uppercase and lowercase letters and was working on CVC words (P-15, p. 34). At this point in second grade, regular education students were beyond CVC



words (N.T., p. 189). The Student was also reading numbers up to 50 (P-15, p. 36). Regular education students were expected to know numbers 1-100 by the end of kindergarten or the beginning of first grade (N.T., p. 191).

### **The 2022 IEP**

31. At the IEP meeting held on April 20, 2022, the Parent expressed that her biggest concern was the acquisition of reading skills (J-2, p. 2).
32. The April 2022 IEP included the same SDI regarding small group or one-on-one instruction in the areas of targeted IEP goals during language arts and math classroom instruction and intervention blocks (J-3, p. 50). Instruction was to continue to be delivered through a continuum of supports inside and outside the regular education classroom in intervention groups (J-3, p. 56). There were no changes made to the Student's reading, writing, or math instruction (N.T., p. 193, 195).
33. The IEP documented the additional 20 minutes of reading intervention that the Student had been receiving (N.T., pp. 195-196).
34. The Student was placed in Itinerant Learning Support; in the regular education classroom for 89 percent of the day (J-3, pp. 47-58), most of which was due to the related services (N.T., p. 199). Intervention groups were not included because the group included students with and without disabilities, and even if only one student in the group was in regular education, the intervention was considered to be regular education (N.T. p. 199).
35. The Director of Special Education determined that the Student was not qualified for ESY during the summer of 2022 based on goal progress (J-3, pp. 52-54; N.T., p. 203).

36. In May 2022, the Student was assessed with the Fountas and Pinnell Benchmark Assessment System 2 (BAS). The Student scored at the Kindergarten level; extremely behind in reading (J-7, p. 5) demonstrating that by the end of [redacted] grade, the gap had widened even more between the Student and the regular education [redacted] graders (N.T., p. 199).

**[redacted], 2022-2023 School Year**

37. The Student's [redacted] grade regular education classroom included 23 students (J-3; N.T., p. 119).

38. The results of the Student's August 26, 2022 iReady Reading and Math Diagnostics showed that the Student was three or more grades below level in phonics, high frequency words, and comprehension, and two grades below level in vocabulary. The Math results were three or more grades below level (J-7, p. 7).

39. On August 31, 2022, the CORE Phonics Survey was administered. The Student scored below grade level in all areas (J-7, 5).

40. At the IEP meeting held on September 1, 2022, the school-based team informed the Parents that the Student was performing much lower than grade-level expectations for a [redacted] grader (P-18, p. 5; N.T. 117-18).

41. During [redacted] grade, when the teachers pushed the Student to be more independent – closer to what would be expected of typical peers – the Student became frustrated and would shut down (N.T., pp. 137; 149; 221). The Student needed one-on-one support to engage in the regular education environment (N.T., pp. 148-49; 244).

42. The Student's level of support increased and evolved as the learning gap continued to increase. The Student was with the Special Education Teacher outside the classroom for ELA intervention using a 95 percent

blending group for 30 minutes a day in addition to seeing a second special education teacher during intervention time using Road to Reading, a Tier 2 level program. Both the Road to Reading and 95 percent blending intervention groups were a mix of regular and special education students (N.T., pp. 204-207).

43. Overall, progress toward IEP goals during [redacted] grade was “very slow with up-and-down growth” (N.T., pp. 146; 246). The Student was nowhere near [redacted] grade benchmarks (J-12; N.T., p. 145). In ELA, the Student was on a [redacted] grade level depending on the skill being targeted; one to two years behind peers (N.T., p. 247). In math, the Student was on a [redacted] grade level; at least one year behind peers (N.T., p. 247).
44. The Student was unable to keep up with the concepts being taught in the [redacted] grade regular education classroom. In ELA, the school year involved students’ analyzing texts. In math, students were working on multiple digit addition and subtraction, multiplication, and division, far above the Student’s levels (N.T., pp. 131; 137, 139). The regular education teacher perceived that the Student was unable to get anything from whole-group instruction (N.T., 150). Therefore, the regular education teacher consulted with [redacted] teachers about the content to deliver to a student on that level and created [redacted]-level lessons that were primarily delivered one-on-one (N.T., p. 120-21). This effort to individualize and modify the curriculum to support the Student, meant the regular education teacher, in effect, was creating everything from scratch because none of the [redacted] grade materials would have been appropriate for Student (N.T., p. 121). Some examples included using visual and tactile strategies in math class (N.T., 125); creating and sending home practice cards for sight words and basic math facts to facilitate repetition (P-20; N.T., p. 129); and providing the Student with a

special math book so the Student would feel more a part of the lesson even though the Student could not access the material in the regular education textbook that the other students were using (N.T., p. 125-26).

45. The Student's social skills were regressing; the Student engaged in parallel play rather than engaging with peers unless an adult prompted an interaction (N.T., pp. 142-43). Because the Student struggled with the names of classmates, the regular education teacher took pictures of all the students and created a game to help the Student memorize those names in an attempt to bolster the Student's confidence in approaching and socializing with the other students (N.T., p. 143; 154-55).
46. The Special Education Teacher was also seeing the Student for 20 minutes a day for math support where she used teacher-created assignments rather than a research-based intervention (N.T., p. 208). The other special education teacher was giving 30 additional minutes of math support using a mix of teacher-made and standard curriculum (N.T., p. 210).

### **November 2022 RR**

47. Based on the widening learning gaps, the District initiated another reevaluation (N.T., pp. 66-67). On September 13, 2022, the District issued a Prior Written Notice for a Reevaluation (J-5).
48. The school psychologist considered the results of the privately obtained neuropsychological evaluation from July 2021 that diagnosed Student as "borderline intellectual functioning" (N.T., p. 35, 67).
49. The November 18, 2022 RR summarized the iReady scores that placed the Student's performance at an overall kindergarten level in math and reading (J-7, pp. 7-8). The Student regressed to a Level A in the Fountas and Pinnell BAS, which is a reading level equivalent to a student in the beginning of kindergarten (J-7, p. 5).

