

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Hearing Officer
Final Decision and Order

CLOSED HEARING
ODR File Number: 21266-18-19

Child's Name: V. S. **Date of Birth:** [redacted]

Parent:
[redacted]

Counsel for Parent
Drew Christian Esq.
105 Claremont Avenue
Clarks Summit, PA 18411

Local Education Agency:
Old Forge School District
300 Marion Street
Old Forge, PA 18518-1647

Counsel for the LEA
David F Conn Esq.
Sweet, Stevens, Katz & Williams LLP
331 East Butler Avenue, P O Box 5069
New Britain, PA 18901

Hearing Officer: Charles W. Jelley Esq. **Date of Decision:** **July 19, 2019**

PROCEDURAL HISTORY

The Student¹ is a rising eleventh grader who resides in the District and attends the local high school in the District. The Parties agree the Student is a person with an intellectual disability within the meaning of the Individuals with Disabilities Education Act (IDEA). The Parties further agree that as a result of the intellectual disability, the Student is otherwise eligible to receive a free appropriate public education (FAPE) and all needed regular and special education services through an individual education program (IEP), including specially-designed instruction (SDI), related services and supports for personnel. Next, the Parties agree the Student's intellectual disability substantially limits the Student's major life function of learning; therefore, the Parties agree the Student is also a person with a disability within the meaning of Section 504 of the Rehabilitation Act.²

The Parents contend the District failed to offer and provide the Student with a FAPE from the 2016-2017 school year to the present date. To remedy the alleged multiyear denial of a FAPE, the Parents now seek appropriate relief in the form of compensatory education and an independent educational evaluation. Initially, the District denied all claims; however, after taking testimony, the District, on the record, confessed judgment as to liability for a three year denial of a FAPE. Thereafter, both Parties through a series of detailed Stipulations of Fact, incorporated by reference herein, requested that the hearing officer enter an Order

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

² The Parents claims arise under 20 U.S.C. §§ 1400-1482 and Section 504. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14). The Parent's Section 504 claims arise under the Section 504 FAPE regulations found at 34 §§ C.F.R. §§ 104.30-36. The applicable Pennsylvania regulations implementing Section 504 are set forth at 22 Pa. Code Chapter 15. References to the record throughout this decision will be to the Notes of Testimony (NT p.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number.

² Preliminary Motions seeking this hearing officer's recusal and disqualification were argued and briefed. The Motions were denied and the action proceeded to a hearing. Due to scheduling conflicts and ongoing alternative dispute resolution negotiations between the Parties regarding renewed settlement talks the Decision Due Date was extended for a good cause, by motion of the Parties, on several occasions.

granting the Student appropriate relief, within the meaning of the IDEA.³ After reviewing the record and exhibits, I accept the Parties' Joint Stipulation of Facts as to a three year denial of a FAPE. As a consequence of the three year denial of a FAPE, the District is now directed to fund an independent education evaluation and bank of compensatory education hours. A Final Order granting both forms of appropriate relief follows.⁴

STATEMENT OF THE ISSUES

1. Whether the District's offer of a free appropriate public education for the 2016-2017 [eighth grade] school year provided the Student with meaningful educational benefit and significant learning in the least restrictive environment? If the District failed to offer a free appropriate public education, is the Student entitled to compensatory education?⁵
2. Whether the District's offer of a free appropriate public education for the 2017-2018 [ninth grade] school year provided the Student with meaningful educational benefit and significant learning in the least restrictive environment? If the District failed to offer a free appropriate public education, is the Student entitled to compensatory education?
3. Whether the District's offer of a free appropriate public education for the 2018-2019 [tenth grade] school year provided the Student with meaningful educational benefit and significant learning in the least restrictive environment? If the District failed to offer a free appropriate public education, is the Student entitled to compensatory education?

³ The Joint Stipulation of Facts as to the three year denial of a FAPE are set forth in the record at NT pp. 224-322.

⁴ After carefully considering the entire testimonial record, including the non-testimonial, extrinsic evidence in the record, in its entirety, I now find that I can draw inferences, make Findings of Fact and Conclusion of Law. Consequently, I do not reference portions of the record that are not relevant to the single issue in dispute.

