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

Pennsylvania Special Education Due Process Hearing Officer
Final Decision and Order

ODR No.
24420-2021-

CLOSED HEARING

Child's Name:
W.M.

Date of Birth:
[redacted]

Parent:
[redacted]

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Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
06/25/2021

Introduction

This special education due process hearing concerns the educational rights of a child with disabilities (the Student). This hearing arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. The Student's parent (the Parent) filed a due process complaint against the Student's local public school district (the District). The parties agree that the Student is a child with disabilities, is entitled to a free appropriate public education (FAPE), and that the District is the Student's local educational agency (LEA), as those terms are defined by the IDEA. *See* 20 U.S.C. § 1401.

The Parent alleges that the District violated the Student's right to a FAPE from August 9, 2020 through the date of this decision. To remedy that violation, the Parent demands several independent educational evaluations (IEEs), an order to increase the amount of time that the Student spends in school, and compensatory education.[1]

As discussed below, I find in part for the Parent and in part for the District.

Issue Presented

Although the Parent alleges that the District violated the Student's right to a FAPE in many different ways, the single issue presented for adjudication is: Did the District violate the Student's right to a FAPE from August 9, 2020 through the date of this decision?

Findings of Fact

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

Enrollment and Discharge from a Prior Residential Placement

1. The Student qualifies for special education under the IDEA disability categories of Intellectual Disability, Autism, and Speech and Language Impairment. S-15. There is no dispute that the Student's disabilities have

[1] The Parent also demands attorney's fees and costs, and other remedies that I find "fitting and just." I have no authority to award attorney's fees, and so I view that demand as a reservation of rights to bring the same demand in an appropriate forum.

a profound impact upon every facet of the Student's life, including but not limited to mobility and activities of daily living. *Passim*.

2. Prior to the 2019-20 school year, the Parent, Student, and Student's sibling lived in another state. A school district in the other state was the Student's LEA. The Parent and the other school district agreed to place the Student at a private residential facility in the other state (the Residential Placement). *See, e.g.* P-1, NT 146-147.

3. For the 2019-20 school year, the Parent and the Student's sibling moved into the District while the Student remained in the Residential Placement. The Parent enrolled the Student's sibling in the District. On the sibling's enrollment paperwork, the Parent stated that the sibling had no other school age siblings. S-33.

4. The Student attended the Residential Placement and the Student's sibling attended the District during the 2019-20 school year. During this time, the District did not know, and had no reason to know, of the Student's existence.

5. The Student's mother testified that the Student was abused by staff at the Residential Placement. That testimony is not disputed. NT 172-174.

6. I take judicial notice that on March 13, 2020, Governor Wolf issued an order requiring all Pennsylvania schools closed for in-person instruction as part of the Commonwealth's COVID-19 mitigation effort.

7. The Parent attempted to enroll the Student in the District in July 2020. NT 128-144. This was the first time that the District learned about the Student. After some miscommunication and assistance from a third party agency, the Student was enrolled in the District by August 6, 2020. *Id,* P-1.

8. On or around July 13, 2020, the Parent informed the out-of-state school district that the Student was enrolled in the District. This prompted the out-of-state school district to discontinue funding for the Residential Placement on July 19, 2020. *See* S-7.

9. On July 24, 2020, the Residential Placement made contact with the District and asked the District to continue funding the Student's placement. *See* P-1.

10. The District discussed the request for funding internally, but did not respond to the Residential Placement. On July 31, 2020, the Residential Placement contacted the District again to coordinate for continuity of

placement. On August 1, 2020, the Residential Placement advised the District that it would discharge the Student the next week if it heard nothing from the District. P-1.

11. On August 6, 2020, the District advised the Residential Placement that the Student was enrolled in the District, but did not respond in substance to any of the Residential Placement's inquires or requests for funding. P-1.