50. The Student's cognitive abilities were in the less than first percentile according to two different standardized measures of cognitive intelligence ability (N.T., 74; J-7 at p. 22, 26). The Student's working memory and processing speed were the Student's greatest areas of need (N.T., 50). Consequently, Student had difficulty with things like multi-step directions and needed repetition (J-7, p. 23; N.T., p. 50).
51. A standardized academic assessment placed the Student below the first percentile in reading, math, and writing. The Student was unable to complete the sentence subtest (N.T., p. 75; J-7, pp. 27-29). The Student was not provided accommodations during the testing because of standardization (N.T., p. 82).
52. These results confirmed the results of the classroom-based assessments, which also showed academic skills significantly delayed compared to peers (N.T., p. 76; J-7, p. 4, 27).
53. The regular education teacher, the PCA, and a Parent completed the adaptive behavior measures. The ratings varied. For example, the teacher rated the Student "low" in Functional Academics, while both the PCA and the Parent rated the Student as "extremely low" in that category. None of the special education teachers were given the adaptive scales to complete (J-7, pp. 30-31).
54. The Student's primary disability changed from SLD to Intellectual Disability, and the secondary disability remained as Speech or Language Impairment (J-7, p. 31).
55. The school psychologist recommended SDI across early reading, math, writing, developmental/adaptive areas, speech/language development, visual/fine motor development, gross motor development, and vision. The specific academic areas of concern identified in this RR included early reading, writing, math, and fine/gross motor skills (J-7, p. 35).

56. The Student's cognitive capacity, academic achievement, and adaptive functioning levels were commensurate with each other and impacted the Student's educational performance, indicating an Intellectual Disability IDEA identification (N.T., p. 77).
57. The RR concluded that the Student met the criteria as a student with Intellectual Disability, presenting with significantly sub-average general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affected educational performance (J-7, p. 32).
58. At the RR review meeting, the Parents agreed with the RR (J-7, p. 36; N.T., p. 161; 419).

### **Recommended Change of Placement**

59. On December 9, 2022, at a meeting with Parents to discuss the RR, the Parents agreed with the RR, but disagreed with the District's recommended change in placement to Supplemental Life Skills located in a different school. The Parents reiterated their request for an emphasis on reading (N.T., p. 61; J-8, p. 2).
60. On December 12, 2022, the District issued a NOREP seeking parental consent to change the Student's placement to Supplemental Life Skills based on the RR diagnosis of an Intellectual Disability. The District explained that Life Skills supports would offer a modified curriculum presented at a pace commensurate with the Student's needs (J-11, p. 2).
61. At the meeting on December 12, 2022, the Parents decided to visit the Life Skills program before deciding whether they would sign the NOREP (J-9, p. 2).
62. The Parents' perception of the life skills classroom they observed was that the students had more significant needs than their child. Many students at the time appeared to be non-verbal and many had more

significant physical needs (N.T., p. 423). The curriculum was focused on functional reading and math, and adaptive skills (N.T., p. 424).

63. On December 21, 2022, the Parents signed and returned the NOREP disapproving the change and requesting a NOREP keeping the current placement. The Parents reiterated their belief that the Student's deficits were in reading and math (J-11, p. 3; N.T., p. 426; P-21, p. 3, P-22, p. 1).
64. The Director of Special Education acquiesced to the Parents' requests and created a back-up NOREP for Supplemental Learning Support at the neighborhood school, which Parents approved on December 21, 2022 (J-13).
65. The 2022 IEP placed the Student in Supplemental Learning Support (J-10, p. 73) in the same neighborhood school, spending 64 percent of the day in the regular education classroom (J-10, p. 75). Eight SDI to address vision deficits, safety, practice reading a calendar, recess play, and sustained work time were added (J-10, p. 66).

### **Spring 2023 & ESY**

66. When they were told at the February 2023 teacher conferences that the Student did not qualify for ESY, the Parents disagreed (N.T., p. 221; p. 428-429).
67. An IEP meeting was held on February 24, 2023 to discuss the Parents' disagreement with the ESY exclusion. Based on the Parents' concerns and the Special Education Teacher's progress data reports demonstrating regression and slow recoupment of skills for math and ELA, the Student was qualified for ESY (J-14, pp. 1-2).
68. At the March 13, 2023 Progress Report meeting, the staff noted that the Student had made improvements in math, letter formation, and writing (J-12, pp. 19-21; J-15 p. 2).

69. At the May 11, 2023 ESY meeting, the District recommended that ESY focus on the Student's goals for time, money, and basic math facts. The team decided that ESY would be for three hours on two days a week, with one day dedicated to math and the other to reading (J-10, p. 71; J-16 pp. 1-2).

**[redacted], 2023-2024 School Year**

70. The Student's regular education classroom, the regular education teacher, and the special education teacher were new at the beginning of the school year, and the Student's PCA was working with three students (P-27; N.T., p. 287-288).

71. At an informational meeting held on August 29, 2023, the Parents reiterated their perspective that the Student's biggest challenge was reading but was making slow progress despite memory struggles. The staff was trying to keep the Student in the regular classroom as much as possible. The Student also worked with the special education teacher in small groups (J-17, p. 1) and the PCA, who is not a teacher, in the hallway with another student every day during ELA, math, and writing; and during learning support time when the special education room was otherwise occupied (N.T., pp. , 292, 295-297, 613).

72. During new ELA lessons, the Student was with the PCA in the hallway (N.T., p. 591). The ELA teacher was not providing the Student with pre-teaching (N.T., p. 592). The ELA teacher used the Smart Board for the other students, but admitted not knowing how to upload that material onto the Student's computer (N.T., p. 593). The Student was using modified curricula with the learning support teacher and PCA (N.T., pp. 595-596).



73. The special education teacher, who was currently on leave, had been using Road to Reading, a Tier 2 level program, and “bits and pieces” of Wilson (N.T., p. 297).
74. No specific math intervention program was offered to the Student (N.T., p. 304).
75. In mid-September, the reading specialist began working with the Student for 30 minutes, four times a week (N.T., pp. 350-352). The reading specialist trialed two different programs with the Student. The first, a 95 percent phonics lesson library, was not beneficial (N.T., p. 354). The second program, a University of Florida Literacy Institute Foundations program, was tried for a month. The reading specialist concluded that the Student needed a more multi-sensory approach and a deep sequence of explicit skills (N.T., p. 354-55). The Reading Specialist, who was not Wilson certified, began using a modified version of the Wilson program with the Student, who showed incremental progress with it (N.T., pp. 355, 358-359, 361).