⁵ Although the Parents make denial of FAPE claims under the IDEA and Section 504, the essential elements of each denial of FAPE claim for liability and equitable relief, under both regulations, directly overlaps. Therefore, the Parents' theory of liability under the IDEA and Section 504 for liability purposes and for appropriate relief are *sub silentio* combined as one claim for each school year in the Statement of Issues set forth above. The Parents did not raise a claim for Section 504 discrimination, before this hearing officer; therefore this hearing officer will not undertake a traditional discrimination deliberate indifference legal analysis. See, *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 275 (3d Cir. 2014) (quoting *Ridley Sch. Dist. v. M.R.* 680 F.3d 260, 283 (3d Cir. 2012). See also, *Fry v. Napoleon Community Schools*, 137 S. Ct. 988 (2017) (February 22, 2017) (NT pp.81-84 reserving Section 504 claims for legal relief for a court of competent jurisdiction).

4. Does the Student currently need a comprehensive evaluation in all areas of suspected disability? If the answer is yes, should the hearing officer Order an independent evaluation at public expense?

FINDINGS OF FACT

THE 2016-2017, 2017-2018 AND 2018-2019 IEPs

1. The Student is a person with an intellectual disability. The Student's intellectual disability adversely affects the Student's education. The Student's lifelong intellectual disability substantially limits the Student's major life functions of learning and thinking (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4, S-2, S-3, S-4).
2. The annual goals, the SDIs, the modifications, accommodations, present levels, statement of transition services and the statement about the Student's participation in the least restrictive environment (LRE) set out in the 2016-2017 IEP crossed over school years and were restated with slight modifications in the 2017-2018 and 2018-2019 IEPs; therefore, the following Findings of Fact apply to the 2016-2017, the 2017-2018 and the 2018-2019 school year IEPs at issue (NT *passim*, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
3. The Student's 2016-2017, 2017-2018, and the 2018-2019 IEPs lack updated, measurable, accurate present levels of educational and functional educational performance (hereinafter "present levels"). The present levels failed to objectively state the Student's entry level baseline skill set in the regular education, transition from school to work and/or the special education curriculum (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
4. The present levels in each IEP, for each school year, failed to provide relevant measureable updated data in all areas of suspected disability, based upon results from technically sound formative assessments, curriculum based assessments, or transition from school to work assessments (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
5. The IEP present levels, in each IEP, for each school year, failed to provide relevant measureable updated information in all areas of suspected disability about the Student's current post-secondary transition interest, needs and preferences (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).

6. The IEP present levels, in each IEP, for each school year, failed to provide updated information about the Parental concerns relating to the Student's transition needs and/or enhancing the Student's education in the LRE (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
7. The present levels, in each IEP, for each school year, failed to provide relevant measureable updated data in all areas of suspected disability about how the Student's disability affects involvement and progress in the general education curriculum (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
8. The present levels, in each IEP, for each school year, failed to provide updated information leading to appropriate measurable postsecondary goals related to training, education, employment and independent living skills (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
9. Each IEP, for each school year, lacked measureable annual goals in all areas of unique needs and individual circumstances (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
10. The goal statements in each IEP, for each school year, failed to state the Student's annual expected level of performance in all areas of unique need and circumstances (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
11. The goal statements in each IEP, for each school year, failed to state the Student's annual expected level of achievement in the regular education and/or the special education curriculum (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
12. The annual goal statements in each IEP, for each school year, failed to include data driven measurable expectations of progress leading to significant learning that can be accomplished within a twelve-month period (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
13. The annual goals in each IEP, for each school year, failed to provide relevant measureable updated information in all areas of suspected disability including academic and functional goals (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
14. The annual goals in each IEP, for each school year, failed to provide measurable performance criteria describing the expected criteria for mastery (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
15. The annual goals in each IEP, for each school year, failed to include a statement describing a direct relationship between the annual goal statement and the present levels (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).