12. On August 10, 2020, the Residential Placement discharged the Student to the Parent's care. P-1.

13. The Parent's apartment in the District was inaccessible to the Student. Shortly after the Residential Placement discharged the Student, the Parent, Student, and Student's sibling moved into a hotel within a neighboring Pennsylvania school district and resided there for 43 days before moving into a more accessible apartment within the District. The Parent received assistance from a third party agency for these housing transitions. *See, e.g.* NT 153.

14. The Parent, Student, and Student's sibling have resided in the more accessible apartment within the District since September 28, 2020. *See, e.g.* NT 153.

15. During the enrollment process, the District considered whether the Student should be considered homeless. The District purposefully avoided designating the Student homeless to avoid the cost of providing services to the Student and the Student's sibling. P-1.

The 2020-21 School Year

16. At the start of the 2020-21 school year, the District remained closed for in-person instruction but provided remote, online instruction to all students. The District concedes that the Student did not receive a meaningful educational benefit from online instruction. *See* NT 74-75, *District's Closing Brief* at 8.

17. Around the time of the Student's enrollment, the District received an Individualized Education Program (IEP) from the out-of-state school district. S-6. The District also received the Student's records from the Residential Placement, which included various evaluations, behavior plans, medical record, and progress notes. P-6.

18. On September 23, 2020, the District sought the Parent's consent to evaluate the Student. S-9. The Parent did not respond, and so the District

attempted to obtain the Parent's consent again October 19, 2020 and, when the Parent did not respond again, the District sent the form again via certified mail on October 30, 2020. S-15.

19. The District sought the Parent's consent to evaluate through a series of Permission to Evaluate forms. These forms were all sent to the Parent's original address in the District. *See* S-15.

20. While attempting to obtain the Parent's consent to evaluate the Student, the District drafted its own IEP and Positive Behavior Support Plan (PBSP) for the Student on October 30, 2020. The IEP and PBSP were based almost entirely on the prior, out-of-state IEP and the Residential Placement records. S-11, S-12.

21. The Parent provided consent for the District to evaluate the Student on November 6, 2020. S-9.

22. The District completed its evaluation report (ER) on January 17, 2021. S-15.

23. As part of its evaluation, the District sent parental input forms to the Parent by mail on September 24, 2020, by email on October 30, 2020, and by mail on January 4, 2021. The Parent did not return these forms. S-15. The Parent also refused to bring the Student to the District for testing. NT 227, 269-270.

24. The ER contains narrative input from the Student's teachers, a Physical Therapist, an Occupational Therapist, and a Speech and Language Pathologist, and a review of the Student's prior records. S-15.

25. The Student's IEP team met on January 25, 2021 (an interagency meeting for the Student convened around the same time). S-17.

26. During the IEP team meeting, the Parent expressed a general preference to *not* place the Student in a residential facility, but was open to a specific, nearby residential placement. NT 241, 559-560.

27. The IEP team drafted a new IEP and PBSP (the 2021 Home IEP and 2021 Home PBSP, respectively) with the goal of educating the Student at home while school was closed for in-person instruction. S-17, S-18.

28. The 2021 Home IEP included goals focusing on life skills, safety skills, functional communication, and emotional regulation. S-17.

29. The 2021 Home IEP offered 10 hours per week of instruction in the Student's home with a one-to-one (1:1) Personal Care Assistant (PCA)

and 360 minutes per quarter of instruction in a Speech and Language Support classroom in the District. S-17.

30. The 2021 Home IEP also offered 10 hours per month of behavioral consultation, 120 minutes per quarter of Occupational Therapy, 45 minutes per quarter of Physical Therapy, 360 minutes per quarter of Speech and Language Therapy, all in the Student's home. S-17.

31. Despite health and safety concerns at the height of the COVID-19 pandemic and other staffing issues, the District began to implement the 2021 Home IEP in the Student's home on February 1, 2021. At this point, the District provided a teacher and a behavioral tech for two hours per day, five days per week. The District also provided the related services contemplated in the 2021 IEP. These services remained in place from February 1, 2021 through April 12, 2021. NT 263, 420, 424, 459-471; S-17.

