

*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:**

25211-21-22

#### **Child's Name:**

C.M.

#### **Date of Birth:**

[redacted]

#### **Parent:**

[redacted]

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#### **Hearing Officer:**

Charles W. Jelley, Esq.

#### **Date of Decision:**

04/08/2022

## PROCEDURAL HISTORY

The Parent filed the pending Due Process Hearing Complaint alleging failures under the Individual with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act (504).<sup>1</sup> The Parent contends, and the District denies, that it failed to offer the Student a Free Appropriate Public Education (FAPE) from August 2020 through the end of the 2022 school year. The Parent requests an Order awarding compensatory education, a prospective placement, and a reevaluation. For all of the reasons that follow, I now find the Parents have established, and the administrative record supports a Decision in their favor, in part, and in part for the District. I now find a time-limited award of compensatory education and a functional diagnostic evaluation is appropriate relief. The Parent's request for a prospective placement is **DENIED**. The District's multiple affirmative defenses are **DENIED**, as argued. All other claims and defenses are dismissed with prejudice. A **FINAL ORDER** granting appropriate relief follows.

## STATEMENT OF THE ISSUE

1. Whether the District failed to provide an appropriate individualized educational program to the Student during the 2020-2021 school year? Assuming a violation occurred, what appropriate relief will make the Student whole?
2. Whether the District failed to provide an appropriate individualized educational program to the Student during the 2021-2022 school year? Assuming a violation occurred, what appropriate relief will make the Student whole?

## FINDINGS OF FACT

<sup>1</sup> All references to the Student and the family are confidential. Certain portions of this Decision will be redacted to protect the Student's privacy. The Parent's claims arise under 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, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). The Parent also makes denial of education claims under Section 504 of the Rehabilitation Act. References to the record throughout this decision will be to the Notes of Testimony (NT. p.), Parent Exhibits (P- p.) followed by the exhibit number. Finally, Hearing Officer Exhibits will be marked as (HO-) followed by the exhibit number.

## THE STUDENT'S MULTIPLE DISABILITIES

1. The Student [redacted] [is a] nonverbal, non-ambulatory, [redacted] [student] who resides within the School District of Philadelphia. (N.T. p.28).
2. The student sustained a birth injury, [redacted]. *Id.*
3. The Student is diagnosed with generalized epilepsy. The Student has experienced seizures lasting longer than 45 minutes, requiring hospitalization. When seizures last longer than five (5) minutes, the Student requires a trained person to administer [medication] and monitor breathing. (N.T. pp.32-33).<sup>2</sup>
4. The Student has feeding problems that require nutrition via [an assistive device]. (N.T. p.34). The Student needs at least two [redacted] feedings a day during a typical school day.<sup>3</sup> (N.T. p.37). Each [redacted] feed lasts for approximately an hour and must be started by a school nurse and monitored. The school nurse is the only person in the school who can set up and provide the [redacted] feedings. (N.T. p.38).
5. The Student is diagnosed with [redacted], which results in vision issues [redacted]. (N.T. pp.33-34). The Student required eye surgery in late 2021 to address related vision issues. The District has never completed a functional vision assessment. *Id.*
6. The Student is diagnosed with [redacted], a cluster of disorders affecting the Student's ability to move and maintain balance. (N.T. p.34). The Student is ambulatory; however, the Student [redacted], needs to be monitored when walking, and requires varying forms of physical assistance. (N.T. p.39). The Student cannot walk long distances, walks at a slower pace, and tires quickly after walking several feet. (N.T. p.40).

<sup>2</sup> [Medication] is used to control seizures, seizure clusters, or acute repetitive seizures in patients who have epilepsy. [Student's medication] belong to the group of medicines called central nervous system (CNS) depressants, which are medicines that slow down the nervous system. [redacted] (last visited on April 5, 2022).

<sup>3</sup> [redacted].

7. The Student has various allergies, including [redacted]. If exposed to these irritants, a trained person may need to use an EpiPen injectable to reopen the Student's airway. (N.T. p.35).<sup>4</sup>
8. The Student has skin issues, [redacted], which require daily topical creams. (N.T. pp.35-36).
9. The Student has asthma. (N.T. p.40).
10. The Student is nonverbal and can make sounds during attempts to communicate. (N.T. p.41).
11. The Student [has toileting issues]. (N.T. p.41). The Student needs to be checked approximately once per hour during a typical school day. (N.T. p.133).
12. When Student became preschool age, the Student attended a community-based preschool. (N.T. p.44). When the agency closed, the Student was placed at another preschool. *Id.*
13. The Student received physical therapy (PT), occupational therapy (OT), speech therapy, aquatic therapy, and specialized instruction in preschool. (N.T. pp.44-45). A nurse was present to administer [redacted] feeds and all medications. *Id.* The Student's preschool program included Occupational Therapy (OT) and Physical Therapy (PT) - related services - and one-on-one support in the classroom with other students. (N.T. pp.45-46).
14. While in preschool, the Student speech/language program included a picture exchange communication system (PECS). (N.T. p.47).

**THE 2019-2020 INTENT TO REGISTER AND THE TRANSITION FROM  
PRESCHOOL TO SCHOOL-AGE SERVICES**

15. In the fall of 2019-2020, the Student was eligible to receive school-age services. (N.T. p.47). The Parent signed a form indicating her intent to register the Student [school-age services]. (N.T. pp.49-50).

<sup>4</sup> EpiPen injectables are disposable, pre-filled auto-injectors used to treat life-threatening, allergic emergencies including anaphylaxis in people who are at risk for or have a history of serious allergic emergencies. Each device contains a single dose of epinephrine.