## **2023 IEP**

76. At the December 6, 2023 IEP meeting, the reading specialist reported that the Student was making slow progress. The Student tested out of CVC words, which typically-learning students master by the second grade, and was working on longer words. In math, the Student had mastered a first-grade computation goal and was working on the second-grade computation goal.
77. In the regular education classroom, the Student appeared to be “lost” and was unable to do many of the things other [redacted] graders were expected to do. Despite modified curricula, as the content became more complex, the learning gap widened. It was becoming increasingly difficult to adjust the curricula to Student’s level of understanding. There was no

discussion of placement at the IEP meeting, and no other significant changes were made to the IEP (J-18; N.T., pp. 230-231; 436).

78. On December 13, 2023, based on the Student's demonstrated growth in the areas of expressive vocabulary and grammatical morphemes, an additional goal was added to the IEP and a revised IEP was sent to the Parents (P-30, pp. 1-2; P-32, pp. 1-2).

### **Spring 2024**

79. On December 28, 2023, the Parents emailed the special education teacher reiterating their concern about the Student's reading and requested that the Student's reading support be better documented in the IEP. The Parents requested that the Student receive intensive research-based reading instruction from a highly trained teacher, like a reading specialist (P-32, p. 1).
80. A meeting was held on February 9, 2024 to discuss the Pennsylvania Alternative System of Assessment ("PASA"), eligibility, and placement (J-21). As the Director of Special Education reviewed PASA eligibility, the discussion veered onto Life Skills placement. The Director of Special Education expressed his opinion that FAPE would be best delivered in a Life Skills placement and handed a prepared NOREP to Parents seeking the change of placement (N.T., p. 441). The Parents declined the Supplemental Life Skills NOREP and requested due process (J-22).
81. In January of 2024, the District's reading specialist began implementing parts of the Wilson Reading System ("Wilson") starting at level 1.3 (N.T., p. 363). Using Wilson with the reading specialist, the Student progressed to sub-step 2.1 (N.T., p. 364).
82. When the learning support teacher returned from leave, she began working with the Student on fluency and reading comprehension. No data was reported (N.T., pp. 299-301).

83. From poems to biomes<sup>3</sup>, the [redacted]-graders students were immersed in curriculum that was three to four grade levels beyond the Student's level of understanding. Even with differentiation, the Student could not access grade level-standards and objectives (N.T., pp. 326, 328, 577, 580-81, 628, 639). The Principal believed that the grade-level curriculum could not be modified to a point where the Student could understand it and such alternations would result in a completely different/replacement curriculum (N.T., p. 655).
84. The Student relied heavily on the PCA, who has been at the Student's side for a few years. This PCA goes beyond her typical job description. Without her, it is unclear how the Student would have managed (J-12, p. 24; N.T., pp. 572, 574, 615).
85. On March 5, 2024, the Parents filed a Complaint requesting a due process hearing.
86. Due to the pending due process hearing, the December 2023 IEP was implemented in the learning support setting for the remainder of the 2023-2024 school year (N.T., p. 234; 313).
87. The Parents contracted an independent reading specialist who taught in a different school district ("Specialist"). The Specialist visited the Student at home, administered several assessments and conducted a classroom observation. The Specialist's report dated May 8, 2024, included a description of her class observation of the Student in the regular education English class. The report indicated that the Student was seated in the back of the classroom, although other witnesses had differing perceptions of the seating. The PCA was seated next to the Student. The teacher used a Smart Board to assist in the poetry lesson involving rhyme schemes, which was placed in the front of the classroom where the poem being studied was displayed. The Student had difficulty

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<sup>3</sup> Beetles in their milieu. (N.T., p. 650)

focusing on the Smart Board. The Student was not given printed copies of the Smart Board projections nor was the lesson loaded onto a laptop or tablet that the Student could see. There was no differentiation in the poetry lesson (P-38, p. 1, N.T., p. 479-482; 586).

88. The Specialist also observed the Student during a reading lesson for approximately 30 minutes. The reading teacher used elements of Wilson. The Specialist reported not observing the reading teacher utilizing an intensive intervention course during the class. The Student then participated in another small-group classroom where the Student was engaged and participated in the lesson (P-38, p.1-2; N.T., pp. 483-484).
89. On the WADE (Wilson Assessment of Decoding and Encoding), the Student placed into Wilson sub step level 2.1 (P38, p. 5).
90. The WIST (Word Identification and Spelling Test), assessed the Student's fundamental literacy skills. The results indicated that the Student needed a Tier 3 reading program that would provide more intensive support (P-38, p.7) than a tier 2 level program.
91. The LETRS Phonics and Word-Reading Survey demonstrated that the Student was able to correctly identify initial and final consonants 95 percent of the time, but had difficulty identifying the other syllables and sounds. It also indicated that the Student's foundational skills were solid (P-38, 10-12).
92. The Specialist concluded that the Student struggled with reading fluency and comprehension and had limited decoding and encoding abilities. (P-38, p. 17).
93. The District reading specialist disagreed with the Specialist's conclusion because the Learning Support Teacher and she have insight into how the Student works best, and believed the demands of the type of intervention that the Specialist recommended would be too difficult for the Student. The District teachers made the material accessible in a way

that would work best based on the Student's unique needs (N.T., p. 332-33, 384). The Specialist's conclusion also failed to appreciate that the District reading specialist was engaging in explicit teaching of phonological elements (N.T., p. 385).

## **Life Skills**

94. During the 2023-2024 school year, the Supplementary Life Skills program at the non-neighborhood school, where the proposed placement would be located, included Kindergarten through six graders. It had seven students and four adults: one kindergartener, four second graders, one third grader and one fifth grader. Every Parent signed a waiver acknowledging that the classroom included students more than three years apart (N.T., pp. 542-544).
95. There were no Itinerant or Full-time Life Skills students at the non-neighborhood school; only Supplemental Like Skills.
96. There were no Life Skills programs at the neighborhood school (N.T., p. 702).
97. Typically, inclusion with grade-level peers occurred during homeroom, lunch, recess, and specials (N.T., p. 699). Examples of other inclusion opportunities were activities such as a movie party, and a discussion on human growth and development for fifth graders (N.T., p. 540-541).
98. The Life Skills Teacher worked with regular education teachers to prepare them for inclusion opportunities (N.T., pp. 538-539). The Life Skills Teacher individualized core instruction and modified regular education science and social studies curricula that worked for all of the students in the life skills program (N.T., pp. 535, 580-581).
99. The Life Skills students transitioned in and out of the classroom at different times based on their individual schedules (N.T., p. 548-549). Reading and Math instruction was individualized (N.T., pp. 549-554; 559-

560). The students also worked with paraeducators (N.T., p. 563). Paraeducators in Life Skills are not teachers (N.T., p. 566).