32. While working with the Student, the teacher and related services providers formed the impression that the Student was more capable than what was reflected in documents from the Residential Placement and out-of-state school district. The Student's IEP team decided to change the Student's placement from the Student's home to a District-run Multidisciplinary Support (MDS) program housed in one of the District's school buildings. *See, e.g.* NT 424, 452-453.

33. On March 29, 2021, the IEP team drafted a new IEP and PBSP, changing the Student's placement to the MDS program (the 2021 MDS IEP and 2021 MDS PBSP). S-28, S-29. The Student shifted from instruction in the home to the in-school MDS placement on April 12, 2021.

34. As compared to the 2021 Home IEP, the 2021 MDS IEP is substantively similar in its goals and the supports and therapies offered to the Student. The placement was the significant change. The 2021 MDS IEP placed the Student in school for three hours per day, four days per week. The District provided a 1:1 PCA for all times that the Student was in school. NT 363-366; S-28.

35. Other students in the District's MDS classroom attended school only two days per week. As a result, the Student attended school with other

children for two days per week and was the only student in the MDS classroom for two days per week. NT 363.[2]

36. There is no dispute that the Student's records from the Residential Placement and the out-of-state school district paint a picture of the Student frequently engaging in dangerous behaviors including elopement and attempting to eat non-food items. After starting the District's program in February 2021, for data collection, the District defined "elopement" as any movement away from instruction and towards the door. The Student never left the room during instruction. The District also tracked when the Student put non-food items into the Student's mouth, not attempts to eat non-food items. These are unusual, expansive definitions under which a greater quantity of behavioral incidents should be expected. S-32A, NT 586-619.[3]

37. Undisputed data collected by the District establishes a reduction in the frequency and intensity of behaviors targeted through the District's programming. *See, e.g.* S-32A.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. S*ee, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v.*

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[2] The Student's time in school was recently increased to five days per week and the District intends to offer a longer school day in the 2021-22 school year based on what District personnel perceive as the Student's increased tolerance for in-school programming. NT 555-558.

[3] For example, chewing on a shoulder strap meets the definition of the Student putting a non-food item in the Student's mouth regardless of any effort to eat the non-food item and the absence of any choking risk. Similarly, any move — no matter how fleeting — away from instruction and towards the door would be tracked as "elopement" despite the fact that the Student never left the room.

Cumberland Valley School District, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution* (Quakertown Community School District), 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

In this case, it is striking that there is very little substantive disagreement between the parties about the underlying facts. Rather, the parties see those facts through very different lenses. I find that all witnesses testified credibly in that all witnesses candidly shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. To the extent that witnesses recall events differently or draw different conclusions from the same information, genuine differences in recollection or opinion explain the difference.

Applicable Legal Principles

The Burden of Proof

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

Free Appropriate Public Education (FAPE)

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

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

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

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

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

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than de minimis" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of

grade-level work. *Id.* Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress. Rather, I must consider the totality of a child's circumstances to determine whether the LEA offered the child a FAPE.

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

Compensatory Education

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

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

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

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

position that the child would have occupied but for the school district's violations of the IDEA.").

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

> "… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

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

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

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is

stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

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

Discussion

The District's Unclean Hands Defense

While practically, if not literally, acknowledging a denial of FAPE from the Student's enrollment through February 1, 2021, the District argues that the Parent's claim must be dismissed because the Parent comes to this matter with unclean hands. It argues that the entire matter could have been avoided if the Parent told the District about the Student upon arriving in the District during the 2019-20 school year. Instead, as framed by the District, the Parent was content for the Student to remain in the Residential Placement at the out-of-state school district's expense — despite the abuse — while living for a year in Pennsylvania. According to the District, if the Parent had enrolled the Student before the COVID-19 shutdown, it would have had an easier time putting appropriate services in place.