16. Neither the District nor the provider held a transition meeting to discuss the Student's transition to school-aged services for the 2019-2020 school year. (N.T. 49). Neither the District nor the provider notified the Parent of the Student's transition options. (N.T. p.50).
17. On February 1, 2019, the Parent received a Permission to Reevaluate (PTRE) Consent Form from the District via email; the Parent signed and returned the form (S-4, N.T. pp.48-49). A school psychologist from the District went to preschool to evaluate the Student. (N.T. p.52). The District failed to issue the comprehensive evaluation report within sixty (60) days of receiving the signed PTRE. (Transcript Volume I, *passim*).
18. Sometime in April 2019, the District psychologist entered the data from the testing and assessments into a working copy of an evaluation report. (N.T. 165, N.T. 155-58).
19. The report included a review of the records, an observation, and input from the teachers and related service providers. The Parent completed a developmental profile and adaptive behavior checklists as part of the evaluation. (N.T. p.180).
20. In April 2020, the Parent informed the psychologist she did not receive an evaluation report from the District. (N.T. p.159). On April 16, 2020, the psychologist sent the Parent a copy of the working May 2019 report. (N.T. pp.57-58, p.159).
21. On June 19, 2020, the Parent emailed the psychologist asking for a status update about the Student's educational plan for the fall. (S-43, N.T. p.58). The Parent did not receive a response. (N.T. p.58).
22. Throughout the Spring and the summer, the Parent reached out to multiple representatives at the school district requesting updates on the evaluation and the pending offer of programming for the 2019-2020 school year. No response or follow-up was ever offered. (N.T. pp.52-53).

23. Although the Parent reached out to multiple representatives at the school district requesting updates on the evaluation and the pending offer of a FAPE for the 2019-2020 school year. No response, follow-up, or offer was ever made. (N.T. pp.52-53).
24. On July 1, 2020, the Parent emailed the psychologist again, asking for a status update about the Student's 2019-2020 educational program. (S-43, N.T. p.58).
25. On August 20, 2019, the Parent emailed the District stating that she still did not have a copy of the reevaluation report. (S-43, p.7, N.T. p.51).
26. On August 21, 2019, a District Supervisor of Special Education identified the Student as a "priority evaluation." (S-43, p. 7, N.T. p.158). Students with multiple disabilities are considered priority evaluations because placement decisions need to be made, and they cannot start the year in regular education. Although identified as a "priority," neither the evaluation nor the IEP team ever met before the start of the 2019-2020 school year. (N.T. p.158).
27. Absent the offer of a school-age program and placement; the Parent continued the Student's preschool placement. (N.T. p.53).

#### **THE 2021-2022 SCHOOL YEAR**

28. In the Spring, the Parent signed a second District intent to register the Student in the District for the 2020-2021 school year. (N.T. pp.49-56, p.160).
29. Although enrolled, the District did not invite the Parent to a transition meeting to discuss the Student's movement to school-aged services. (N.T. p.55). The District did not provide the Parent with a notice of available transition options or procedural safeguards. (N.T. p.55).
30. On August 25, 2020, the District requested updated records from the preschool. (S-7; N.T. 162-164).

31. On August 27, 2020, recognizing the Student was reenrolled in the District and aging out of preschool services, the District issued a second PTRE. (S-6).
32. On August 28, 2020, one year after completing the first evaluation report, the District gave the Parent the previously completed working 2019-2020 evaluation report. (S-7). But for the date change from August 2019 to August 2020, the 2020 reevaluation included the same information found in the psychologist's April-May 2019 working document (N.T. p.180, N.T. p.166).
33. The August 2020 evaluation included the following statement:  
"Date IEP Team Reviewed Existing Data:05/07/2019

The IEP team must decide if it has enough data to determine: the student's educational needs; the present levels of academic achievement and related developmental needs of the student; whether any additions or modifications to the special education and related services are needed to enable the student to meet the measurable annual goals in the IEP and to participate as appropriate in the general education curriculum; and whether the student continues to need special education and related services."

Neither the testimony nor the exhibits corroborate a finding that the District and the Parent met on May 7, 2019, to discuss the need to collect additional data. (S-7).

34. The District never completed the August 27, 2020, consented to evaluation.  
*Id.*
35. The 2020 evaluation report lacked an updated observation, Parent, teacher input, checklists, speech/language, physical therapy, occupational therapy, assistive technology, school health, or other functional assessment data. (S-7, N.T. p.202).
36. The 2019 data collected by the psychologist became the single source of data used in the 2020 report. (N.T. *passim*).

37. No witness for the District explained why the August 27, 2020, PTRE was not completed, why the 2019 working document became the basis for the 2020 evaluation report, or who decided to use the 2019 report. (N.T. pp.203-04).

### **THE 2020-2021 SCHOOL YEAR IEP**

38. On September 14, 2020, the District issued its first proposed IEP. (S-8).

39. The IEP included seven goals statements with short-term objectives, targeting speech and language, fine motor, gross motor, interpersonal communication, toileting, functional academics, recreational skills, and turn-taking (N.T. pp.22-40, N.T. pp.329-330).

40. As the Student is nonverbal, the speech and language goal focused on the use of augmentative and alternative communication (AAC) supports. (N.T. pp.22-23). The IEP contained a variety of SDIs targeting cognitive, functional, and developmental deficits (S-8, p. 27, p.31, p.34, p.36, p.38, p.40, p.41).

41. The IEP included physical therapy (PT), occupational therapy (OT), speech and language therapy, specialized transportation with a five (5) point harness, and a 1:1 Personal Care Assistant for the entire school day (PCA) (S-8, p.41). The IEP team proposed a supplemental level of support in a Multiple Disabilities Support (MDS) classroom in another building. (S-8, pp.45-47, N.T. p.196, N.T. p.322).