16. The annual goal statements for each IEP, for each school year, failed to include updated statements describing how the Student's progress toward meeting this goal would be measured and reported to the Parents (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
17. Each IEP, for each school year, lacked appropriate services, goals, supports and specially-designed instruction to support the Student's transition from school to work (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
18. Each IEP, for each school year, lacked transition from school to work present levels, measureable annual goals and specially-designed in all areas of transition from school to work needs and/or circumstances (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
19. The transition goal statements in each IEP, for each school year, failed to correspond to the Student's unique transition from school to work needs and circumstances (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
20. The transition from school to work goal statements, in each IEP, for each school year, failed to state the Student's annual expected level of performance in all areas of unique need (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
21. Each IEP, for each school year, lacked detailed descriptive progress monitoring measurement strategies and updated data (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
22. Each IEP, for each school year, lacked appropriate specially-designed instruction to support the Student's significant learning (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
23. Each IEP, for each school year, lacked supplemental aids and services to support the Student's education and participation with age appropriate peers in the LRE (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
24. Each IEP, for each school year, failed to include specially designed instruction including updated statements about how the IEP team and the regular education teachers will adapt, as appropriate, the content, methodology, or delivery of instruction to address the Student's unique needs that result from the Student's intellectual disability (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
25. Each IEP failed to state how the District would ensure the Student was provided with equally effective commensurate opportunity to access the general education curriculum (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).

26. Each IEP, for each school year, failed to ensure the Student was provided with an equally effective commensurate opportunity to access grade and age based regular education curriculum based standards (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
27. At each IEP meeting, for each school year, the District failed to indicate how and if the Student was eligible for extended school year ESY services. P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
28. At each IEP meeting, for each school year, the District failed to state the basis for its ESY determination (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
29. Each IEP, for each school year, failed to include appropriate ESY supports, related services, annual goals or specially designed instruction in all areas of ESY eligibility (NT pp.90-226. P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
30. Each summer from 2016 through 2019 the District failed to provide the Student with an ESY program that appropriately met the Student's academic or functional reading, math, written expression, adaptive behavior, social, emotional and transition needs (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
31. At each IEP meeting from 2016 through 2019 the District failed to make an appropriate determination about whether the Student had a regression or recoupment learning problem (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
32. At each IEP meeting from 2016 through 2019 the District failed to discuss, document and describe the extent to which the Student either failed to master and/or failed to consolidate an important skill or behavior prior to and after breaks in each school year (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
33. At each IEP meeting from 2016 through 2019 the District failed to discuss, document and describe the extent to which the Student's skills, behaviors or disability related needs and weakness interfered with learning or achieving the goal statements (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
34. From 2016 through 2019 the District failed to discuss, consider and describe the extent to which successive interruptions in the Student's educational programming resulted in the Student's withdrawal from or failure to meet the goal statements (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).

35. From 2016 through 2019 the District failed to consider, discuss and include relevant data about the Student's progress in all areas of the Student's disability and in all areas of unique needs and/or circumstances (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
36. From 2016 through 2019 the District failed to ensure that the progress reports and/or progress monitoring data maintained by educators, therapists and others having direct contact with the Student and then provided to the Parents, either after interruptions or breaks during the school year or as scheduled in the IEP, were collected and reviewed to document the Student received meaningful educational benefit and significant learning in the LRE (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
37. From 2016 through 2019 the District failed to review, discuss and update each IEP after receiving relevant input from the Parents regarding changes in Student's adaptive behaviors, present levels in all areas of suspected disability and/or related needs/circumstances (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
38. From 2016 through 2019 the District failed to include, review and revise each IEP after receiving the results of updated data from criterion-referenced tests, curriculum-based assessments, ecological life skills assessments and other equivalent Student centered measurements (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
39. From 2016 through 2019 the District failed to ensure that to the maximum extent appropriate the Student would be educated with other peers/students who are not disabled in the LRE (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
40. From 2016 through 2019 the District failed to consider what supplementary aids and services were otherwise needed to enable the Student to make progress on the goals and objectives in each IEP, for each school year, in the regular education and the special education curriculum (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
41. From 2016 through 2019 the District failed to discuss, consider and provide appropriate amounts of supports to the special education personnel, the regular education personnel, the related service providers, and the paraprofessionals to allow the Student to make meaningful educational progress and significant learning in the LRE (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).

42. From 2016 through 2019 the District failed to calculate the appropriate amount of time the Student should spend in and outside the regular and or special education classroom. From 2016 through 2019 the District failed to calculate the appropriate amount of time the Student should spend in age-appropriate community-based activities/settings that included individuals with and without disabilities in the LRE (NT pp.90-226, P-2, P-3, P-4, P-5, P-7, P-8, P-10, P-11, S-2, S-3, S-4).
43. The 2016-2017, 2017-2018 and the 2018-2019 school year calendars documenting the length of each school year were reviewed by this hearing officer in calculating the awarded appropriate relief (HO#2).
44. I find the entire testimonial record, including the non-testimonial extrinsic evidence, described herein, in conjunction with all of the exhibits provided this hearing officer with a sufficient factual record to calculate an award of appropriate relief (NT *passim*).

