

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:

24322-20-21

Child's Name:

[J.C.]

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

05/15/2021

INTRODUCTION AND PROCEDURAL HISTORY

The student, J.C. (hereafter Student),¹ is a preteen-aged student in the Octorara Area School District (District) who currently is identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.³

The Parent filed a Due Process Complaint against the District asserting a denial of a free, appropriate public education (FAPE) to Student under the IDEA, Section 504, and the Americans with Disabilities Act (ADA).⁴ The case proceeded to a due process hearing,⁵ during which the parties presented evidence in support of their respective positions. The Parent sought to establish that the District failed to provide Student with FAPE in the least restrictive environment beginning in the 2018-19 school year⁶ and continuing to the present. She sought compensatory education and prospective relief. The District maintained that its special education program, as offered and implemented, was appropriate for Student, and that no remedy is due.

¹ 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 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 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).

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

⁴ 42 U.S.C. §§ 12101-12213.

⁵ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number.

⁶ The Parent clarified that she did not seek relief beyond the two-year period immediately filing the Due Process Complaint. (HO-1.)

For the reasons set forth below, the claims of the Parent must be granted.

ISSUES

1. Whether the District's program provided Student with FAPE during the 2018-19, 2019-20, and 2020-21 school years continuing through the present;
2. If the District did not provide FAPE to Student during any portion of the time period in question, should Student be awarded compensatory education;
3. If the District's current program is not appropriate for Student, should the District be ordered to develop a new program; and
4. Should the District be directed to provide an Independent Educational Evaluation at public expense?

FINDINGS OF FACT

1. Student is a preteen-aged child who is eligible for special education under the IDEA. Student's current placement is operated by a local Intermediate Unit (IU). (N.T. 33-34.)

Early Educational History

2. Student was evaluated and determined to be eligible for early intervention services in preschool on the basis of Developmental Delay. (S-1.)

3. Student was evaluated by the District before the start of the kindergarten school year (2015-16) and determined to be eligible for special education on the basis of Speech/Language Impairment. At that time, the District noted some characteristics of Autism and a need to monitor Student's eligibility category. Student remained eligible for speech/language support through the 2017-18 school year, participating in the regular education environment with typical peers except during those therapy sessions. (S-1; S-2; S-4; S-5.)
4. Behaviors at home following enrollment in the District included aggression and refusal to attend school. (N.T. 524-28.)

The IU-Operated Program⁷

5. The IU-operated program serves approximately 300 students between five and twenty-one years of age. (N.T. 238-39.)
6. The IU-operated program has mental health therapists and a guidance counselor on staff. Those professionals provide small group counseling and social skill development activities. Individual counseling is available for students who need that service. (N.T. 281-83.)
7. The IU-operated program location was open for in-person instruction five days each week from the start of the 2020-21 school year, with short closures as necessary due to COVID-19 risks, as well as for part of the summer of 2020. (N.T. 400-03.)

Spring 2018

8. The District reevaluated Student in the spring of 2018 with consent of the Parent, and a Reevaluation Report (RR) was issued in April. (S-5.)

⁷ The IU-operated program has a number of components. For purposes of this decision, the two settings in which Student was placed will be referred to as the emotional support program (in the spring of 2019 and during the 2020-21 school year) and the therapeutic program (during the 2019-20 school year).

9. As of the spring of 2018, Student was provided with home- and community-based behavioral support. The April 2018 RR included a January 2018 evaluation by the provider of those behavioral services who noted diagnoses (by history) of Autism, Attention-Deficit/Hyperactivity Disorder, and Separation Anxiety Disorder. (S-5 at 6-12.)
10. Cognitive assessment for the April 2018 RR (Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V)) reflected average range scores across Composites with the exception of Working Memory (low average range). Student’s Full Scale IQ and General Ability Index scores were also in the average range, with the latter somewhat higher further supporting the conclusion that working memory skills were a relative weakness for Student. (S-5 at 23-26.)
11. Assessment of Student’s academic achievement for the April 2018 RR (Wechsler Individual Achievement Test – Third Edition (WIAT-III)) yielded variable scores on the Composites: in the low range for Total Reading and Reading Comprehension/Fluency; in the below average range for Basic Reading, Written Expression, Math Fluency, and Total Achievement; and in the average range for Oral Language and Mathematics. (S-5 at 26-30.)
12. The Autism Diagnostic Observation Schedule – Second Edition (ADOS-2) was administered for the April 2018 RR. Results of that administration did not support Autism Spectrum Disorder, although Student did manifest some symptoms characteristic of Autism in the areas of communication and reciprocal language. Autism Spectrum Rating Scales completed by the Parent and two classroom teachers yielded two scores in the very elevated range by the Parent (peer socialization and behavioral rigidity); and several scores in the elevated range: social/communication, unusual behaviors, social/emotional

reciprocity, and sensory sensitivity (Parent); and social/emotional reciprocity, atypical language, and sensory sensitivity (current teacher). Overall, the Parent's ratings were more indicative of Autism than were the teachers' ratings. (S-5 at 31-35.)

13. Results of the Social Skills Improvement System rating scales for the April 2018 RR were also disparate between home and school. The Parent rated Student below average across all subtests for social skills, while one of two teachers rated Student below average on only one subtest (self-control). With respect to problem behaviors, the Parent's ratings were all in the above average range, while the teachers rated Student in the average range with the exception of one teacher indicating above-average internalizing behaviors. On the scales for Autism-related behaviors, the Parent's ratings were in the above average range but both teachers' scales were in the average range. (S-5 at 18-20.)
14. The April 2018 RR included assessment of Student's speech/language skills, which were determined to be age-appropriate. Speech/language services were no longer recommended. (S-5 at 15-18.)
15. Assessment of social/emotional/behavioral functioning for the April 2018 RR by the Parent and two teachers (Behavior Assessment System for Children – Third Edition (BASC-3)) also yielded scores reflecting more concerns at home than at school. Neither teacher endorsed any clinically significant concerns, but one or both indicated at-risk concerns with Learning Problems, Leadership, Study Skills, and Functional Communication. By contrast, the Parent endorsed clinically significant concerns with Aggression, Conduct Problems, Depression, Adaptability, and Functional Communication; and at-risk concerns with Hyperactivity, Attention Problems, Atypicality, Withdrawal, Social Skills, Leadership, and Activities of Daily Living. (S-5 at 35-37.)