42. Following the IEP meeting, the District issued a Notice of Recommended Educational Placement (NOREP). On or about September 25, 2020, the Parent signed the NOREP and checked the box "I approve" and then checked another Box, "I do not approve this action/recommendation." After reviewing the second box, the Parent stated, ". . . the plan does not meet [redacted] needs." (S-11 p.1). The NOREP then says the team reviewed one option: "The regular education environment with supplemental aids and services." Next, the NOREP in the Options Considered Box states: "Reason for Rejection



The IEP team feels that this is the least restrictive setting." (NT p.325). The NOREP then suggests "Supplemental Multiple Disabilities Support." The Parent did not indicate what she found objectionable. No one from the District signed the NOREP. (S-11).

43. On September 25, 2020, the Parent signed and returned a Notice of Recommended Educational Placement (NOREP). Although the Mother agreed the Student could start, she did not agree the IEP met the Student's educational needs. (S-11, N.T. pp.62-63). Sometime between September 25, 2020, and October 19, 2020, the IEP team at the neighborhood school that offered the IEP and the IEP team at the receiving school participated in an IEP meeting. *Id.* The Mother was not invited to the meeting. (N.T. *passim*)
44. On or about October 19, 2020, the Student began to receive educational services. (N.T. p.321, pp.406-07, S-47).
45. The new teacher reviewed the August 2020 evaluation report and September IEP before the Student joined the class (N.T. p.324).
46. The Student's MDS class includes eight students supported by five (5) adults, the teacher, two (2) classroom assistants, two (2) classroom PCAs, and another PCA was assigned to be the Student's one-on-one aide. (N.T. pp.331-332).
47. On November 24, 2020, the teacher held another IEP meeting to discuss how online – digital-only, digital plus in school, or in-school-only instruction would occur. (NT p.327, S-12). Following the meeting, the District did not issue a second NOREP. (N.T. *Transcript Volume II passim*).
48. The Mother served as the Student's PCA during the online academic, speech, OT, and PT instruction. When the Student's instruction took place online, the Mother and the Student could sign on, and the teacher would offer activities. Provided a physician completed the District's OT and PT therapist school health paperwork, the therapist would provide the IEP related services. The

forms were never provided to the Parent before the IEP meeting or with the NOREP. Since the health forms were not completed, OT and PT services were not provided during the 2019-2020 school year as listed in the IEP. (N.T. p.450, S-15).

49. The November 2020 hybrid IEP offered 1545 Minutes per week of online services outside the general education setting. (S-11 p.2).
50. During online digital instruction, the teacher delivered materials to the Family, including picture cards and a speech output device, for the Student to use both during sessions and at home (NT pp.333-334). The Student continued to have an assigned PCA, who, although scheduled to support the Student, did not meet individually or provide any hand-over-hand support. (NT pp.415-417). When the Student would lose interest or disengage from lessons, the teacher would adjust the instruction in real-time. (N.T. pp.444-445). The teacher provided additional materials for in-home instruction. For example, to support the toileting goal, the teacher delivered wet/dry cards that the Parents could use while changing. The teacher also delivered an assistive technology device to communicate. (N.T. p.340)
51. Over the course of the school year, the teacher took data on the Student's progress. The teacher provided written progress reports and graphs at regular intervals (NT p.346-347, S-47, S-48, S-49, S-50, and S-51).
52. The goal statements include a criterion for performance like matching 7 pictures from an array of 10 in 3 out of 4 trials. (S-5 p.1-14). In another example, if the Student were called on to match 21 photos right, out of 40 photos, in 3 attempts, the Student would meet the goal. The raw data recorded in and testified to in School District Exhibits S-47, S-48, and S-49 does not match the goal statement criterion for each goal statement. The raw data recording does not match the stated number of trials or the number of instructional presentations required in the IEP. (Compare S-47 p.4, p.5, p.7, p.9, p.11, p.13, p.15, p.18, p.21, p.23, with S-48 p.6, p.10,

p.11, p.13, p.14, p.17, p.19, p.21, p.24, with S-49 p.2, p4, p.7, p.8, p.11, p.12, p.14, p.15, p.17, p.19, p.21, p.22, p.23 vs. S-47, S-48, S-49, S-50, S-51)).

53. Because the progress monitoring data provided at S-49, S-50, and S-51 does not align with the criterion for success listed in the goal statement, the progress monitoring data either misrepresents or overstates the overall learning that may have occurred. (Compare and contrast S-47, S-48, S-49, S-50, and S-51 with S-23, S-34, P-3, P4, and P-5).
54. The IEP team did not include a school nurse or a knowledgeable person to discuss the Student's school health service needs for [redacted] feeding, administration of emergency medications for allergenic reactions [redacted], administration of [medication] for seizures lasting more than five minutes, medication for excessive drooling or administration of topical skin lotions. (N.T. p.205).
55. Throughout the 2020-2021 school year, the Student received virtual instruction in the home. (N.T. p.63). Every day the Student attended virtual instruction, the Parent functioned as the one-on-one aide. (N.T. p.64).
56. Due to the Student's limited focus, attention, and overall deficits, the Student did not meaningfully participate in virtual instruction. (N.T. p.65, p.411). During virtual instruction, the Student would not attend, disrupted instruction, would throw or slam the computer, and have tantrums. (N.T. p.65).
57. While the Student sometimes participated in the "independent learning block" with one-to-one instruction with the teacher for approximately 20 minutes, anecdotal records report inconsistent participation. (N.T. p.412, S-47, S-48, S-49, S-50, S-51).
58. The special education teacher's handwritten notes and the COVID19 Tracking form reflect inconsistent attention, limited learning, and irregular

attendance throughout the entire school year. (N.T. p.430-35, S-47, S-48, S-49, S-50, S-51).