## **Assistive Technology**

100. There has never been an assistive technology ("AT") or Student Environments Tasks and Tools ("SETT") evaluation of the Student (N.T., p. 647).

101. The District did not access the PaTTAN Framework for Access and Belonging ("FAB") program<sup>4</sup> (N.T., pp. 781-783).

102. The Student's IEPs indicated that the IEP teams considered the Student's AT needs with no description of how that happened. The only evidence of that was that the question box was checked off in the IEP Special Considerations section asking if the student needed AT devices and/or services. In the Student's 2019 (P-3), 2020 (P-6), 2021 (P-9), and 2022 (J-3, p. 10) IEPs, the box was checked "no." For the first time, the AT question box was checked "yes" in the 2023 IEP (J-19, p. 6). The SDI for vision needs included "Use of a wide screen computer" and "larger cursor" (J-19, p. 37), then in contrast indicated that no AT needs were evident (J-19, p. 39). There was nothing designating AT devices or services under present levels (J-19, p. 7) or goals (J-19, p. 50-57). Several SDI listed the use of a "large screen monitor": (1) "monitor use of large screen monitor" in the "School Building," "as needed" (J-19, p. 60); (2) "use of a wide screen computer" "for all printed materials," "across all educational settings"; and (3) the need to "apply accessibility features" on the Student's computer "(large cursor, etc.)", "across all educational settings" when the Student is on the computer (J-19, p. 61). No other AT devices were noted.

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<sup>4</sup> FAB replaced the SAS Toolkit.

## **Parents' Claims**

The Parents claim that the District's proposed change of placement to Supplemental Life Skills at a school outside the Student's neighborhood is not appropriate and is not the LRE. They request an IEE, and an Independent Assistive Technology Evaluation to assist the IEP team in developing an appropriate program at the Student's neighborhood school.

The Parents contend that the District has denied the Student a FAPE from March 5, 2022 through the last day of the 2023-2024 school year in violation of the IDEA, Section 504, and Pennsylvania regulations. The Parents cite *K.D. v. Downingtown Area Sch. Dist.*, No. 16-0165 (E.D. Pa. 2017) to support their claim that the IDEA demands a District to offer educational programming that provides "merely more than *de minimis*" progress from year to year. See *id.* at 1001. The Parents claim that the evidence shows that at no point was the Student ever provided a Tier 3, research-based intervention to target math and written expression needs until January 2024 and that once the District made that change, the Student made immediate and significant progress.

The Parents argue that the District engaged in no serious consideration of the use of additional supplementary aids and services at the neighborhood school in both the regular education and special education classrooms. The District's Director made no attempt to seek assistance from the IU or PaTTAN to help with the determination of whether there were supplementary aids and services available beyond the District.

The Parents point out that the IDEA requires that a child's placement be "as close as possible to the child's home" and, unless the IEP requires some other arrangement, that "the child is educated in the school that he or she would attend if nondisabled." 34 C.F.R. § 300.116(3)(c)-(d). The Parents argue that there is nothing in the proposed IEP that cannot be

implemented at the neighborhood that would require a change to a non-neighborhood school.

As a equitable remedy, the Parents request compensatory education. From March 3, 2022 through the end of the 2021-2022 school year, the Parents request three hours a day to account for the lack of appropriate reading, written expression and math instruction (135 hours). For ESY 2022, Parents request 36 hours of compensatory education for the Director's refusal to qualify the Student. For the 2022-2023 school year, the Parents request three hours a day to account for the lack of appropriate reading, written expression, and math instruction (540 hours). For the 2023-2024 school year, Parents request 5.5 hours a day to account for the denial of FAPE throughout the day except for the related services and time with the reading specialist (990 hours).

### **District's Arguments**

The District maintains that the Student made slow, yet inconsistent, progress on all goals in the learning support environment; not just in reading and math. The District argues that the data supports the District's recommendation of a change of placement to Supplementary Life Skills. The academic, adaptive, and social gaps between the Student and typically developing peers that were not as noticeable when they were younger, have widened. Now, the disparity is unworkable. Therefore, the Student is a passive observer in the classroom, looks lost, and has verbalized not wanting to be in the regular education classroom anymore. The Student is not accessing the regular education curriculum and needs an adapted, life-skills curriculum.

Despite the Parents' assertion that reading is Student's greatest area of need, a review of the Student's evaluations and IEPs shows a complex



constellation of needs that require related services of vision, OT, PT, and speech, in addition to adaptive, academic, and cognitive needs.

The District maintains that it has provided a FAPE because the Student's IEPs are reasonably calculated to allow the Student to make progress in light of the Student's unique circumstances. Albeit incremental and slow, the Student's progress has been measurable and meaningful. As such, the Parents have not met their burden of proving that the District denied a FAPE, so no compensatory education is due.

The District argues that since at least September 2023, the Student's growth has plateaued through no fault of the District, indicating that the District needed to force litigation on the December 2023 NOREP to implement its correct recommended change of placement to Supplemental Life Skills, which is the LRE.

## **GENERAL LEGAL PRINCIPLES**

### **Burden of Proof**

In general, the burden of proof essentially consists of two elements: the burden of production and the burden of persuasion. Here, it should be recognized that the burden of persuasion lies with the party seeking relief: the Parent. *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 burden of persuasion must be established by a preponderance of the evidence. *Jaffess v. Council Rock School District*, 2006 EL 3097939 (E.D. Pa. October 26, 2006). A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal

weight, which the Supreme Court in *Schaffer* called “equipoise.” On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See *Schaffer*, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who filed the Complaint. In essence, the Parents must prove by a preponderance of the evidence that the Student should remain in Supplemental Learning Support in the neighborhood school rather than being transferred to a non-neighborhood District school that offers a Supplemental Life Skills.