CONCLUSIONS OF LAW AND GENERAL LEGAL PRINCIPLES

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that 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). Accordingly, the burden of persuasion, in this case, must rest with the Parents who requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer*, *supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here. Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See, *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). This hearing officer found all of the witnesses who testified to be credible, testifying to the best of his or her recollection from his or her perspective. The testimony overall was essentially consistent on factual matters. This hearing officer now finds the District’s witnesses and the Parents’ testimony credible and essentially consistent with respect to the actions taken or not taken by the team in evaluating, instructing and designing the Student’s ESY program.

FREE APPROPRIATE PUBLIC EDUCATION

The IDEA and the implementing state and federal regulations obligate local education agencies (LEAs *a.k.a.* districts) to provide a FAPE to children who are

eligible for special education. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services that are reasonably calculated to permit the 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). Districts/LEAs meet the obligation of providing FAPE to eligible students through development and implementation of an IEP that is “‘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).

Recently, the U.S. Supreme Court was called upon to consider once again the application of the *Rowley* standard, and it then observed that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, 37 US. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) 137 S. Ct. 988, 999, 197 L. Ed.2d 335, 350 (2017). The IEP must aim to enable the child to make progress. The essential function of an IEP is to set out a detailed individualized program for pursuing academic and functional advancement in all areas of unique need. *Endrew F.*, 137 S. Ct. 988, 999 (citing *Rowley* at 206-09) (other citations omitted). The *Endrew* court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 137 S. Ct. at 1001, 197 L. Ed. 2d at 352. The *Endrew F.* standard is not inconsistent with the above longstanding interpretations of *Rowley* by the Third Circuit. As *Endrew*, *Rowley*, and the IDEA make abundantly clear, the IEP must be responsive to the child’s identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, a school district is not required to provide the “best” program, but rather one that is appropriate in light of a child’s unique circumstances. *Endrew F.*. In addition, an IEP must be judged “as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993). (hearing officers and courts should avoid the temptations of the “Monday Morning” quarterback).

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Endrew 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 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, 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). When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690, (1982). A FAPE, as the IDEA defines it, includes both "special education" and "related services." Id. 20 U.S.C. § 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. 20 U.S.C. §§ 1401(26), (29). A school district must provide a child with disabilities all such special education and related services "in conformity with the [child's] individualized education program," or "IEP." Id. 20 U.S.C. § 1401(9)(D).

A school district may violate the IDEA in two different ways. "First, a school district, in creating and implementing an IEP, can run afoul of the Act's procedural requirements." *Rowley*, 458 U.S. at 206. "Second, a school district can be liable for a substantive violation by drafting an IEP that is not reasonably calculated to enable the child to receive educational benefits." *Fresno Unified*, 626 F.3d at 432 (citing *Rowley*, 458 U.S. at 206-07); See also, *Andrew F.*, 137 S. Ct. at 999.

A procedural violation occurs when a district fails to abide by the IDEA's procedural requirements. Procedural violations do not necessarily amount to a denial of a FAPE. See, e.g. *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 909 (9th Cir. 2009). A procedural violation constitutes a denial of a FAPE where it "results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010).

A substantive violation occurs when an IEP is not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Andrew F.* 137 S.Ct. 1001, but the IDEA does not guarantee "the absolutely best or 'potential-maximizing' education." *Rowley, Andrew F., Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987).

SECTION 504 AND CHAPTER 15 FAPE CLAIMS

Section 504 provides: "No otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . ." 29 U.S.C. § 794. A recipient of federal funds that operates a public elementary or secondary education program "shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities ." 34 C.F.R. § 104 .37(a)(1). Section 504 also requires school districts to make all nonacademic and extracurricular services and activities like counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment available to persons with a disability. 34 C.F.R. § 104 .37(a)(2). Accordingly, a school district may not deny a disabled student equally effective services needed to provide a FAPE and must afford disabled students an equal opportunity to receive a FAPE in the LRE.