59. As the year elapsed, it became more and more difficult for the Mother to hold the Student's attention during the online instruction. The Mother eventually gave up. (N.T. p.144. N.T. Volume 1, *passim*).
60. Although listed in the IEP as specially-designed instruction, the District did not provide the one-to-one PCA services when the teacher was not providing online instruction. (N.T. p.68, N.T. pp.417-418). The District did not provide the Parent with training on how to act as a one-to-one aide. (N.T. p.134). During the limited online related service time, the speech therapist directed the untrained Parent to provide the services. (N.T. p.145).

#### **THE APRIL 2021 INDEPENDENT EDUCATION EVALUATION**

61. The Parent requested, and the District agreed to fund an independent educational evaluation ("IEE") by a private School for Children with Cerebral Palsy. (N.T. p.69).
62. The Parent accompanied Student to the evaluation. (N.T. p.70). On April 29, 2021, the IEE examiners completed, and the Parent provided a copy of the IEE to the District. (N.T. 75). The Mother requested an IEP meeting to review the report. *Id.*
63. On June 11, 2021, the District canceled an IEP meeting when Counsel for the District could not attend. N.T. p.76).
64. On June 14, 2021, the District, after reviewing the IEE issued another Reevaluation Report. (S-34).
65. District policy requires a review of medical records and completion of school health forms to determine Student's eligibility for school health services, OT, and PT services. As the health forms were not completed, the June 2021 report did not include updated information about the Student's disability-related school health needs, objective OT, or PT data. (N.T. pp.309-310).

66. Neither the IEP nor the June 2021 reevaluation report included a seizure action plan to administer emergency medications, an allergy medication plan for anaphylaxis, or a plan to provide daily [redacted] feedings. (N.T. p.78). A school nurse or health representative for the District never participated as a member of the Student's IEP or evaluation team. (N.T. p. 205, N.T. p.140).
67. To understand the Student's school health service needs, the District requested, and the Parents agreed to provide documentation from Student's physicians. (N.T. pp.78-79).
68. On August 27, 2021, the Parent returned the requested medical forms. (P-25, N.T. p.79). After reviewing the physician's forms, the District requested, and the Parent agreed to have the doctors complete a second set of medical forms. (N.T. p.80). Although this time, the physician listed the administration of seizure medication, allergy medications, and [redacted] feeding by a nurse, the forms were determined incomplete. The physician who completed the forms failed to list the Student's specific instructions, like the Student's name, the need for the medication, the amount to be given, the route of administration, and frequency per day or hour. (P-27, N.T. p.81, N.T. Volume IV *passim*). The physician health data forms were never completed; therefore, the Student never received PT or school nursing. While OT was provided infrequently, the service time did not match what was scheduled in the IEP. *Id.*

### **THE 2021-2022 SCHOOL YEAR IEP**

69. At the IEP team's invitation, the Parent went to view the District's proposed placement for the 2021-2022 school year. (N.T. p.83).
70. The proposed building is a multi-level building with one elevator. (N.T. p.84). The building has four stories and is a little over 100,000 square feet. (N.T. p.231).

71. At the time of the Parent's visit in August 2021, Student's assigned classroom was not set up, and the COVID safety measures were unclear. (N.T. p.85). The classroom was hot, and the building did not have consistent air conditioning. (N.T. p.85). The Mother reports that the related service areas appeared to be storage closets with unused desks and chairs piled on top of each other and old equipment off the side. (N.T. p.85). The Parent was not permitted to view the nurse's office. (N.T p.85).
72. One full-time nurse oversees the school health needs of over 600 students. (N.T. 219). While not a certified school nurse, the current nurse is licensed to provide all school health services the Student needs. The nurse is qualified to give all school health services. (N.T. p.242).
73. The 2021-2022 IEP does not have a seizure action plan or a school health plan for the emergency lifesaving medications or the [redacted] feedings. (N.T. p.226).
74. The nurse is the only person in the building legally allowed to administer the injectable lifesaving seizure-related [redacted] medication for seizures last longer than five minutes. (N.T. p.230).
75. While the nurse can set up the Student's [redacted] feeds in school, she cannot remain in the class for the entire feeding. (N.T. pp.228-229). The IEP does not identify who would monitor the feeding after the nurse left the room or if instruction could continue during the infusion. *Id.*

**APPLICABLE LEGAL PRINCIPLES AT ISSUE  
IDEA AND SECTION 504 FAPE**

The IDEA requires 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 (LEA) – districts - meet the obligation of providing a FAPE to eligible students through the 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."<sup>5</sup> Substantively, the IEP must respond to the child's individual educational needs. 20 U.S.C. § 1414(d), 34 C.F.R. § 300.324.<sup>6</sup>

In *Rowley*, the court established the contours of actionable procedural or substantive violations of FAPE.<sup>7</sup> A finding of a procedural breach requires preponderant evidence the district violated IDEA and parallel state law procedural requirements. If the offense is purely procedural, the question then becomes, did the violation(s) result in a loss of educational benefits to the student. Or did the violation significantly impede the parents' opportunity for participation in the IEP process?<sup>8</sup> Substantive compliance occurs when the evidence establishes the IEP developed through the Act's procedures was reasonably calculated to enable the child to receive educational benefits. Later, in *Andrew F.*, the court held when the student is in an integrated setting, the question is whether the IEP is reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.<sup>9</sup> The Third Circuit has interpreted *Rowley* and then *Andrew* to mean that the "benefits" provided to the child must be meaningful and significant. Meaningfulness is relative to the child's potential.<sup>10</sup> At the same time, the district is not required to maximize a child's potential.<sup>11</sup> The

<sup>5</sup> *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009).