### **Credibility Determinations**

It is the responsibility of the hearing officer, as factfinder, to determine the credibility and reliability of the witnesses’ testimony. See *22 Pa. Code §14.162* (requiring findings of fact); See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution*, 88 A.3d 256, 266 (Pa. Commw. 2014) (it is within the province of the hearing officer to make credibility determinations and weigh the evidence to make the required findings).

In this due process hearing, the witnesses spoke from their heart when they described the Student. They all testified credibly and to the best of their ability and knowledge of the Student.

Many of the District witnesses who have worked side-by-side with the Student over the years are invested in what will best support the Student’s success. They related impressive stories of how they developed creative and nurturing support materials specifically for the Student, and their dismay when, despite these heroic efforts, the learning gap widened. The

compassion, emotionality, and caring of the staff witnesses' words were illuminating and heart-rending.

## **ELIGIBILITY UNDER IDEA**

The Individuals with Disabilities Education Act ("IDEA")<sup>5</sup> requires the provision of a "free appropriate public education" ("FAPE") to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Decades ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are *reasonably calculated* to assist a child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). "Meaningful benefit" means that a student's program affords the student the opportunity for significant learning in light of their individual needs, not simply *de minimis* or minimal education progress. *Andrew F. ex rel. Joseph F. v. 15 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).

## **Individualized Education Program (IEP)**

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<sup>5</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency ("LEA") representative, and the child's parents.

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)).

An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i).

IDEA does not concern itself with labels, rather, once a child is eligible under one of the enumerated disability categories, the IEP of the child must be tailored to the unique needs of the particular child. 34 C.F.R. § 300.106(a)(3)(i); See *Heather S. v. State of Wisconsin*, 125 F. 3d 1045, 26 IDELR 870 (7th Cir. 1997); *Osage R-1 School District v. Sims ex rel. BS*, 841 F. 3d 996, 56 IDELR 282 (8th Cir. 2011).

The child's identified needs and not the child's disability category determine the services that must be provided to the child. *School District of Philadelphia v. Post, et al*, 262 F. Supp. 3d 178, 70 IDELR 96 (E.D. Penna. [12] 2017); See, *Maine School Administrative District No. 56 v. Mrs. W. ex rel. KS*, 47 IDELR 219 (D. ME 2007); See also, Analysis of comments to proposed federal regulations, 71 Fed. Reg. 156 at pp. 46586, 46588 (OSVP

August 14, 2006); *In re Student With A Disability*, 52 IDELR 239 (SEA WVa 2009).

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

A FAPE, as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." Id. § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. Id. §§ 1401(26), (29).

The United States Supreme Court has developed a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be: (1) a determination as to whether a school district has complied with the procedural safeguards as set forth in IDEA, and (2) an analysis of whether the individualized educational program is reasonably calculated to enable the child to make progress in light of the child's unique circumstances. *Endrew F by Joseph F v. Douglass County School District RE-1*, 580 U.S. \_\_\_, 137 S. Ct. 988, 69 IDELR 174 (2017); *Board of Educ., etc. v. Rowley*, 458 U.S. 178, 553 IDELR 656 (1982); *KD by Theresa Dunn and Jonathan Dunn v. Downingtown Area School District*, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018).

The appropriateness of an IEP in terms of whether it has provided a FAPE must be determined at the time that it was made. The law does not require a school district to maximize the potential of a student with a disability or to provide the best possible education; instead, it requires an educational plan that provides the basic floor of educational opportunity. *Ridley School District v. MR and JR ex rel. ER*, 680 F.3d 260, 58 IDELR 281 (3d Cir. 2012); *DS v. Bayonne Board of Education*, 602 F.3d 553, 54 IDELR 141 (3d Cir. 2010); *Mary Courtney T. v. School District of Philadelphia*, 575

F.3d 235, 251, 52 IDELR 211 (3d Cir. 2009). In order to provide FAPE, an IEP must be reasonable, not ideal. See *KD by Theresa Dunn and Jonathan Dunn v. Downingtown Area School District*, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018); *LB by RB and MB v Radnor Twp Sch Dist*, 78 IDELR 186 (ED Penna 2021).

IDEA does not require a school district to guarantee a particular result or to close the gap between children with disabilities and their nondisabled peers. *JN and JN ex rel. JN v. Southwest School District*, 56 IDELR [11] 102 (N.D. Penna. 2015); see, *Kline Independent School District v. Hovem*, 690 F.3d 390, 59 IDELR 121 (5th Cir. 2012); *HC and JC ex rel. MC v. Katonah – Lewisboro Union Free School District*, 59 IDELR 108 (S.D. NY 2012); *District of Columbia Public Schools*, 111 L.R.P 77405 (SEA D.C. 2011).

Progress toward a FAPE is measured according to the unique individual circumstances of the individual student and not in comparison to other students. See, *GD by Jeffrey and Melissa D v. Swampscott Public Schs*, 122 LRP 6305 (1st Cir. 2022). The Third Circuit has specifically ruled that IDEA does not require that all (or even most) disabled children advance at a grade-level pace. *KD by Dunn v. Downingtown Area School District*, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018).

## **Inclusion**

A school district must "...to the maximum extent appropriate (ensure that) children with disabilities... are educated with children who are nondisabled and that special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in the regular classroom with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2); IDEA § 612(a)(5)(A); 22 Pa. Code § 14-195.

The Third Circuit has stated that the least restrictive environment requirement sets forth a “strong congressional preference” for integrating children with disabilities in regular education classrooms. *Oberti v. Board of Education*, 995 F. 2d 1204, 19 IDELR 908 (3d Cir. 1993).

### **Least Restrictive Environment (LRE)**

The IDEA obligates the LEA to educate eligible students in the “least restrictive environment” (LRE) that permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993).

The IDEA requires LEAs to “ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.” 34 C.F.R. § 300.115(a). That continuum must include “instruction in regular classes, special schools, home instruction, and instruction in hospitals and institutions.” 34 C.F.R. § 300.115(b)(1); See also 34 C.F.R. § 300.99(a)(1)(i); 22 Pa. Code 14.145. In addition, placement decisions must be determined at least annually based on the child’s IEP and should be “as close as possible to the child’s home.” 34 C.F.R. § 300.116

LEAs must place eligible students in the LRE in which each student can receive FAPE. 34 C.F.R. § 300.114. Generally, restrictiveness is measured by the extent to which a student with a disability is educated with children who do not have disabilities. In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993), the Third Circuit held that the LEA must determine whether a student can receive a FAPE by adding supplementary aids and services to an LRE placement. If a student cannot receive a FAPE in a less restrictive placement, the LEA may offer a more

restrictive placement. Even then, the LEA must ensure that the student has as much access to typical peers as possible. *Id.* at 1215-1218.