16. The April 2018 RR concluded that Student was eligible for special education based on Specific Learning Disability in the areas of reading and written expression, with mathematics calculation skills/mathematics facts another area of weakness. Recommendations in this RR related to all of these. Speech/language services were no longer suggested. (S-5 at 37-39.)
17. An IEP was developed in May 2018. That IEP identified needs for nonsense word and oral reading fluency, sight word vocabulary, reading comprehension, encoding, and mathematics calculation. Student had shown growth since March 2018 in reading comprehension, a need addressed through direct instruction. (S-6 at 9, 24-27.)
18. Annual goals in the May 2018 IEP addressed reading fluency; sight word vocabulary; encoding; and mathematics calculation on second grade level probes. Program modifications and items of specially designed instruction were for direct instruction in reading (including reading comprehension, S-6 at 9), spelling, and mathematics; multisensory instruction for mathematics; and test and assignment accommodations. (S-6.)
19. Student's program in the May 2018 IEP was specified as one of itinerant learning support with participation in regular education except during direct instruction (ninety minutes per week) and a support period.⁸ The least restrictive environment (LRE) section of the IEP set

⁸ The Pennsylvania Department of Education has explained that, "Educational environment reporting [in the PennData section of an IEP] is not an indication of the amount of special education service a student with a disability receives. Rather, it reflects the location of services." See Annotated IEP Form, School Age, available at <https://www.pattan.net/forms/> (last visited May 13, 2021).

forth an explanation that Student's academic needs required special education outside of the regular classroom. (S-6.)

2018-19 School Year (Third Grade)

20. The District implements a school-wide behavior program wherein students monitor their compliance with school rules and ability to meet expectations such as engage in positive peer interactions. Consequences are imposed for failing to do so, and positive reinforcement follows success. The school counselor meets with students who have difficulty succeeding with that program. (N.T. 95-96, 219-20; S-6 at 12.)
21. The elementary school (grades 3-4) where Student attended in the fall of 2018 implemented the District school-wide behavior program. (N.T. 174, 217-20.)
22. Student engaged in several instances of problematic behavior in October 2018. Two incidents involved physical aggression against a peer; one involved physical aggression against District staff and property (for which Student was restrained); and the last involved physical aggression against a peer during transportation. Meetings convened with the Parent to discuss those events. Student was disciplined for the first three incidents (in- or out-of-school suspension) and a meeting was scheduled after the fourth. (N.T. 530-33; S-7 at 14-15.)
23. Student's IEP was revised in October 2018 after the behaviors at school. Student also reportedly continued to exhibit difficult behaviors at home at the time. Parent input at the October 2018 revision meeting reflected concern with Student's behaviors at school and a plan for de-escalation of behavior. (S-7.)

24. Additional needs identified for the October 2018 IEP were for self-regulation and sequencing multi-step problems. (S-7 at 21.)
25. The October 2018 IEP suggested a future goal for self-regulation. Additional program modifications and items of specially designed instruction were for direct instruction in self-regulation and coping strategies twice weekly; additional daily direct instruction including reading phonetics and strategies; completion of a Functional Behavioral Assessment (FBA) and Positive Behavior Support Plan (PBSP); de-escalation techniques (including breaks; positive “if, then” statements, and reinforcement of earlier success); a Crisis Plan when others were at risk involving use of restraint when necessary with parent notification; and an accommodation for transportation. Student’s time in regular education was reduced by the daily reading instruction and the twice-weekly emotional support. The program transitioned to one of itinerant emotional support, with the LRE section again reflecting that Student’s academic needs required special education outside of the regular classroom. (S-7 at 15, 32-42.)
26. The October 2018 IEP provided for Extended School Year (ESY) services in the District for reading and mathematics. (S-7 at 39-40.)

Spring 2019

27. In January 2019, the decision was made for Student to be placed in an IU-operated full time emotional support setting. (S-8 at 1, 11.)
28. Student’s IEP was revised in early February 2019 due to Student’s change in placement to the IU-operated emotional support program. The team changed the ESY services to be provided at that same location. The mathematics calculation goal was removed because Student had met its criteria. The direct instruction in reading and mathematics was replaced by services with a reading specialist for

twenty-five minutes twice each week in a small group; and direct instruction in self-regulation and coping skill strategies increased to three times per week. (S-8.)

29. The February 2019 IEP continued to indicate, erroneously, itinerant emotional support with Student participating in regular education except for direct instruction in academics and emotional support. (S-8.)⁹
30. Student was in an emotional support class at the IU-operated emotional support program in the spring of 2019. There were approximately ten to twelve students in the classroom with a teacher and an instructional assistant. Behavior support staff also were present at times each day. (N.T. 238-39, 242-43, 261-62.)
31. Student's classes at the IU-operated emotional support program in third grade included a homeroom, language arts, mathematics, social studies, science, and specials. The homeroom, language arts, and mathematics classes for Student were in the emotional support classroom. (N.T. 240-41.)
32. Student's reading instruction during the 2018-19 school year at the IU-operated emotional support program included small group instruction using an Orton-Gillingham-based program with a reading specialist. That program addressed phonics including decoding and encoding. (N.T. 471-74, 483.)
33. The IU-operated program implemented a school-wide behavior program to support its students, who earned rewards for positive behavior and decisions but not for noncompliance or inappropriate behaviors. Social

⁹ The PennData reporting section of this IEP did specify a full time placement outside of the regular education environment. (S-8 at 48-49.)

skills were part of that program. (N.T. 277-79, 284-85, 336-37, 338-40, 445-46.)