The District has a point. It is eyebrow-raising at the very least that the out-of-state school district funded the Residential Placement for a year after the Parent moved to Pennsylvania and stopped when the Parent registered the Student in the District. Unfortunately, the District's argument is undercut by its own actions.

While the Parent should have told the District about the Student when enrolling the Student's sibling, the District's actions during the Student's enrollment were equally problematic. When the District finally learned about the Student, the family very likely qualified as a homeless student under the McKinney-Vento Homeless Assistance Act. 42 U.S.C.S. § 11431 *et seq*.

Despite suspecting the family's homeless status, the District purposefully buried its head in the sand in an effort to save money.

Similarly, the District did not communicate with the Residential Placement (either purposefully or through negligence). Both parties describe the Student as being unceremoniously "dumped" by the Residential Placement at the Parent's first, inaccessible apartment. Both parties appropriately express outrage at this action. However, in the run up to the Student's discharge, the Residential Placement requested coordination with the District, and the District was not responsive to that request. So, after purposefully avoiding a homeless designation, the District knew that the Student was going to be discharged, knew that a plan was needed, and took no action to develop a plan.

The Parent's actions, if viewed in isolation, might warrant some reduction in compensatory education. The District's actions offset this, and I will not reduce or eliminate a compensatory education award to remedy a denial of FAPE in this case.

Enrollment Through January 31, 2021

Prior to August 10, 2020, the Student attended the Residential Placement through an agreement between the Parent and the out-of-state school district. Regardless of the actual date of the Student's enrollment, the District cannot be responsible for any denial of FAPE before the Residential Placement returns the Student to the Parent.

Whatever delays and miscommunications there were during the enrollment process, there is no dispute that the Student was enrolled in the District before the first day of the 2020-21 school year. Consequently, there can be no dispute that the Student was entitled to a FAPE from the District from the first day of the 2020-21 school year onward. From the first day of school through January 31, 2021, the record preponderantly establishes that the Student received hardly any services, and that the few services that the Student received did not amount to a FAPE.

Compensatory education is an appropriate remedy when a FAPE is denied. Above, I explain why I reject the District's argument that no compensatory education should be awarded to remedy this violation.

The Student's disabilities are significant, pervasive, and impact upon every aspect of the Student's education. The special education that the Student received, and the benefits of those services, were less than de minims. I, therefore, award one hour of compensatory education for each hour that the

District was open for instruction (either in person or remotely) from the first day of the 2020-21 school year through January 31, 2021.

In issuing this award, I recognize the significant practical hurdles that the District faced, and would have faced regardless of both parties' delays. The reality is that providing services in the Student's home or finding an open, in-person placement with space available for the Student in the middle of the COVID-19 pandemic would have required a Herculean effort. However, the United States Department of Education has issued guidance that COVID-19 school shutdowns do not alter the Student's right to a FAPE.[4] *Questions and Answers on Providing Servs. to Children With Disabilities During the Coronavirus Disease 2019 Outbreak*, 76 IDELR 77 (EDU 2020).

The Pennsylvania Department of Education also acknowledged that COVID-19 mitigation efforts do not abrogate the rights of children with disabilities, but anticipated significant difficulty for LEAs to satisfy their obligations. The Pennsylvania DoE provided guidance that LEAs should offer COVID Compensatory Services (compensatory education by another name) to remedy denials of FAPE.[5] As such, under guidance from both the federal and Commonwealth departments of education, even if the District's failure to provide a FAPE from the first day of the 2020-21 school year through January 31, 2021 were entirely attributable COVID-19, the Student's rights are the same, and so are the remedies for violating those rights.

The Parent may direct the use of the compensatory education for any appropriate developmental, remedial, or enriching educational service, product, or device that furthers the Student's educational and related services needs. 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 the Student's IEPs to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and during the summer months when convenient for the Student and the Parent.