<sup>6</sup> Parent's Section 504 claims here are repackage IDEA evaluation and FAPE claims; therefore, for all the same reasons, the disposition of the IDEA claims resolved the Section 504 FAPE claims. *K.D. by Theresa Dunn and Jonathan Dunn v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 256 (3d Cir. 2018).

<sup>7</sup> *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 102 (1982),

<sup>8</sup> 20 U.S.C. § 1415(f)(3)(E)(ii), 20 U.S.C. § 1415(f)(3)(E)(iii).

<sup>9</sup> *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (*Andrew F.*, 137 S. Ct. at 1000).

<sup>10</sup> 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).

<sup>11</sup> See, *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), cert. denied, 488 U.S. 925 (1988).

meaningful benefit standard requires LEAs to provide more than "trivial" or "de minimis" benefit.<sup>12</sup> It is well-established that an eligible student is not entitled to the best possible program, the type of program preferred by a parent, or a guaranteed specific level of achievement.<sup>13</sup> Thus, the IDEA guarantees an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'"<sup>14</sup>

## **IDEA EVALUATIONS AND ASSESSMENTS**

The IDEA sets forth three broad criteria that districts must meet when evaluating or reevaluating a child's IDEA eligibility. Evaluators must "use a variety of assessment tools and strategies" to determine "whether the child is a child with a disability." The district "[may] not use any single measure or assessment as the sole criterion" for determining whether the child is a child with a disability or the child's educational needs. 20 USC § 1414(b)(2)(B). And finally, the District must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors and physical or developmental factors." 20 USC § 1414(b)(2)(C).<sup>15</sup> Other intertwined subparts of the IDEA regulations impose additional criteria school officials must meet when evaluating a child. *Id.*

Once the District completes a full comprehensive evaluation, provided the evaluation team determines the Student is IDEA eligible, the focus then shifts to creating an IEP.<sup>16</sup> Annually, or as needed, after reviewing the

<sup>12</sup> 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).

<sup>13</sup> See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011).

<sup>14</sup> *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

<sup>15</sup> An IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Andrew F. v. Douglas County School District RE-1*, U.S.\_\_\_\_\_, 137 S. Ct. 988, 999 (2017).

<sup>16</sup> IEPs include a statement of the student's present levels of academic achievement and functional performance 34 C.F.R. § 300.320(a); establishes measurable annual goals designed to meet the student's needs resulting from the student's disability; that enables students to make progress in the general education curriculum 34 C.F.R. §



student's continuous progress monitoring data, districts must adjust, modify and revise the IEP goals, related services, and specially-designed instruction to meet the student's then-current needs/circumstances. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320, 324.

### **APPROPRIATE RELIEF**

In this instance, both Parties seek appropriate relief within the meaning of the IDEA.<sup>17</sup> Here the Parent seeks compensatory education, a prospective placement, and a reevaluation.<sup>18</sup> At the same time, the District desires a declaratory finding that its program and offer of FAPE were appropriate.

### **WITNESS CREDIBILITY**

During a due process hearing, the hearing officer is charged with judging the credibility of witnesses and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses."<sup>19</sup>

Explicit credibility determinations give courts the information that they need in the event of a judicial review. All but one witness testified credibly and candidly freely shared their recollection of facts and their lay opinions.<sup>20</sup> In one instance, I did discern efforts by one witness to withhold information, misstate, and understate the facts. Therefore, I will give reduced weight to that person's statements. In this instance, I will give the testimony of District staff who never worked with the Student in person, never observed the Student in person, or met the Student before drafting the IEP reduced weight. The teacher never provided any in-person instruction. However, she

300.320(a)(2)(i); provides for the use of appropriate special-designed instructional services 34 C.F.R. 300.320(a)(4); and, schedule of continuous progress monitoring.

<sup>17</sup> *Sch. Dist. of Phila. v. Post.*, 262 F. Supp. 3d 178, 197 (E.D. Pa. 2017) (citing 20 U.S.C. § 1415(i)(2)(C)(iii)).

<sup>18</sup> *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) (comparing the make-whole versus the hour-for-hour approach).

<sup>19</sup> *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003).

<sup>20</sup> *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014), *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014).

did provide online instruction; therefore, I will give her testimony medium weight. I will give the testimony of the psychologist medium weight, provided that her testing comports with the expected assessment, data collection, test selection, and observation requirements otherwise expected in an evaluation or reevaluation report. Otherwise, I will give the psychologist's testimony about the development of the reevaluation reports little to no weight.<sup>21</sup>

The Parties' credibility determinations and the persuasiveness of the testimony played a limited role in crafting the equitable relief. I found the Mother credible; however, her testimony about the requested prospective placement was not persuasive. I also found the Mother's testimony on other topics, like registering the Student, compelling and clear.

### **THE BURDEN OF PROOF**

Generally, the burden of proof 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.<sup>22</sup> The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise.<sup>23</sup> In this case, the Parents are the party seeking relief and must bear the burden of persuasion.

### **DISCUSSION, ANALYSIS, AND CONCLUSIONS OF LAW**

The Parties competing positions, the exhibits, the testimony, and briefs were studied in reaching the following Conclusions. First, I will review the Student's 2020 evaluation and discuss how it impacted the transition to the

<sup>21</sup> 22 Pa Code Chapter §§ 14.124, 14.131, 14.132, and 34 CFR §300.320. *et. seq.*

<sup>22</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

<sup>23</sup> 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).

2020-2021 school-age IEP. Next, I will discuss the 2020 reevaluation, the development of the 2020 IEP, and the Student's online learning during the 2020-2021 school year. Finally, I will discuss the award of appropriate relief.