34. Student engaged in some problematic behavior after starting at the IU-operated emotional support program and required behavioral intervention. One incident involved physical aggression and two were for leaving the instructional areas. Staff reported those incidents to the Parent. (N.T. 537-38; S-9 at 2.)
35. An FBA was conducted at the IU-operated program in the spring of 2019. Such an assessment soon after a transition to a new learning environment, particularly one much more structured, was not likely to yield useful information because there was not sufficient time to determine Student's behaviors in the new setting as compared to a prior setting. (N.T. 253-55.)
36. The target behaviors identified for the FBA were noncompliance with task demands; elopement from instruction; sleeping or resting head during instruction; and physical disruption. However, Student exhibited the targeted behavior only on a limited basis at school. The hypothesized functions of the behaviors were to escape or postpone a task. Consideration of a PBSP was recommended, including instruction in and practice with coping strategies and self-regulation, and check-ins with mental health staff. (S-9.)
37. Assessment of phonological processing skills was obtained in March 2019. Results indicated weaknesses in retrieving information as well as deficits requiring instruction in phonological awareness and phonics. Assessment of Student's reading skills at that time yielded an instructional reading level at end of first grade. (S-11 at 11-13.)
38. Student's IEP was revised again in March 2019 following review of the FBA and new concerns with Student's behavior during transportation.

The IEP added individual social work services for thirty minutes in each six-day cycle. However, there was no PBSP, and the IEP remained otherwise the same as the one from February. (S-10.)

39. A new IEP was developed in May 2019. Needs identified at that time were for development of mathematics, reading, and written expression skills, as well as use of coping strategies. (S-11.)
40. At the time of the May 2019 IEP, Student reportedly had met the reading fluency and sight word vocabulary goals; and nearly met the encoding goal. (S-11 at 6-8.)
41. Annual goals in the May 2019 IEP addressed reading fluency at a second grade level; mathematics computation at a third grade level; written expression (writing simple dictated sentences with correct spelling); and a behavior goal for use of coping strategies. Program modifications and items of specially designed instruction were for reading specialist services to continue (twenty five minutes in a group twice each week); small group academic instruction; preferential seating; and behavior support strategies (modeling, consistent expectations, chunked assignments, and positive reinforcement) that included antecedent strategies including use of a timer, warnings before transitions, and choices. A PBSP also provided for consequences of behavior consistent with all of these strategies, with a plan for de-escalation. Social work services also continued from the prior revision. (S-11.)
42. The May 2019 IEP provided for ESY services at the IU-operated program location to include direct instruction and practice of skills in the areas of reading fluency, mathematics calculation, written expression, and coping strategies. (S-11 at 51-52.)

43. The program proposed by the May 2019 IEP was itinerant learning support in the special education placement in the IU-operated emotional support program. The LRE section of this IEP reflected that Student had self-regulation, academic, and other skill deficits that required special education services throughout the school day that could not be met in a regular education environment. However, that section does not indicate any of the substance of the IEP team's discussion about LRE. (S-11.)
44. Student made modest gains on benchmark assessments in the spring of 2019 in the areas of oral reading fluency, reading comprehension, written expression, and mathematics computation, but remained at or below the tenth percentile at the third grade level in all areas. (S-11 at 6.)
45. A psychiatric evaluation in August 2019 was conducted by the IU following concerns with Student's emotional and behavioral presentation. Diagnoses at that time were for Disruptive Mood Dysregulation Disorder, Separation Anxiety Disorder, ADHD, and Autism Spectrum Disorder by history. The psychiatrist recommended a therapeutic school-based program as well as community-based behavioral services. (S-12.)

2019-20 School Year (Fourth Grade)

46. Student's IEP was revised at the start of the 2019-20 school year (August 2019 IEP) to reflect Student's entry into a different IU-operated program, one that is school-based involving intensive emotional support with a therapeutic component including psychiatric services. The intensive therapeutic program served children with mental health needs. (N.T. 101-02, 309, 312, 345; S-13.)

47. Revisions to the August 2019 IEP included changes to program modifications and items of specially designed instruction to reflect academic instruction in a small structured classroom; a visual point system; and reintroduction of a crisis plan when safety was compromised involving use of restraint when necessary with parent notification. Related services included weekly social work services (individual and group) and monthly psychiatric services. The twice weekly reading specialist services remained. (N.T. 501-03; S-13.)
48. Student was to be provided with learning support at a supplemental level through the August 2019 IEP. The LRE section again reflected that Student had self-regulation, academic, and other skill deficits that required special education services throughout the school day that could not be met in a regular education environment. That section as in May does not indicate any of the substance of the IEP team's discussion about LRE. (S-13 at 59-60.)
49. There were approximately ten to twelve students in Student's classroom in the 2019-20 school year. A teacher and instructional assistant were in the classroom, with staff mental health therapists and other behavior support personnel are also assigned to classrooms. The school-wide system of behavior support was also implemented in the therapeutic program. (N.T. 310, 317-18, 392.)
50. A de-escalation room was available in the IU-operated therapeutic program for students who requested the opportunity to go to that location or sometimes who were escorted there for safety reasons. The room has a padded floor and walls. (N.T. 332-33, 347.)
51. There was a restorative room available in the IU-operated therapeutic program for students who needed to complete schoolwork. That room

was also sometimes used for purposes of disciplinary suspension or detention. (N.T. 333-34.)