More specifically, the court articulated three factors to consider when judging the appropriateness of a placement offer: "First, the court should look at the steps that the school has taken to try to include the child in a regular classroom." Here, the court or hearing officer should consider what supplementary aids and services were already tried. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1216 (3d Cir. 1993)

"A second factor courts should consider in determining whether a child with disabilities can be included in a regular classroom is the comparison between the educational benefits the child will receive in a regular classroom (with supplementary aids and services) and the benefits the child will receive in the segregated, special education classroom. The court will have to rely heavily in this regard on the testimony of educational experts." The court cautioned, however, that the expectation of a child making greater progress in a segregated classroom is not determinative. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1216-1217 (3d Cir. 1993).

If placement outside of the regular classroom is determined to be necessary, the second prong requires an assessment of whether the child has been included with non-disabled children to the maximum extent possible. *Id.* The U.S. Supreme Court's *Endrew* decision further recognized that educational benefit for a child with a disability is wholly dependent on the individual child, who should be challenged by his or her educational program. *Endrew*, *supra*, 137 S. Ct. at 999.

"A third factor the court should consider in determining whether a child with disabilities can be educated satisfactorily in a regular classroom is the possible negative effect the child's inclusion may have on the education of the other children in the regular classroom." If a child's disruptive behavior may have such a negative impact upon the learning of others that removal is



warranted, the court instructs that hearing officers must consider what the LEA did or did not do (or could or could not do) to curb the child's behavior in less restrictive environments. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1217 (3d Cir. 1993)

FAPE and LRE are related but separate concepts. *A.G. v. Wissahickon School District*, 374 Fed. App'x 330 (3d Cir. 2010) (citing *T.R.*, supra, at 575, 578); See also *L.G. v. Fair Lawn Board of Education*, 486 Fed. Appx. 967, 973 (3d Cir. 2012). There may be several potentially appropriate placements for any student. The IDEA requires the LEA to place students in the least restrictive of all potentially appropriate placements. There is no requirement for an LEA to place a student into an inappropriate placement simply because it is less restrictive; however, LEAs must consider whether a less restrictive but inappropriate placement can be rendered appropriate through the provision of supplementary aids and services.

## **Education Methodology**

Parents cannot compel a school district to use a specific educational methodology. A school district is afforded the discretion to select from among various methodologies in implementing a student's IEP. *T.L. v. Lower Merion Sch. Dist.*, No. 15- 0885, 2016 U.S. Dist. LEXIS 80315 (E.D. Pa. June 20, 2016); *K.C. v. Nazareth Area Sch. Dist.*, 806 F.Supp.2d 806, 813-814 (E.D. Pa. 2011) (upholding agencies' discretion under the IDEA to select their own educational methodology); *Ridley School District v. MR and JR ex rel. ER*, 680 F. 3d 260, 58 IDELR 271 (3d Cir. 2012). See also *EL by Lorsson v. Chapel Hill – Carrboro Board of Education*, 773 F. 3d 509, 64 IDELR 192 (4th Cir. 2014); *Lessard v. Wilton – Lyndborough Coop School District*, 592 F. 3d 267, 53 IDELR 279 (1st Cir. 2010); *In re Student With A Disability*, 51 IDELR 87 (SEA WV. 2008).

## **Assistive Technology (“AT”)**

AT includes various devices, software, and applications that remediate students’ challenges in reading, writing, note-taking, time management, and organization, including but not limited to: text-to-speech tools that read text aloud; speech-to-text tools that transcribe what the student says; digital books/articles; study aids that help students to take notes and make comments digitally; and visual tracking solutions to adjust font size, background colors, and color layer.

The IDEA does not explicitly require a district to provide assistive technology; rather it requires a district to “[c]onsider whether the child needs assistive technology devices and services.” 34 C.F.R.

§300.324(a)(2)(v). The IDEA requires Districts to ensure that AT devices or services, or both, are made available to a child with a disability if required as a part of the child's special education, related services or supplementary aids and services. On a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP team determines that the child needs access to those devices in order to receive a FAPE. 34 C.F.R. § 300.105.

It is the IEP Team’s responsibility to consider whether the child needs assistive technology devices and services. 34 C.F.R. § 300.324(a)(2)(v); *H.G. v. Sch. Dist. of Upper Dublin*, No. 13-cv-1976, 2014 U.S. Dist. LEXIS 183544 (E.D. Pa. Oct. 16, 2014) (failure to consider is procedural violation.) However, if the district determines that AT is needed and fails to provide it, the failure could rise to the level of a deprivation of a FAPE. *School Dist. of Phila. v. Williams*, 2015 U.S. Dist. LEXIS 157493 (E.D. Pa. 2015) (The IEP team having determined that AT was an “important tool” for student’s ability to receive appropriate or meaningful educational benefit, its failure to provide the needed AT was a deprivation of FAPE).

## **Compensatory Education**

Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). “The remedy of compensatory education is available only where a student’s substantive rights are affected by a school district’s noncompliance with the IDEA.” *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012).

It is well settled that compensatory education may be an appropriate remedy where an LEA knows, or should know, that a child's special education program is not appropriate or that the student is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). Compensatory education is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has also endorsed an alternate approach, sometimes described as a “make whole” remedy, where the award of compensatory education is crafted “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014).

## **DISCUSSION**

### **FAPE – Teaching Methodology**

The Parents’ assertion that the District *never* responded to the Student’s “slow progress” in a meaningful way is inflated. The evidence shows that the teachers went above and beyond to modify the learning materials searching for methodology that would meet the specific needs of the Student.

The Parents' claim that until January 2024, the District did not provide the Student a Tier 3, research-based, intervention and that once the District changed to Wilson, the Student made immediate and significant progress. The evidence relied upon here is based on the results of independent assessment conducted by a reading teacher from a different district after the due process complaint had already been filed. In fact, the District reading specialist, who is not Wilson certified, had been using modified versions of Wilson as early as the Fall of 2023, which may have attributed to the Student's progress. The Special Education Teacher, who is Wilson certified, credibly testified that all the steps of the Wilson program with Student would be too much for the Student at one time (N.T., p. 239). The District satisfactorily explained that the Student's stamina prevented the implementation of Wilson with fidelity.