Pennsylvania has decided to implement the statutory and regulatory requirements of § 504 at the state level through the enactment of 22 Pa. Code Chapter 15. Because Chapter 15 does not preempt or expand the rights and liabilities under Section 504, courts treat Chapter 15 as coextensive with Section 504. *K .K. ex rel. L .K. v. Pittsburgh Pub. Schs.* 590 F. App'x 148, 153 n .3 (3d Cir. 2014) (quoting 22 Pa. Code § 15.1), *A .W. ex rel. H .W. v. Middletown Area Sch. Dist.*, Civ. Action No. 13-2379, 2015 U .S . Dist. LEXIS 9774, 2015 WL 390864, at *15 (M .D. Pa. Jan. 28, 2015).

The substantive standards for determining liability under Section 504 and the IDEA for a denial of a FAPE are the same. *Blunt v. Lower Merion Sch. Dist .*, 767 F .3d 247, 275 (3d Cir . 2014) (quoting *Ridley Sch. Dist. v. M .R.* 680 F .3d 260, 283 (3d Cir. 2012). As discussed above, the denial of a FAPE, guaranteed by the IDEA, generally violates Section 504 because it deprives disabled students of a benefit that non-disabled students receive simply by attending school in the normal course—a free appropriate public education. Courts within this circuit have rejected the argument that a student asserting a violation of Section 504 must establish more than a denial of a FAPE to prevail under 504. See, *Centennial Sch. Dist. v. Phil L. ex rel. Matthew L.*, 799 F. Supp. 2d 473, 488, 489 n. 10 (E .D. Pa. 2011) (rejecting the argument that to prevail under Section 504 a student must prove not only a denial of a FAPE but also that the denial was "solely on the basis

of disability"); *Neena S. ex rel . Robert S. v. Sch. Dist. of Philadelphia*, 2008 U.S. Dist. LEXIS 102841, 2008 WL 5273546, at *14 (E .D. Pa. Dec. 19, 2008) . The "substantive law governing Section 504 for educational matters is functionally identical to that applied in the context of a claim under IDEA, which entitles every student to a FAPE." *Id.* Importantly, the Third Circuit has held that " § 504's negative prohibition is similar to the IDEA's affirmative duty"--in other words, a finding that a student received a FAPE under the IDEA "is equally dispositive" of a plaintiff's § 504 claims. *D .K. v. Abington Sch. Dist.*, 696 F .3d 233, 253 n .8 (3d Cir. 2012) (internal quotation marks omitted).

COMPENSATORY EDUCATION

In *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) the court endorsed a "complete" make whole compensatory education remedy favoring relief for the entire period of the violation *G.L.* 802 F.3d at 626. Compensatory education " 'accrue[s] from the point, that the school district knows or should know of the injury to the child, and the child 'is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.' " ⁶ Existing case law describes three competing methods to calculate the quantum of compensatory education hearing officers should award. One option is to adopt the *MC* "cookie cutter" approach. The second option is to employ the *Reid* "qualitative" approach. The third compensatory education option, after reviewing the record as a whole, is to make an equitable determination about the time and services necessary to provide appropriate relief. ⁷ Each option, however, assumes the record is properly developed to support an equitable finding.

⁶ *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

⁷ *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted). REP. 501 (2010). For the analogy-based relationship of compensatory education with tuition reimbursement, see Perry Zirkel, *Compensatory Education under the Individuals with Disabilities Education Act: The Third Circuit's Partially Mis-Leading Position*, 110 Penn St. L. Rev. 879 (2006). For the prevailing description of the two approaches for determining the appropriate amount of compensatory is appropriate relief, which are generally referred to under the rubrics of "quantitative" and "qualitative" methods. See, Perry A. Zirkel, *Two Competing Approaches for Calculating Compensatory Education under the IDEA*, 257 EDUC. L. REP. 550 (2010).

Compensatory education, unlike the promise of a FAPE, is intended to compensate a disabled student, for past denials otherwise guaranteed by the IDEA.⁸

Compensatory education should place the child in the position they would have been in but for the violation.⁹ As an equitable remedy, compensatory education is intended to provide more than “some benefit” or for that matter, “meaningful educational benefit and significant learning.”¹⁰ The factors included, in the compensatory education relief hinges on student specific facts like how much more progress the student might have shown if he or she had received the required special education services, the student’s age, ability, past achievement, stage of learning, unmet needs, and the student’s current present level. Therefore, whether the hearing officer follows *Reid*, MC, or the equitable approach, appropriate relief must be supported by the record evidence as a whole. *Id.*

INDEPENDENT EVALUATIONS AS MAKE WHOLE RELIEF

An independent educational evaluation (IEE) is defined as an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student in question. A parent may request an IEE, at public expense, if the parent disagrees with the evaluation completed by the district. In the alternative, parents are free, at any time, to obtain an IEE at the parent’s own expense. If the parent requests an IEE at public expense, the district, without unnecessary delay, shall either provide the IEE at public expense or file a due process complaint. Regardless if the IEE is publically or privately funded, the results of an IEE must be considered by the district in any decision regarding that student’s FAPE.