### **THE FIRST TRANSITION TO SCHOOL-AGE SERVICES WAS BOTCHED**

By February 1 of each year, early intervention programs must identify children approaching kindergarten or first grade in their districts of residence. Once identified, the provider must send the parents a letter explaining the transition process. By the end of February, for all children approaching the age of kindergarten or first grade, the early intervention provider must then convene a transition meeting and give the parents an "intent to register form." The registration form signifies an intent to move from preschool to school-age services. A district's FAPE responsibility begins with receiving the parents' intent to register form. After that, school districts must conduct a reevaluation and develop IEPs. Once registered, the evaluation and IEP timelines at 22 Pa. Code Chapter 14. No later than April 15, the school district must notify the parent in writing about the transition options. Districts must ensure that the special education programs of young children with disabilities are not interrupted when they transition from preschool early intervention programs to school-age programs.<sup>24</sup>

On February 1, 2019, the District psychologist issued, and the Parent signed a Permission to Reevaluate. The District's psychologist contacted the preschool, observed, and tested the Student. The psychologist then prepared and uploaded a draft psychological report to the District's database. In April 2020, the psychologist sent the Mother a copy of her testing. After that, although the Mother contacted the District, no one followed up, forwarded a completed evaluation report, issued procedural

<sup>24</sup> Early Intervention Transition: Preschool Program to School-Age Programs, <https://www.education.pa.gov/Policy-Funding/BECS/Purdons/Pages/EITransitionPreschool.aspx>

safeguards, or scheduled an evaluation or an IEP meeting. Faced with the uncertainty the Student would not start school by September 2019, the Mother elected to keep the Student in the preschool. While these events are outside the statute of limitations, they provide background on what occurred the following year. The above events did not factor into my finding of a denial of a FAPE or relief.

### **THE SECOND INTENT TO REGISTER WAS ALSO BOTCHED**

In February 2020, the preschool provider did not schedule a transition meeting, and the District and the Parents did not meet in April 2020. The transition options were never explained in 2020, and procedural safeguards were not issued. The Mother, on her own, downloaded, completed, and returned the second intent to register and District's enrollment medical forms.

On August 27, 2020, the District requested, and the Mother agreed to a second reevaluation. In the psychologist's words, "someone" hit a "button," and the 2019 report became the August 2020 reevaluation report. No team member disclosed the switcheroo and the switcheroo directly interfered with the Parent's procedural due process rights. The failure to disclose the switch and the failure to complete the promised August 27, 2020 evaluation excluded the Mother from participating in the evaluation process. The record is preponderant that this rolling omission denied this rising [student] a comprehensive initial assessment. In summary, rather than complete the August 27, 2020, reevaluation, the District, without the Parent's knowledge, passed off the earlier April 2019 draft report as the completed August 28, 2020, reevaluation. (FOF ##16-25). This combination of substantive and procedural errors caused and contributed to the subsequent multiyear denial of a FAPE.

A Final **ORDER** addressing these procedural and substantive errors follows.

## **THE 2019 AND THE 2020 EVALUATIONS FAILED TO INCLUDE A VARIETY OF ASSESSMENTS**

Neither the witnesses nor the exhibits explain how the August 2020 or April 2019 evaluation report states that an IEP team met and decided on May 7, 2019, that additional assessment data were needed. The May 2019 back and forth emails and text messages between the Parties corroborate that the Parties never met in May 2019 or May 2020. At the same time, procedural safeguards were not shared. (P-28, FOF ## 21-25). This type of recordkeeping undercuts the District's FAPE arguments.

Neither the testimony nor the exhibits clearly explain why no one on the evaluation or IEP team noticed the stale April 2019 data. At the same time, the record does not explain why no one noticed that the August 27, 2020, evaluation was never completed. These unexplained adoptions, errors, and omissions interfered with the development of the August 2020 reevaluation and cut against the District's affirmative FAPE arguments.

## **THE 2019 EVALUATION WAS INCOMPLETE AND INSUFFICIENT**

Assuming the above procedural errors are not an impediment, the IDEA and Pennsylvania regulations state that reevaluations include a variety of technically sound assessments in all areas of unique need. At the same time, the team may not rely on a sole measure when making decisions. These protections were not followed. While the 2019-2020 report lists three global assessment tools, using three selected generalized assessment tools as the basis for decision-making violates the IDEA's sole criterion standard. The reevaluation omitted a variety of assessments. The three assessments listed failed to measure all areas of functional needs. For a Student with this profile, I would have expected to see in-depth functional skill assessment data; that did not happen. The failure to collect functional data created a forward rolling flaw.

The reevaluation acknowledges a need for lifesaving seizure and anaphylaxis medications during the school day, yet no one thought to include the school nurse to collect school health data.<sup>25</sup> The failure to assess the Student's need for school health services OT, PT, AT and speech/language created a data hole, which caused a denial of a FAPE. I find it hard to believe, absent assessment data, that 15 to 24 minutes of OT and PT a week for this Student is reasonably calculated to provide any benefit. The reevaluation omits functional baseline data, fails to describe strengths and weaknesses, and lacks practical examples of functional specially-designed instruction in all areas of unique need. To correct this multiyear failure, I will now **ORDER** a diagnostic placement.

### **APPROPRIATE RELIEF NOW REQUIRES A DIAGNOSTIC EVALUATION**

When appropriate, a hearing officer may order a diagnostic evaluation outside the district without the parties' agreement. A diagnostic evaluation is not an educational placement. Therefore, the out of District evaluation will not affect the Student's current stay-put status.<sup>26</sup>

As a consequence of the Parties' rigid positions, the Student has not attended school for quite some time. Understanding the tensions between the Parties, the Student's multiple disabilities, and the overlapping school health needs, I now believe that returning the Student to the MDS class under these conditions would, this late in the year, disrupt the MDS class and further delay, the completion of a comprehensive diagnostic evaluation.