The Parents claim that the District's failure to provide individualized, systematic, research-based interventions and instruction hampered the Student's ability to make meaningful progress. From the testimony, progress reports, and evaluation results, it is clear that the Student made progress in every area. Based on the Student's unique needs, what would be deemed *de minimis* for other students, is meaningful for the Student. It was expected that as the content became more complex, requiring critical thinking rather than basic skills<sup>6</sup>, the learning gap would widen. In this situation, the District trialed, modified, and created a panoply of learning supports and offered various research-based programs in their desire to support the Student's needs and narrow the learning gap. There is insufficient evidence to demonstrate that a research-based intervention would meet the Student's academic needs.

This disagreement about teaching strategy is not a denial of FAPE. The IDEA does not impose teaching strategies upon districts, nor does it require

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<sup>6</sup> The Principal put this succinctly, "Learning to read versus reading to learn."

districts to acquiesce in any, and all, parental requests for services. The courts have consistently ruled that school districts are afforded the discretion to select from among various learning methodologies and determine the methodology(ies) to be used in educating a child based on that student's individual needs.

### **FAPE – The IEPs**

The Parents allege that the clearly well-intentioned staff were hamstrung by the Director of Special Education's failure "give them the tools they needed to instruct" the Student "appropriately" and were confined to the building schedule and what the building offers (N.T., p. 256). The Parents cite Hearing Officer Jelley's well-reasoned decision in *N.G. v. Central Bucks School District* (ODR No. 27804-22-23, November 3, 2023) that awarded compensatory education and other remedies for a denial of FAPE under similar circumstances. While there are some similarities between the two cases (e.g., both students required a full-time PCA), there are significant differences that distinguish the two cases: (1) The other student was not diagnosed with an intellectual disability; (2) The other student demonstrated work avoidance behaviors, whereas the witnesses in this matter credibly testified that the Student herein, despite physical issues that impact stamina, is eager to please and diligently attempts to do everything asked unless the Student's lack of confidence triggers a shutdown; and (3) the District herein timely and comprehensively evaluated the Student; and (4) The IEPs here were reasonably calculated for the Student to make meaningful progress based on the Student's learning pace and other unique needs.

Hearing Officers must render decisions based on unique situations, and the circumstances here are clearly distinct from those in the Jelley case. The IEPs resulted in meaningful progress, even though it was not as fast as the

Parents would have liked it to be. Therefore, the hearing officer concludes that the District preponderantly showed that the IEPs were calculated to result in meaningful progress.

### **FAPE – Assistive Technology**

The IDEA does not explicitly require a district to provide assistive technology unless the IEP team requests an evaluation which results in a finding that the student needs specific AT devices and services. In this matter, the Student's IEPs during the time in question indicate AT needs and services were considered by the IEP Team. However, a deeper dive indicates that there is no evidence that the IEP team considered any AT other than a wide-screen computer and a large cursor to accommodate the Student's visual needs. Furthermore, unless that computer and cursor are used, the accommodation is useless. The witnesses credibly testified that the Student did not always bring the computer to class, and the evidence shows that at least one the teacher did not know how to upload material on the Smart Board to the Student's computer. This resulted in the Student being unable to access some lessons delivered in the regular classroom.

There is no evidence that that anyone requested evaluating the Student's AT or SETT needs until the due process complaint was filed. That failure would only be a procedural error if the IEP team did not consider the Student's AT needs. Because the IEP team *technically* considered the Student's AT needs as evidenced by the IEP question "box" in the Special Considerations section was always checked off (yes or no), the District's failure to further evaluate the Student's AT needs does not rise to the level of a procedural denial of FAPE. Nor does it rise to the level of a substantive denial of FAPE because the District did not *deny* a requested AT device or service.

Now that it has been requested by the Parents, the District must conduct an Independent Assistive Technology Evaluation and a SETT to assist the IEP team in determining if the Student needs additional AT devices and application to develop an appropriate program.

### **FAPE - ESY**

The Director of Special Education determined that the Student was not qualified for ESY during the summer of 2022 based on "goal progress" (J-3, pp. 52-54; N.T., p. 203). The District used a list of pre-determined questions to determine ESY eligibility. Then, based on their answers, decided that the Student did not qualify for ESY. That decision did not take into consideration (1) the Student's present levels; (2) that the Student's "goal progress" was incredibly slow and inconsistent; and (3) the Student's documented memory concerns, and past retention and regression issues.

Therefore, the Parents met their burden of proving that the District failed to provide a FAPE to the Student during the 2022 ESY and that an equitable compensatory remedy is appropriate for that denial of FAPE.

### **FAPE Overall**

The law does not require a District to close the learning gap or guarantee a particular result or a grade-level pace of learning. Progress toward a FAPE is measured according to the unique circumstances of the individual student and not in comparison to other students.

There were no procedural denials of FAPE in that the District complied with the mandate to provide the Parents with the procedural safeguards as set forth in IDEA, the IEPs and evaluations were timely, and the Parents' rights to meaningful participation were not denied.

The evidence demonstrates that the IEPs were reasonably calculated to enable the child to make progress in light of the child's unique

circumstances. Therefore, the Hearing Officer finds that the School District offered FAPE during the time at issue, except when it failed to qualify the Student and offer ESY during the summer of 2022.

### **Change of Placement and LRE**

The Parents claim that the proposed change of placement from Supplemental Learning Support in the neighborhood school to Supplemental Life Skills at a non-neighborhood District school is not appropriate because the District did not determine whether supplementary aides and services (for example, offering tier 3 level instruction) could be added to the Supplemental Learning Support program at the Student's neighborhood school before proposing a more restrictive placement.

The Parents allege that the change of placement was predetermined by the Director of Special Education based on his belief that the Student "requires a more intensive level of academic support and instruction that requires a supplemental level of modified curriculum presented and in an educational environment that is more commensurate with [the Student's] educational needs." (J-22, p.22).

The District alleges that the learning gap is widening and the level of supports being offered to the Student in the regular education classroom were unsustainable. While in the regular education classroom, the Student was totally dependent on the PCA. And, the Student expressed not wanting to be in the regular education classroom. Would that change if there were adequate supplementary services, support, and AT available in the regular education classroom?