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[4] It is worth noting that this guidance was published on March 12, 2020 (prior to the Student's enrollment) and has remained in place without substantive changes ever since.

[5] https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/COVID-19-Compensatory-Services.aspx - last accessed 2021-06-25.

Services and products funded by compensatory education must be acquired at or below market rates in the District's geographical area. Any compensatory education not used before the end of the school year in which the Student reaches 21 years old is forfeited.

February 1, 2021 through Present

I find no violation of the Student's right to a FAPE from February 1, 2021, through the present. There is no preponderant evidence in the record that the operative IEPs during this time were inappropriate at the time that they were drafted. The Student received a significant level of support both at home and within the District's MDS classroom. There is no preponderant evidence in the record that the level of support that was actually provided to the Student was inappropriate.

The record also establishes that the District was over-capturing data about the Student's behavior, and that the Student's behavior was improving despite the over-capture. Said differently, the District used operational definitions of behavior that inflated reports of behavioral incidents, and the data shows a reduction in negative behaviors despite that inflation. At the same time, the Student demonstrated an increasing tolerance for education outside of the Parent's home, enabling the District to plan for increased services going forward. When the District started working with the Student, that work was appropriate both on paper and in practice.

I find no violation of the Student's right to a FAPE from February 1, 2021 through the present, and award no compensatory education for this period of time.

Evaluations

I find that a comprehensive educational reevaluation of the Student is necessary, but I do not award the Parent the demanded IEEs.

The Parent is correct that there are flaws in the District's ER. Most notably, the ER included no new testing and scant, formal parental input. However, guidance from the US and Pennsylvania departments of education does not prohibit me from factoring the real-world circumstances of the COVID-19 pandemic into this aspect of the analysis. It would be difficult to test the Student under perfect conditions. COVID-19 brought its own host of difficulties, including a reasonable reluctance on the Parent's part to make the Student available for testing. Now, in late June 2021, circumstances have changed and a comprehensive assessment is possible.

Not only is a comprehensive assessment possible, it is necessary. Under the IDEA, a reevaluation is warranted when "the educational or related services needs, *including improved academic achievement and functional performance*, of the child warrant a reevaluation" 20 U.S.C. § 1414(a)(2)(A)(i) (emphasis added). The District established that the Student is vastly more capable than the records sent by the Residential Placement and the out-of-state school district would suggest. The District also established that the Student's abilities have improved, even in the period from February 1, 2021 onward. As applied in this case, these circumstances trigger the District's obligation to reevaluate the Student.

In sum, the District's evaluation was incomplete but also was as good as it could have been at the time it was drafted. I find that the Parent is not entitled to District funding for various IEEs but the Student is entitled to a comprehensive reevaluation from the District.

ORDER

Now, June 25, 2021, it is hereby **ORDERED** as follows:

1. The Student is awarded one hour of compensatory education for each hour that the District was open for in-person or remote instruction from the first day of the 2020-21 school year through January 31, 2021.

2. The Parent may direct the use of the compensatory education awarded herein in any way consistent with the limitations in the accompanying decision.

3. Within 10 calendar days of this decision, the District shall request the Parent's consent for a comprehensive education reevaluation through the PTRE-Consent form promulgated through the Pennsylvania Department of Education and the Pennsylvania Training and Technical Assistance Network (PaTTAN). The PTRE shall be sent by certified mail and email to the Parent, and by email to the Parent's attorney.

4. The timeline for the District to complete the reevaluation, as specified at 22 Pa Code § 14.153, shall commence upon the District's receipt of consent from the Parent.

5. Nothing herein shall prohibit the District from contracting with third parties, including its local Intermediate Unit, to complete the reevaluation.

6. The District's reevaluation shall satisfy all substantive requirements found at 20 U.S.C. §§ 1414, 1415; their corresponding federal regulations, and 22 Pa Code § 14.153.

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

/s/ Brian Jason Ford
HEARING OFFICER