52. Student's school day in the IU-operated therapeutic program had a period of social skills instruction, three academic classes (language arts, mathematics, and science), two group therapy sessions, and a period of a special class in addition to lunch, recess, and opportunities for other routine activities. (N.T. 324, 365-66.)
53. Fourth grade level benchmark assessments in the fall and winter of the 2019-20 school year reflected that Student scored below the first percentile in oral reading fluency, reading comprehension, and writing; and in the thirty-first and forty-second percentile in mathematics computation, respectively. (S-16 at 12.)
54. Over the course of the 2019-20 school year, the therapeutic aspect of Student's program addressed long term goals to increase communication skills and to develop self-regulation skills and manage emotions. Student exhibited inconsistent progress toward those goals prior to the school closures in March 2020. Student also exhibited numerous and significant instances of problematic behaviors throughout that school year prior to the closures. (P-2; S-16 at 23-29.)
55. An incident occurred at the IU-operated intensive therapeutic program in March 2020 after the Parent spoke with and tried to calm Student. In this incident, Student engaged in physical aggression toward a staff member. Student ultimately faced criminal charges as a result. (N.T. 330-31, 549-54; S-15.)
56. A new IEP was developed in May 2020. The team met virtually due to the COVID-19 pandemic. (S-16.)

57. Needs identified in the May 2020 were for oral reading fluency, decoding, and sight word recognition skills; mathematics computation and concepts/application skills; use of coping strategies; and interactions with peer and adults. (S-16 at 35-36.)
58. Annual goals in the May 2020 IEP addressed oral reading fluency at a second grade level; writing dictated simple sentences with proper spelling; mathematics computation at a third grade level; and use of coping strategies. Antecedent strategies and consequences of behaviors were also part of the IEP. (S-16 at 47-55.)
59. The goals in the May 2020 IEP were virtually identical to those in May 2019 IEP, but the baseline for the mathematics computation and behavior goals increased. Additions were made to the antecedent strategies in the PBSP section (including sensory breaks, a visual schedule, breaks, and wait time for processing), and the consequences of behaviors were slightly revised. (S-11 as revised by S-13 *compared with* S-16.)
60. Program modifications and items of specially designed instruction in the May 2020 IEP provided for reading specialist services twice weekly; small group direct instruction in English/language arts (including phonics) and mathematics; multisensory instruction; repetition and review; accommodations for writing tasks; checks for understanding; and accommodations for assessments. The antecedent strategies and consequences of behavior from the PBSP were also specified in that section of the IEP. (S-16 at 56-64.)
61. Related services in the May 2020 IEP were for social work services and monthly psychiatric services through the therapeutic program at the IU. (S-16 at 64.)

62. The program proposed by the May 2020 IEP was supplemental learning support in the IU-operated therapeutic program. Student would also remain at the IU-operated therapeutic program for ESY services and would continue to work on the goals in the May 2020 IEP. The LRE section continued to reflect that Student had self-regulation, academic, and other skill deficits that required special education services throughout the school day that could not be met in a regular education environment. That section again does not indicate any of the substance of the IEP team's discussion about LRE. (S-16 at 66-70.)
63. Progress monitoring for the 2019-20 school year as of the end of the second quarter reflected inconsistent performance and essentially no progress on all of the academic and behavioral goals. Some later progress monitoring was reportedly not possible to obtain due to the school closures and resulting virtual instruction. (P-8.)
64. The team reconvened in July 2020 and recommended that Student be discharged from the therapeutic program in the fall and return to the previous IU-operated full time emotional support program.¹⁰ The family had declined ESY services although they remained available. Student would have access to mental health services as needed and requested during the 2020-21 school year. (P-9; S-16 at 6, 11; S-17 at 15.)

2020-21 School Year (Fifth Grade)

65. Student's IEP was revised in October 2020 following several meetings. The October 2020 IEP provided new benchmark assessment results

¹⁰ It is unclear from the record whether, or to what extent, the Parent expressed agreement or disagreement with this recommendation at the time. However, District staff were aware at least as of October 2020 that the Parent did not assent to Student's return to the IU full time emotional support program. (N.T. 611-13.)

that reflected that Student was at an instructional reading level at the beginning of second grade. (S-17 at 13-16.)

66. The Parent elected in October 2020 to retain Student in virtual programming. However, Student has had difficulty accessing the remote programming. The Parent had also expressed concern about Student returning to the IU program campus for the 2020-21 school year and discussed that at a meeting in October 2020. (N.T. 93-94, 556-59, 609-13.)
67. The October 2020 IEP largely mirrored the May 2020 IEP, including the LRE section. Program modifications and items of specially designed instruction were slightly revised to provide for social work services for emotional regulation and social skills; and accommodations for Student's progress on goals during virtual instruction. (S-17.)
68. Student has been provided with reading instruction for approximately thirty minutes twice each week using a remote platform. (N.T. 497-98, 503.)
69. The District sought and obtained the Parent's consent to a reevaluation in November 2020. (S-19.)
70. Another FBA was conducted in January 2021. That assessment included observations of Student in the home environment; attempts at observing Student virtually were not successful because Student did not attend when the observations were scheduled. Student was sleeping during most of one of the two in-home observations. (S-20.)
71. Target behaviors identified for the January 2021 FBA were being off-task and noncompliance. Student was not exhibiting problematic behaviors observed by teachers because Student typically would not turn on the camera during virtual sessions. Student at that time

reportedly refused assistance and failed to complete assignments in a timely manner. (S-20.)

72. The January 2021 FBA determined the hypothesis for the function of the problem behaviors to be avoidance of tasks. The FBA provided recommendations for helping Student engage during virtual instruction, and for an updated FBA upon return to in-person instruction. (S-20.)