Until the Fall of 2023, the Student was making slow progress. District witnesses credibly testified that by the [redacted] grade the learning gap had widened to the point that the Student was "lost" in a regular education classroom where the other students were two or more years ahead of the



Student. Does that mean that the Student requires a change to Supplemental Life Skills in a different school outside of the Student's neighborhood that will decrease the Student's access to typical peers, and provide a less challenging, functional education program?

Not every student with an Intellectual Disability needs a Life Skills program. Separate schooling, or other removal of children with disabilities from the regular education environment is permissible only if education in regular classes "cannot be achieved satisfactorily" through the use of supplementary aids and services. 34 C.F.R. §300.114(a)(2)(ii). Removal is not permitted if the sole reason is "needed modifications in the general education curriculum." 34 C.F.R. §300.116(e).

In resolving conflicts, issues can be framed in a "yes" or "no," "either/or" fashion: "Should the Student be placed in the Supplemental Learning Support program in the neighborhood school or a Supplemental Life Skills program in another school farther from the Student's home?" Up until now, the District has answered this question by providing two dichotomous alternatives.

However, if the issue is framed in a way that will yield more options for consideration, the answers may be totally different: "What supplementary services, support, and AT are needed for the Student to derive meaningful educational progress?" At this point, the evidence does not adequately answer that question.

In the neighborhood school, the Student is mainstreamed for homeroom, lunch, recess, and specials; similar to the schedule in Life Skills program at the other school. The major differences between the two are: (1) the location; (2) Life Skills would eliminate the need to mainstream the Student for the core subjects (ELA, math, and writing); and (3) the curriculum at the other school is more "basic/functional" than the

“academic” content in the Supplemental Learning Support program at the neighborhood school.

In a similar matter where a District proposed changing the student’s IEP from Supplemental Learning Support in the student’s neighborhood elementary school to a Supplemental Life Skills placement in a different elementary school, Hearing Officer Ford applied *Oberti* and held that the District’s proposal “reduces the amount of time that the Student will spend in general education settings and moves the Student out of the Student’s neighborhood elementary school.” Hearing Officer Ford, in *H.B. v Sharon City School District*, ODR # 24221-2021 (February 2, 2021) at p. 15 – 16. Ford further held: “[t]he record as a whole shows that the IEP team was choosing between two predefined options as opposed to crafting services around the Student’s needs – and only then deciding the least restrictive environment.” *Id.* at 18.

The fact that this is a circumstance where the District would be required to create a program specifically for Student in the neighborhood school where none is currently available, does not excuse the District from the *Oberti* obligations. The District failed to consider a full range of supplemental aids and services that the Student now needs.

What was offered by the District in the past, that did result in progress based on the Student’s unique needs, is no longer sufficient. The District’s decision to move the Student out of the LRE into a more restrictive Life Skills program without additional assessments has not been proven to be necessary. The District must mainstream the Student to the maximum extent and not just move the Student outside of the regular education classroom to the hallway.

The Parents have met their burden of proving that the District’s proposed change of placement to a non-neighborhood school, in a more restrictive program, was predetermined because the District’s continuum of

alternative placements does not include an appropriate Supplemental Learning Support program that could be adapted to the Student in the neighborhood school. The Supplemental Learning Support programming available at the neighborhood school lacks a full range of resources, a staff trained to competently implement assistive technology, and the time to do so.

As requested by the Parents, in order to educate the Student alongside nondisabled peers in the LRE, the District must gather more information by conducting an Independent Educational Evaluation (IEE), and AT and SETT evaluations to better understand the Student's needs now that the learning gap has widened so that the District can adapt the Supplemental Learning Support program at the neighborhood school to meet the unique needs of the Student.

## **LEGAL CONCLUSIONS**

1. The Parents failed to meet their burden of proving that the District substantively denied the Student a FAPE from March 5, 2022 through the last day of the 2023-2024 school year in violation of the IDEA, Section 504, and Pennsylvania regulations with the following exception: The Parents met their burden of proving that the District failed to provide the Student with a FAPE during the Summer of 2022 when it found the Student not eligible for ESY.
2. The Parents met its burden of proving by a preponderance of evidence that the District has failed to offer the Student sufficient supplemental aids and services in the LRE to justify its proposed change of placement. Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District's proposed change of placement does not comply with the IDEA least restrictive environment mandate at this time.

## **ORDER**

AND NOW, this 24th day of June, 2024, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Parent's claim is **SUSTAINED** in part and **DENIED** in part.

1. The Parents' request for 36 hours of compensatory education, based on what the Student received in 2021, as an equitable remedy for the denial of FAPE during the summer of 2022 is **SUSTAINED**. The award of compensatory education is subject to the following conditions and limitations. The Student's Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related-services' needs. The compensatory education may not be used for products or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through the 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 the Student and the Parents. The hours of compensatory education may be used at any time from the present until the Student's 22<sup>nd</sup> birthday. The compensatory services shall be provided by appropriately qualified professionals selected by the Parents; and the cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

2. The Parent's request that the District conduct an IEE, and Independent Assistive Technology Evaluation, and a SETT evaluation to assist the IEP team in developing an appropriate program at the Student's neighborhood school is **GRANTED**. The evaluations and the supplemental aids and services the IEP Team determine are needed by the Student will be provided at the public's expense.
3. The IEP team will convene as soon as practicable during the Fall semester of the 2024-2025 school year following receipt of the results of these evaluations. Until that time, the pendant IEP will remain in place in the neighborhood school.
4. This Order shall not be construed to determine whether or how much time the Student will be required to spend in the regular education classroom for the core subjects (ELA, Math, and writing). That must be determined by the IEP Team once it has the necessary assessments to develop an appropriate program at the neighborhood school.
5. Furthermore, by September 30, 2024, the District shall train all of the Student's teachers who use a Smart Board to be competent in uploading the material on the Student's computer in an a format easily accessible to the Student. If necessary, after the AT and SETT evaluations have been completed, the teachers and aides shall also be trained to competently use any new AT devices and applications that will be used by the Student.
6. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED. The Hearing Officer's jurisdiction is relinquished.

*Cheryl Cutrona*

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**Cheryl Cutrona, J.D.**  
**Hearing Officer**

**Date of Decision**

June 24, 2024

**ODR 29330-23-24**