Districts are permitted to establish policies and procedures for requesting and funding IEEs. District policies for IEEs, at public expense, must describe the criteria under which the IEE evaluation is obtained, including the location of the evaluation and the qualifications of the examiner.¹¹

⁸ *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 276 (D.D.C.2011) (citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir. 2005).

⁹ *Boose v. District of Columbia*, 786 F.3d 1054, 2015 U.S. App. LEXIS 8599 (D.C. Cir. 2015) IEPs are forward looking and intended to “conform[] to . . . [a] standard that looks to the child's present abilities”, whereas compensatory education is meant to “make up for prior deficiencies”. *Reid*, 401 F.3d at 522-23. Unlike compensatory education, therefore, an IEP “carries no guarantee of undoing damage done by prior violations,” IEPs do not do compensatory education's job.

¹⁰ *Boose v. District of Columbia*, 786 F.3d 1054, 1058 (D.C. Cir. 2015).

¹¹ 34 C.F.R. § 300.502 *et seq.*, *Letter to Wessels*, 16 EHLR 735 (OSEP 1989), *Letter to Smith*, 16 EHLR 1080 (OSERS 1990), and *Letter to Bartlett*, 16 EHLR 292 (OSERS 1989).

The district's local IEE criteria may (1) limit the parent to a comprehensive list of local or state wide evaluators, (2) require IEE evaluators to follow the criteria established by the producer/maker of the evaluation instrument(s), (3) impose mileage/travel limits on the IEE's costs, and (4) require the IEE examiner to hold a particular license/certification when the district requires the same for its personnel who conduct corresponding district evaluations. 34 C.F.R. § 300.502 *et seq.* Hearing officers, subject to the above regulations, have equitable authority to order independent education evaluations 34 C.F.R. §300.300(a)(3)(i), 34 C.F.R. §300.502(d) and 22 PA Code §14.102(a)(2)(xxix).¹²

THE PARENTS' CLAIMS AND THE DISTRICT'S RESPONSE

Initially, the Parties reported to this hearing officer that after a face-to-face meeting, they reached an otherwise valid agreement and requested a conditional 60-Day Dismissal Order. This hearing officer granted the request, issued the Order, canceled the pending hearing and closed the file. Subsequently, within the 60-day timeline, the Parents advised this hearing officer that the Board rejected the local educational agency representative (LEAR) commitment of resources; shortly thereafter the Parents requested and this hearing officer agreed to reinstate the Parent's due process Complaint. Initially, the District at all times argued that it complied with all substantive and procedural regulations; after taking testimony, the District confessed judgment, as to liability, for a three year denial of a FAPE [2016-2017, 2017-2018 and the 2018-2019 school years]. After placing Joint Stipulations of Fact as to the scope of the confession of judgment, the Parties requested and this hearing officer after studying the record agreed to enter an Order in favor of the Parents. Reading the testimonial record, in conjunction with the non-testimonial extrinsic record as a whole, I will now enter the attached Order directing the District to fund an IEE, prepare an updated RR and propose a revised IEP. The Final Order will also award the make whole remedy of compensatory education.

¹² The IDEA authorizes hearing officers to order IEEs. See, *Penn-Delco Sch. Dist.*, 11 ECLPR 7 (SEA PA 2013) (hearing officer may order an IEE at public expense); *Pennridge Sch. Dist.*, 12 ECLPR 45 (SEA PA 2014), See also, *Loleta Union School District*, 118 LRP 34026 (OCR November 22, 2017)(individualized assessment in all areas of suspected disability may include culturally sensitive assessment techniques).