March 2021 RR

73. The District completed its reevaluation with a report issued on March 22, 2021. The limited parent input she provided was included, in addition to information from teachers and other school-based professionals. (P-10.)
74. Cognitive assessment for the March 2021 RR (WISC-V) yielded Composite scores ranged from the very low (Working Memory, Processing Speed) to average (Visual Spatial) range, with low average scores attained for Verbal Comprehension and Fluid Reasoning. Student's Full Scale IQ was reportedly 75 (very low range). Because of statistically significant differences among some of the Composite scores, the Full Scale IQ was to be interpreted with caution. (P-10 at 39-44.)
75. Assessment of academic achievement for the March 2021 RR (Fourth Edition of the WIAT) revealed skills ranging from the extremely low to low average range, with the most significant deficits in the areas of pseudoword decoding and oral reading fluency. Scores in all areas (reading, mathematics, and written expression) were below expectations. (P-10 at 44-48.)
76. Additional reading assessments conducted in March 2021 and reported in the RR revealed poor fluency and decoding skills and below average reading comprehension. Student's instructional reading level was

reportedly still at the beginning of second grade. Written expression skills similarly remained very weak in comparison to peers, although mathematics skills were overall in the average range with some deficits noted. (P-10 at 57-65.)

77. BASC-3 rating scales for the March 2021 RR revealed a number of clinically significant areas of concern across raters: Aggression (Parent); Learning Problems (one teacher); Withdrawal (Parent); Atypicality (Parent and one teacher); Adaptability (Parent and one teacher); Social Skills (Parent and one teacher); Study Skills (one teacher); and Functional Communication (one teacher). At-risk concerns were endorsed by at least one rater in most of these areas as well as Hyperactivity, Conduct Problems, Depression, Attention Problems, and Leadership. (P-10 at 49-53.)
78. The March 2021 RR determined that Student remained eligible for special education on the basis of Specific Learning Disability (reading fluency, basic reading skills, mathematics calculation, and written expression) as well as Emotional Disturbance. (P-10.)
79. Recommendations in the March 2021 RR included maintaining full time emotional support. (P-10.)
80. Progress monitoring for the 2020-21 school year as of the end of the third quarter reflected inconsistent progress on all of the (academic and behavioral) goals. Some progress monitoring was evidently challenging to obtain due to the virtual instruction. (P-10 at 19-21, 66-69.)
81. As of the final session of the due process hearing, the IEP team had not met to discuss COVID Compensatory Services (CCS) for Student. (N.T. 615-18.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

The burden of proof is generally construed as consisting of two elements: the burden of production and the burden of persuasion. The burden of persuasion in a case such as this 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 Parent who filed for this administrative hearing. Application of this principle, however, 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.

A special education hearing officer, who has the role of fact-finder, is also tasked with the responsibility to make credibility determinations of the witnesses who testify. *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 (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible as to the facts; that is, there did not appear to be any attempt to deceive, or to embellish or minimize events. There were, understandably, lapses in specific recall, and the parties' differing perspectives undoubtedly impacted the testimony of each witness to some degree. The weight accorded the evidence was dependent upon a variety of factors beyond credibility, however, including relevance and the existence of support in the documentation. The weight of the evidence shall be addressed further below as necessary.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony or exhibits were explicitly cited.¹¹ Nonetheless, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' focused and comprehensive closing statements.

General IDEA Principles: Substantive FAPE

The IDEA 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. The U.S. Supreme Court addressed these statutory requirements a number of years ago in *Board of Education v. Rowley*, 458 U.S. 176 (1982), holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program, and also complying with the procedural obligations in the Act.

The various states, through local educational agencies (LEAs), comply with the obligation to provide FAPE to eligible students through development and implementation of an IEP which is "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." " *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). The U.S. Supreme Court has recently 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*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). "A focus on the particular child is at the core of the IDEA." *Id.*, ___ U.S. at ___, 137 S. Ct.

¹¹ For example, there was extensive testimony that did nothing more than repeat the content of documents into the record, despite reminders that doing so was unnecessary.

at 999, 197 L.Ed.2d at 349-50 (2017)(citing *Rowley* at 206-09)(other citations omitted).

Individualization is, accordingly, a prime consideration for purposes of the IDEA. The duty to ensure a student's right to FAPE lies with the LEA, not parents. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996)(explaining that, "a child's entitlement to special education should not depend upon the vigilance of the parents[.]"). Still, an LEA is not obligated to "provide 'the optimal level of services,' or incorporate every program requested by the child's parents." *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands services are reasonable and appropriate in light of a child's unique circumstances, and not necessarily those that his or her "loving parents" might desire. *Andrew F.*, *supra*; *Ridley*, *supra*; see also *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard must be based on information "as of the time it was made," and not viewed in hindsight. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); see also *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same).

Substantive FAPE: IDEA Evaluation Requirements

Substantively, an IEP must follow and be based on an evaluation. The IDEA sets forth two purposes of a special education evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to "determine the educational needs of such child[.]" 20 U.S.C. §1414(a)(1)(C)(i).

Certain procedural requirements are set forth in the IDEA and its implementing regulations that are designed to ensure that all of a child's individual needs are examined in this type of evaluation:

Conduct of evaluation. In conducting the evaluation, the local educational agency shall—

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining—

(i) whether the child is a child with a disability; and

(ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

20 U.S.C. § 1414(b)(2); *see also* 34 C.F.R. §§ 300.303(a), 304(b). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment

tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); see also 20 U.S.C. § 1414(b)(3). Any evaluation or reevaluation must include a review of existing data including that provided by the parents in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a).