<sup>25</sup> *Stafford County (VA) Pub. Schs.*, 70 IDELR 164 (OCR 2017) (trained staff members should handle and administer epinephrine in the event of an anaphylactic or other serious allergy-related reaction).

<sup>26</sup> 34 CFR 300.300 (a)(3)(i). *East Windsor Bd. of Educ.*, 114 LRP 36178 (SEA CT 05/15/14), *Middletown Bd. of Educ.*, 10 ECLPR 77 (SEA CT 2013), *In re: Student with a Disability*, 115 LRP 32147 (SEA NM 05/21/15), (hearing office may order a diagnostic placement as appropriate relief) See, Appendix A to the IDEA-Part B regulations, Question 14 (1999 regulations), *In re: Student with a Disability*, 115 LRP 3214 (SEA NM 05/21/15).

The record demonstrates the Student has not yet received the benefits of a comprehensive evaluation. The record also indicates that the Student is a person with an intellectual disability. Reevaluations for persons with this exceptionality should occur every two years, not three.<sup>27</sup> The District should have completed two reevaluations by now, the first in 2019, the second in 2021, and a third in upcoming in 2023. Each reevaluation would have lasted a minimum of 60 up to 100-days. As it stands now, the Student has not received the benefits of the required 200-days of individualized assessment and much-needed attention. Therefore, to correct the above multiyear violations, I now find that the Student requires a 100-day, in-class diagnostic evaluation outside of the District.

Consistent with the case law, this functional diagnostic evaluation should occur in a classroom setting, where the Student receives direct instruction and a contemporaneous functional assessment in all areas of suspected disability. Therefore, I would expect the student to be in the diagnostic classroom for 1545 minutes a week to collect the much-needed data.

The Mother, in her sole discretion, should select the diagnostic evaluation provider, setting, and classroom. The Mother must select the diagnostic provider within five (5) school days of this **ORDER**. Once chosen, the Mother should notify the District no later than the fifth school day; after that, the District will have ten (10) school days to arrange for the placement. The District is now **ORDERED** to fund a 100-day diagnostic evaluation.<sup>28</sup> The District is further **ORDERED** to transport the Student to and from the out of District evaluation, with appropriate related services, discussed below, during the transportation. During the diagnostic evaluation, the District is

<sup>27</sup> 22 PA Code 14.124(c).

<sup>28</sup> For this **ORDER** the term "day" tracks the IDEA's definition of a *business day* meaning Monday through Friday, except for Federal and State holidays (unless holidays are specifically included in the designation of business day, as in § 300.148(d)(1)(ii). See, 34 CFR §300.11 (b).

**ORDERED** to provide or pay for the Student to have a designated one-on-one paraprofessional throughout the day. If the provider does not provide a one-on-one throughout the day, the District must provide the aide.

During the diagnostic evaluation and transportation, the District is now **ORDERED**, with Parent input, to create an "Individualized Transportation Health Care Plan" and an "Emergency Care Plan" as described below to manage the Student's school nursing needs to and from the diagnostic evaluation.

During the first 60-days, the provider should complete a comprehensive, independent functional diagnostic evaluation. The evaluation should include functional academic, school health, speech, OT, PT, and AT assessments.<sup>29</sup> The Parent selected entity providing the evaluation should issue interim status reports about the Student's functional present levels to both Parties every 20-days.

Once the evaluation is completed, the evaluator, teachers, and the District will have 30-days to prepare a comprehensive evaluation report. After that, the District should provide a copy to the Parent, and then the Parties should meet within 10-days and prepare an IEP. The diagnostic evaluation timeline will end once a new IEP and NOREP are presented.

### **THE IEP TEAM LACKED A KNOWLEDGEABLE PERSON**

It is black letter law that every IEP team must include knowledgeable people who construct a statement of measurable annual goals.<sup>30</sup> I now find that the 2020-2021 and the 2021-2022 IEP teams lacked an essential member – the

<sup>29</sup> Understanding that norm-referenced assessments may not provide useful instructional insight, the diagnostic evaluator should consider a functional assessment of the Student in the following areas: daily living, gross motor; fine motor; speech-language; negative behaviors; classroom routines; group skills; social skills; academic independence; generalization; reinforcers; rate of skill acquisition and retention; natural environment learning; adaptability to change; spontaneity; independent play; general self-help skills' dressing skills; toileting skills; and, eating skills data.

<sup>30</sup> 34 CFR 300.320 (a)(2)(i).



school nurse. The record is preponderant that although the school nurse was the only person who would oversee the [redacted] feeding and administer emergency medications, she was not present. The school nurse was also charged with ensuring the PT and OT-related school health forms were completed. The record is clear the health forms were not completed, and the Student did not receive the promised OT and PT services. Therefore, each IEP was fundamentally flawed without a knowledgeable school nurse when offered as a team member.

### **THE IEPS, WHEN OFFERED, WERE FUNDAMENTALLY FLAWED**

The IEP allocates 1545 minutes a week for instruction. Under the "Special Consideration" component, the IEP team checked the box indicating the Student needed either an assistive technology device(s) or assistive technology service(s). The District never offered or completed an AT screening or assessment. This omission interfered with speech and language success and would later create a separate standalone fatal flaw.