COMPENSATORY EDUCATION IS APPROPRIATE RELIEF

The Student is a person with an intellectual disability; the Student's IEPs, for each year at issue, call for the Student to receive specially designed instruction all day in either the regular education classroom, the special education classroom, at the transition from school to work environment, the community work experience setting or in nonacademic classes. The Student is scheduled to attend school for a five and a half to six hour school day. The Stipulation and the record as a whole provide preponderant evidence that the Student has not received a FAPE for three school years. After taking into account factors like, how much more progress the student might have shown if he or she had received the required special education services, the student's age, ability, past achievement, stage of learning, unmet needs, functional academic skills, transition needs, adaptive behavior and the Student's current circumstances. As a person with an intellectual disability the Student needs SDIs, throughout the day to learn, the failure to provide substantive and procedurally appropriate IEPs denied the Student an appropriate education for every minute of every hour of every day for three school years. Accordingly, the Student is awarded two thousand seven hundred and ninety hours of compensatory education.

As for the ESY denial of a FAPE, after reviewing each IEP and the records as a whole, I now find I can equitably calculate an award of appropriate relief. I now find the equitable relief for the ESY violations is 300 hundred hours of ESY compensatory education services.¹³ Accordingly, the Student is awarded a total of three thousand and ninety hours of compensatory education.

The compensatory education services Ordered herein can take the form of any developmental, corrective, remedial or specially-designed instruction including related services, transportation services to and from the service provider, transition from school to work services, supplemental aids, one-on-one supports, overnight lodging, modifications, accommodations, assistive technology, as these terms are currently defined and applied in IDEA or Section 504 regulations. The Parents in their sole unfettered discretion can select all compensatory education service providers.

The Parent are also permitted to self-fund the provision of compensatory education services and then obtain immediate reimbursement, from the District, within 30-

¹³ Assuming the Student received one of hour reading, math, written expression and transition services instruction each day, five days a week, for five weeks during the summer months, for each of the three consecutive summers, the District is now Ordered to pay for up to 300 hours of ESY compensatory education services.

calendar days, for any and all costs incurred to provide the compensatory education services described herein. Self-funded costs may include travel to and from the provider, lodging costs associated with providing any or all of the services otherwise described herein. The compensatory education services described above may take place in either in the Student's county of residence or at any setting or location selected by the Parents in their sole discretion. As set forth in the attached Order, the District is directed to pay all invoices, at the market rate charged by the provider where the service is provided within 30-calendar days. Accordingly, a Final Order awarding 3090 hours of compensatory education follows.¹⁴

APPROPRIATE RELIEF INCLUDES AN INDEPENDENT EVALUATION

I also find good cause exists to Order the District to fund a complete comprehensive evaluation of the Student in all areas of suspected disability. Accordingly, as a consequence of not providing a FAPE, the District within five (5) business days from the date of this Order, pursuant to 34 C.F.R. §300.502(e)(1) is directed to provide the Parents with its IEE criteria and list of evaluators. Thereafter, the Parents have five (5) calendar days to notify the District about their selection of the IEE evaluator. If the Parents fail to select an evaluator by the close of business on the fifth day, on the sixth day, the District is free to select an evaluator(s) from the list provided to the Parents. The IEE evaluator(s) in their sole, absolute and unfettered discretion shall select the assessment(s) protocols and after meeting with the Student. If the evaluator(s) determine(s) that the Student needs any further evaluation(s), not described herein, the IEE evaluator(s) should immediately inform the Parties about the IEE evaluator's opinion that the team needs additional data. Thereafter the IEP team should meet to review the request for additional data. Notwithstanding the provisions of this paragraph, any observation by the IEE evaluator(s) may, in their sole discretion, take place in the home, the school or both. Once the IEE evaluator(s) has issued the independent evaluation report, the District shall within five (5) business days hold a meeting to review the report. Thereafter, the District consistent with 22 PA Code Chapter 14, shall prepare an RR and a revised IEP. The District is Ordered to pay the costs for the IEE evaluator(s) to participate by phone, video conference or in person in any meeting(s) to review the IEE, the RR and the development of the next IEP. The decision to participate and the manner of participation, in either the IEE review meeting, the RR meeting or the IEP meeting, is best left to the sole

¹⁴ School year calculation of compensatory education 990 hours per year for three years =2970 hours. Extended school year calculation for three summers. Five week program, five days a week for four hours per day totaling 20 hours a week = 100 hours per summer. Therefore the Student is awarded 300 hours of ESY compensatory education.

discretion of the IEE evaluator(s). The terms of this Order regarding the involvement of and payment for the IEE examiner's participation will end once the District's offers the Parents a revised IEP and a new NOREP.