When a parent disagrees with an LEA’s educational evaluation, he or she may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). The standards for an LEA evaluation are utilized to determine whether or not an IEE at public expense is warranted. 34 C.F.R. § 300.502.

General IDEA Principles: Least Restrictive Environment

The IDEA contains a crucial mandate that eligible students are to be educated in the “least restrictive environment” (LRE) that also satisfies meaningful educational benefit standards.

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.S. § 1412(a)(5)(A); see *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 federal Office of Special Education Programs has explained this principle as requiring

“first consideration” of the regular education classroom with supplementary aids and services. *Letter to Cohen*, 25 IDELR 516 (OSEP August 6, 1996).

The Third Circuit in *Oberti* identified a two-pronged test for making a determination of whether a student’s placement is in conformity with the LRE mandate in the IDEA. The first prong involves consideration of whether the child can, with supplementary aids and services, be educated successfully within the regular classroom. 995 F.2d at 1215. That question includes review of whether the LEA “has made reasonable efforts to accommodate the child in a regular classroom;” a comparison of educational benefit in the regular class with those in a special education setting; and consideration of potential negative implications on peers in the regular classroom. *Id.* at 1217-18. Then, 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.* at 1215.

In assessing the first prong, the mere fact that a child might attain better academic progress in a segregated setting than in an inclusive setting is not the determining factor, because one must evaluate the unique benefits of the typical environment for the individual child, such as social skills and peer interactions. *Girty v. School District of Valley Grove*, 163 F.Supp.2d 527, 536 (W.D. Pa. 2001), *aff’d mem.*, 60 Fed. Appx. 889 (3d Cir. 2002) (quoting *Oberti* at 1217). 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.

Also crucial to this analysis is a recognition that LRE principles “do not contemplate an all-or-nothing educational system” of regular education versus special education. *Oberti, supra*, 995 F.2d at 1218 (quoting *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1050 (5th Cir. 1989)). It

is also generally true that LEAs are provided with broad authority to determine the site for providing special education services, as long as the selected location is appropriate. *White v. Ascension Parish School Board*, 343 F.3d 373, 382-83 (5th Cir. 2003); *Lebron v. North Penn School District*, 769 F.Supp.2d 788, 801 (E.D. Pa. 2011). Still, LEAs are required to have available a “continuum of alternative placements” in order to meet the educational and related service needs of IDEA-eligible children. 34 C.F.R. § 300.115(a); 22 Pa. Code § 14.145. Furthermore, the “continuum” of placements in the law enumerates settings that grow progressively more restrictive, beginning with regular education classes, before moving first toward special classes and then toward special schools and beyond. 34 C.F.R. § 300.115.

It is, however, important to also recognize that the failure to adhere to LRE principles does not automatically mean that the student has been denied FAPE. *A.G. v. Wissahickon School District*, 374 Fed. App’x 330 (3d Cir. 2010)(citations omitted). The issues of FAPE and LRE are related, but they are discrete concepts.

General IDEA Principles: Procedural FAPE

Another core principle of the IDEA is that of procedural FAPE, which includes parent participation in educational decisions. *Schaffer, supra*, 546 U.S. at 53. Procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

The IEP is developed by a team, and a child’s educational placement must be determined by the IEP team based upon the child’s IEP, as well as other relevant factors. 20 U.S.C. §§ 1414(d)(1)(B), 1414(e); 34 C.F.R. § 300.116; *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994); *see also Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258-59 (4th Cir.

1988). The law does not permit the LEA to have predetermined a program and placement, without evidencing an open mind to consideration of alternatives. *See, e.g., Deal v. Hamilton County Board of Education*, 392 F.3d 840, 858 (6th Cir. 2004).

General Section 504 And ADA Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). Further, the substantive standards for evaluating claims under Section 504 and the ADA are essentially identical. *See, e.g., Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those two statutes, particularly when considered together with claims under the IDEA. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

The Parent's Claims

The primary issue is whether the District denied FAPE to Student during any or all of the time period in question. This issue requires a review of Student's changing needs and the District's responses thereto.

The May 2018 IEP addressed the needs that had been identified, with Student participating in regular education with the exception of direct instruction on academic skill deficits. At that time, Student's academic performance was well below expectations in the areas addressed by annual goals. At that point, Student was not exhibiting significant behaviors in the school environment, despite Student's presentation at home. Although the Parent argued that the absence of written expression and reading comprehension goals were fatal to the content of that IEP, there was persuasive testimony that Student at that time needed to first focus on basic spelling skills (N.T. 97-98); moreover, reading comprehension was addressed in the IEP. The evidence is preponderant that the May 2018 IEP was reasonably calculated to provide meaningful educational benefit at the start of the 2018-19 school year, and that LRE was appropriately considered given Student's academic deficits.

In the fall of 2018, however, Student began to exhibit behaviors in the educational environment that occurred within a relatively short period of time and resulted in discipline. As such, Student's behavior was impeding Student's learning and that of others; and, the school-wide behavior program alone was inadequate for Student. At that time, the IEP was revised to appropriately note a new need for self-regulation, and to plan for an FBA in order to develop a PBSP. Had the FBA occurred, Student's IEP could and should have been further revised to address the newly exhibited behaviors. Unfortunately, no FBA occurred in the fall of 2018. Instead, Student was provided some emotional support at an itinerant level. Then,

by January 2019, the District proposed that Student transition to an out-of-district segregated educational setting for full-time emotional support.

As the Parent observes, the U.S. Department of Education has cautioned against proceeding to a more restrictive placement in the absence of appropriate behavior support across environments:

[A] failure to consider and provide for needed behavioral supports through the IEP process is likely to result in a child not receiving a meaningful educational benefit or FAPE. In addition, a failure to make behavioral supports available throughout a continuum of placements, including in a regular education setting, could result in an inappropriately restrictive placement and constitute a denial of placement in the LRE.

Dear Colleague: Supporting Behavior of Students with Disabilities, at 3 (U.S. Department of Education, August 1, 2016.)

Student's academic program in the spring of 2019 included small group instruction in Student's areas of reading deficits. The majority of other academic instruction was provided in an emotional support classroom, but Student had met the mathematics goal so that was no longer a need. Student engaged in problematic behavior following the transition, but did not typically engage in the behaviors that were targeted by the FBA in the spring of 2019. Yet, no new FBA was conducted and no PBSP was developed to address the behaviors that Student did exhibit. Academically by May 2019, by contrast, Student had mastered three of the four academic goals and had made progress on the fourth (encoding). New IEP goals in May targeted then-current needs and there was, for the first time, a PBSP. Prior to the end of the spring 2019 semester, thus, Student's program was deficient with respect to behavioral needs but not academics.

In the fall of 2019, Student's program was changed to a different segregated learning environment that included intensive therapeutic emotional support. This decision was made even without Student having the benefit of an individualized PBSP until the May 2019 IEP, and there had been little if any time to gauge its effectiveness so close to the end of that school year. Student's behavior in the new environment remained very concerning despite the introduction of therapeutic support, and any progress toward mental health goals was inconsistent throughout the course of that school year. Academically, Student clearly did not make any real progress on IEP goals, which is clearly evident since those remained unchanged in May 2020 from the May 2019 IEP. Student's benchmark assessments confirmed Student's significant skill deficits in oral reading fluency, reading comprehension, written expression, and mathematics computation, despite some growth in the area of mathematics computation. For the 2019-20 school year, accordingly, Student's program was inappropriate with respect to academic and behavioral components.

The March 2020 school closures resulting from the COVID-19 pandemic did not, unfortunately, serve to cure all of the deficiencies in Student's program. Student did not exhibit the same behaviors that had been a concern in the school environment earlier in the school year while at home. That consequence in itself is positive. Still, the decision to return Student in the fall of 2020 to the same program and placement as in the spring of 2019, one that was not wholly successful and without considering other options, is perplexing. Nevertheless, one must also consider the circumstances presented by the pandemic in this matter. Here, the Parent's decision to retain Student in virtual instruction was based in significant part on her assumption that Student had been and would continue to be subject to police involvement in that setting (N.T. 501-03), a conclusion that amounted to no more than speculation and was, further, unsupported by the

record as a whole. There can be no dispute that Student experienced significant difficulties with accessing and engaging in virtual instruction that would and likely will continue as long as Student is not in a school environment. The fact that Student continues in that environment, pursuant to a pandemic-related option the Parent is not alone in choosing, must be balanced with the understandable difficulties in obtaining accurate progress monitoring during virtual programming that present a challenge to assessing the appropriateness of the program. The most compelling evidence of Student's growth (or relative stagnation) in reading and written expression skills may be found in benchmark assessments, together with a comparison of Student's instructional reading levels over the time period in question and the standardized assessments in the record. At best, Student has made minimal progress toward development of basic language arts skills since May of 2019, a conclusion that is particularly concerning as Student is now at a grade level where students are expected to read to learn, rather than learn to read. Overall, between March 2020 and the present, the evidence is preponderant that Student has been denied FAPE academically with respect to literacy skills.

With respect to LRE principles, the record is preponderant that there was little, if any, consideration of whether Student could, with supplementary aids and services, be educated successfully in a regular education environment beginning in the spring of 2019. On the contrary, although an FBA was contemplated in the fall of 2018 that could easily have informed efforts to accommodate Student in a regular classroom or other placement along the continuum, that assessment was not conducted until after Student moved to a segregated setting. The caution quoted above by the U.S. Department of Education unfortunately reflects precisely what occurred in this case. There was also no comparison of educational benefits in a regular education environment with those in a special education setting.

Even assuming that the impact on peers in the regular classroom due to the incidents of aggression was a factor, that consideration is but one of three in the first *Oberti* prong. Finally, even if the team had properly concluded that a more restrictive placement was necessary for Student, there is no indication that Student was to be included with typical peers to the maximum extent possible from the spring of 2019 through the present.

The District accurately notes that it is not required to provide every level of every type of service in all settings within its boundaries, and that LEAs generally may determine location. However, the services themselves must be appropriate for the individual child and based on his or her unique strengths and needs. Choosing a placement and then trying to fit a special education program into what that placement offers is not what the IDEA contemplates. To the extent that the District sought suggestions from the Parent on placement options, particularly at the start of the 2020-21 school year, it is the LEA that is required to ensure a continuum of various placements. Seeking her input and participation was, of course, required and important, but she did not have the obligation to offer options.

As noted, the failure to comply with LRE mandates does not necessarily constitute a denial of FAPE. In this particular case, had the District conducted an FBA in the fall of 2018 and revised Student's IEP, with or without a change in placement, one can assume that would have occurred around the same time that Student transitioned to the IU-operated emotional support program in January 2019. Allowing a reasonable period of time for the involved professionals to monitor Student in any program and placement would have provided the opportunity to consider and propose program revisions. Here, no later than the date of the March 2019 IEP meeting, the team had adequate information to recognize that Student's program in the segregated setting was not appropriate in many respects and to respond accordingly. The lack of adherence to LRE mandates is one

aspect of the FAPE denial here. Student is for these reasons entitled to compensatory education.

All of the Parent's claims under the IDEA, Section 504, and the ADA having been addressed above, there is no need to discuss Section 504 and the ADA separately.

Remedies

Compensatory Education

Compensatory education may be an appropriate form of relief where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she 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). This type of award 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). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Here, absent evidence to support a make whole award, the hour for approach must be used. The Parent suggests that full days of compensatory education are warranted, which is appropriate in some cases. *See Keystone Central School District v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (M.D. Pa.