CONCLUSIONS

The record is preponderant that the District failed to commit sufficient resources to provide a FAPE. Accordingly, this hearing officer will **GRANT** Parents' request for compensatory education and an IEE. A Final Order awarding the Student appropriate relief directing the District to fund an independent evaluation and compensatory education follows.

FINAL ORDER

And now, this 19th, day of July 2019, it is hereby **ORDERED** as follows:

1. Pursuant to 34 C.F.R. §300.300(a)(3)(i), 34 C.F.R. §300.502(d) and 22 PA Code §14.102(a)(2)(xxix) I now find good cause exists to Order the District to fund the following independent evaluations:
 - (a) A complete comprehensive psychological assessment, including a complete social history, achievement testing, behavioral checklists, and an assessment of executive functioning in all areas of suspected disability
 - (b) A comprehensive transition from school to work and a comprehensive vocational assessment.
 - (c) A comprehensive speech and language evaluation, including an assessment of the Student's assistive technology needs.
2. The IEE evaluator(s) in their sole discretion shall select the assessment(s) protocols and the scope of the evaluation. If the evaluator(s) determines that the Student needs any further evaluation(s), not described herein, the IEE evaluator(s) should immediately inform the Parties about the IEE evaluator's opinion that the team needs additional data.
3. Notwithstanding the provisions of this paragraph, any observation by the IEE evaluator may, in their sole discretion, take place in the home, the school or both.
4. Once the IEE evaluator(s) has issued the independent evaluation report, the District shall within five (5) business days hold a meeting to review the report. Thereafter, the District consistent with 22 PA Code Chapter 14, shall prepare an RR and a revised IEP.
5. The Parent also has the sole authority to select any and all evaluator(s) and/or providers needed to craft, provide and/or complete the IEE. Within five (5) business days from the date of this Order, pursuant to 34 C.F.R.

§300.502(e)(1), the District is directed to provide the Parents with its IEE criteria and list of evaluators. Thereafter, the Parents have five (5) calendar days to notify the District about their selections. If the Parents fail to select an evaluator by the close of business on the fifth day, on the sixth day, the District is free to select evaluators from the list provided to the Parents.

6. The District is directed to pay the costs for the IEE evaluator(s) to participate by phone, video conference or in person in any meeting(s) to review the IEE, the RR and the development of the next IEP. The decision to participate and the manner of participation, in either the IEE review meeting, the RR meeting or the IEP meeting, is best left to the sole discretion of the IEE evaluator(s).
7. The terms of this Order regarding the involvement of and payment for the IEE examiner(s) participation will end once the District offers the Parents a revised IEP and a new Notice of Recommended Educational Placement (NOREP).
8. Nothing in this Order should be read to limit, or interfere with, the continued involvement of the IEE evaluator(s), once the duties described herein are discharged to such continued involvement.
9. The compensatory education hours awarded herein can take the form of any developmental, corrective, remedial or specially-designed instruction including related services, transportation services to and from the services, transitions services, supplemental aids, one-one-one supports, overnight lodging, modifications, accommodations, including specially-designed instruction as these terms are defined in the current or future regulations implementing the IDEA/Section 504.
10. The Parents in their sole, absolute and unfettered decision can select the compensatory education service provider(s). As set forth in the attached Order, the District is directed to pay all invoices, at the market rate charged by the provider where the service is provided, within 30-days.
11. The Parent is also permitted to self-fund and then obtain immediate reimbursement, within 30-days, for any and all costs associated in providing the compensatory education services described herein, including travel to and from the provider, lodging costs associated with providing any and all developmental, remedial, instructional, vocational, specially-designed instruction, related services, and transition services, otherwise described herein.
12. To correct the 2016-2017, 2017-2018 and 2018-2019 denial of FAPE, the Student is awarded two thousand nine hundred and seventy hours (2970) of compensatory education.

13. To correct the 2016-2017, 2017-2018 and 2018-2019 denial of an ESY FAPE, the Student is awarded three hundred hours (300) of compensatory education.
14. Any and all other claims for appropriate relief, demands or any other affirmative defenses are dismissed with prejudice.

Date: July 19, 2019

s/ Charles W. Jelley, Esq. LL.M.
ODR FILE #21266-2829 AS