2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education, affirming an award of full days). However, the remedy must be equitable under the circumstances, particularly where, as here, Student made gains in some programming areas at different points in time.

The denial of FAPE was determined above to commence on March 27, 2019, at which time the team was aware that the program was not meeting Student's needs behavioral needs. The period of reasonable rectification is that prior to March 27, 2019 after Student was placed into the IU emotional support program, and continued through the end of that school year. Student shall be awarded one hour of compensatory education for the failure to provide appropriate behavioral programming, including development of a PBSP, an amount that is intended to reflect the impact of the supportive environment provided that enabled Student to achieve significant academic success despite some ongoing behavioral concerns.

For the 2019-20 school year, Student's program was inappropriate both academically and behaviorally. For this time period, it would be impossible to parse out the number of hours that may have provided educational benefit. Thus, Student shall be awarded five hours per day of compensatory education¹² for each day that the District's schools were in session from the start of the 2019-20 school year until the closures in March 2020.

During the period of time from the March 2020 school closures through the present, when Student was participating in virtual instruction rather unsuccessfully from an academic standpoint but without behavioral concerns, Student shall be awarded ninety minutes of compensatory

¹² Students at the elementary school level are entitled to 900 hours of instruction per school year over 180 school days, equating to 5 hours per day. 22 Pa. Code §§ 11.1, 11.3.

education. This figure provides the approximate amount of time that Student, in any environment, should have been provided with individualized, direct, intensive special education services for two, forty-five minute class periods each day to address Student's substantial reading and writing deficits. The award shall continue through the end of the 2020-21 school year because the IEP team will be directed to reconvene and develop a new program that realistically would not be implemented until the start of the 2021-22 school year.

The award of compensatory education is subject to the following conditions and limitations. Student's Parent 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 Student's educational and related services needs. The compensatory education may be used for independent evaluations. The compensatory education may not be used for services, 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 Student's IEPs to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age eighteen (18). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent. The cost to the District of providing the awarded hours of compensatory services shall be limited to the average market rate for private providers of those services in the county where the District is located. The District may also credit against the compensatory education award any CCS agreed to be provided, on an hour-for-hour basis,

should such a determination be made by the entire IEP team before the end of the 2020-21 school year.

Independent Educational Evaluation

The Parent's request for an IEE was based on the District's failure to timely provide a report after the Parent consented in November 2020. The District's March 2021 RR, although not provided within the sixty day time period, utilized a variety of assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student in all areas of suspected disability. Specifically, the District conducted assessment of Student's current cognitive ability and academic achievement; summarized available classroom- and curriculum-based assessment data; obtained and reported information from teachers and other professionals in the school environment; included the parental input she gave; and used rating scales to evaluate Student's social/emotional/behavioral functioning in the school and home environments, in addition to another FBA.

The District's March 2021 RR determined Student's eligibility for special education, and made recommendations to address Student's then-current needs. The content of the RR was, of course, limited to some extent because of Student's virtual programming, but this fact among all attendant circumstances did not render it inappropriate. All of the evidence preponderantly supports the conclusion that the District's March 2021 RR was sufficiently comprehensive to identify Student's special education and related service needs in all areas related to suspected disability, and thus met IDEA criteria. There is simply no basis at this juncture to warrant an IEE at public expense.¹³

¹³ The Parent's closing did not mention the IEE request.

Prospective Relief

The Parent further seeks an order directing the IEP team to reconvene and revise Student's IEP. Having concluded that Student was denied FAPE for the time period in question and that the program and placement require revision and reconsideration, this demand must be granted. The District now has a very recent RR that is comprehensive, identifying Student's current strengths and needs. The team together will be in a position to make a collaborative informed decision on a new IEP, and will thereafter be able to consider an appropriate placement that is consistent with LRE principles.

CONCLUSIONS OF LAW

The District denied FAPE to Student with respect to various aspects of the educational programming provided over the 2018-19, 2019-20, and 2020-21 school years.

The District failed to comply with its LRE obligations during the 2018-19, 2019-20, and 2020-21 school years.

Student is entitled to compensatory education to remedy the past FAPE denial; and the IEP team must reconvene to develop a new program appropriate for Student's current needs prospectively.

The Parent is not entitled to an IEE at public expense.

ORDER

AND NOW, this 15th day of May, 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Student was denied FAPE by the District during the 2018-19, 2019-20, and 2020-21 school years.
2. Student is awarded compensatory education as follows:
 - a. Student is entitled to one hour of compensatory education for each school day that the District was in session from March 27, 2019 through the end of the 2018-19 school year.
 - b. Student is entitled to five hours of compensatory education for each school day that the District was in session from the start of the 2019-20 school year through the date of the March 2020 closure due to the pandemic.
 - c. Student is entitled to ninety minutes of compensatory education for each school day that the District was in session from the date of the March 2020 closure through the end of the 2019-20 school year and each school day that the District was or is scheduled to be in session for the 2020-21 school year.
 - d. All of the conditions and limitations on that award set forth above are expressly made a part hereof as though set forth at length.

3. The District may receive credit on the compensatory education award, on an hour-for-hour basis, for any determination of CCS before the end of the 2020-21 school year to which the IEP team including the Parent agrees.
4. The District is directed to reconvene the IEP team within ten days of the date of this order to review the recent RR and develop a new program based on Student's current special education needs. The team shall thereafter, based on the new IEP, determine Student's placement in accordance with LRE mandates including documentation thereof in the new IEP.
5. The Parent is not entitled to an IEE at public expense.
6. Nothing in this order should be read to preclude 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**.

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 24322-20-21