The IEP, as written, called for in-person instruction, yet, everyone knew, when offered, that the delivery of instruction would occur online. Aware that the Student required continuous hand-over-hand prompting to learn, the IEP included a one-on-one PCA, yet the Mother was expected to act as the PCA. Although the IDEA calls for the IEP to be in effect at the beginning of the school year, online instruction began in mid-October 2020. The decision to provide online instruction was a significant change in placement requiring a reevaluation, but one was not done.<sup>31</sup> Contrary to the IEP time allotments, the teacher unilaterally reduced the Student's daily instructional time. The OT and the PT knew that they would not provide services under District policy when the IEP was offered, yet they remained silent. Accordingly, I

<sup>31</sup> The move from in-school to online education was a significant change; yet, the District did not initiate a reevaluation or issue procedural safeguards or a NOREP describing the basis for the evaluation. 34 CFR §300.502, 34 CFR §104.35(a).

now find these additional procedural errors created flawed IEPs.

### **THE PRESENT LEVELS AND THE GOALS ARE VAGUE**

After reviewing the 2020 IEP and the 2021 IEP, I now find the present levels are vague, the goals are not measurable, and the description of the related services is insufficient. The IEP present levels adopted the incomplete, vague narrative statements found in the 2020 reevaluation; therefore, the present levels, across the board, are substandard and inappropriate for all the reasons discussed above. Assuming *arguendo* the present levels are legally sufficient, the remaining subcomponents of the IEP are not. While I will use the speech, OT, and PT goals to explain the IEP flaws, those same flaws undercut the appropriateness of the remaining goals.

To the extent the District points to the speech, OT and PT present level statements as concrete starting points, I disagree. The speech goal statement and the objectives are neither clear nor measurable. The Mother's DAP-3, ABAS-1, and Battelle rankings are the sole global measures in the IEP, and these measures do not provide objective speech, OT, or PT baseline data.<sup>32</sup> That is the first substantive *Rowley* problem.

The speech goal does not explain why the therapist used a stale May 8, 2019, data point of 10% as the baseline for a September 2020 IEP. (S-8 p.22). Next, the speech goal calls for the Student to combine "symbols and expressing [sic] different communication functions at 70% success in 3 out of 4 probes given minimal visual and verbal prompting." After multiple readings, I cannot discern what the Student is expected to do to be

<sup>32</sup> IDEA require districts to: 1) identifying present levels of academic achievement and functional performance; 2) set measurable annual goals, including academic and functional goals; and 3) describe schedules how a child's progress toward meeting annual goals will be measured and reported. *Questions and Answers on Endrew F. v. Douglas County School District. Re-1*, 71 IDELR 68 (EDU 2017)

successful. The goal qualifier given "minimal visual and verbal prompting" modifies the Student performance level; absent an objective definition, the prompts cannot be repeated or recorded by a stranger. These omissions make data collection unreliable. This is the second substantive *Rowley* problem.

This is the third substantive *Rowley* problem. Like the remaining six goals, the speech goal fails to pass the regularly accepted "stranger test." The "stranger test" provides that a goal is vague, meaning not measurable, if an impartial person, after reading the goal, could not either teach or watch someone teach the goal, observe learning, record data, monitor progress, and track changes in performance over time. If a "stranger" could not complete these tasks, that goal is flawed like the others here. Although I benefited from hearing the testimony, reading the transcript, and the exhibits, this "stranger" could not teach or progress monitor this goal.

The speech short-term objectives add to the confusion rather than correct and save the goals from a vagueness finding. The objectives describe three different unrelated tasks that are not based on a logical task analysis breakdown of the major components of the annual goal. The short-term objectives are not written in a sequential order that reflects a steady progression through the various subskills needed to meet the annual goal.<sup>33</sup> This is the fourth substantive *Rowley* problem. Accordingly, I now find that neither the short-term objectives nor the speech goal will enable the Parent to monitor success throughout the year.

By way of further example, while the OT present levels reference the name of the test - Gross Motor Classification Scale (GMFCS) Level II - absent

<sup>33</sup> *Notice of Interpretation, Appendix A to 34 CFR Part 300 (1999 regulations), Pocatello Sch. Dist. #25, 18 IDELR 83 (SEA ID 1991) (the IEP did not sufficiently break down some short-term objectives and did not include objectives relating to behavior problems and first-grade academics), Homewood-Flossmoor Cmty. High Sch. Dist. #233 60 IDELR 115 (SEA ILL 2012).*

explanation or data, and none was provided, this passing name dropping does not cure the vagueness flaw.<sup>34</sup> The OT narrative describes feeding deficits and then, in passing, mentions a particular feeding program recommended by a recognized feeding clinic, yet the IEP lacks a self-feeding present level, a goal statement, or specially-designed on how to teach self-feeding. Absent specially-designed instruction, this Student will never learn how to self-feed.

While sequential, the walking short-term objectives fail to include an essential criterion - distance walked - overtime detail. Next, the walking goal also calls for the Student to walk with peers when moving from class to class; yet, the Student is in a self-contained class all day. Therefore, as written, the PT goal statement is inadequate.

When viewed as a whole, the academic, OT, PT, speech narrative present levels, goal statements, and objectives are a series of disconnected statements that do not provide a baseline or a starting point describing what the Student can do or where the Student will go. This same error pattern is repeated in the remaining IEP goal statements. A present level or goal without a measurement criterion is not legally sufficient. Accordingly, I now find the 2020-2021 IEP and the 2021-2022 IEP goal statements and objectives are legally insufficient and inappropriate.

### **SCHOOL HEALTH SERVICES ARE A RELATED SERVICE**

The District's argument that the Parent's failure to provide completed health forms for OT or PT, despite their internal requirements, is not a convincing affirmative defense. The record is preponderant; the Mother received the OT, PT, school health forms in August 2021[redacted]. The PT knew in March

<sup>34</sup> *Pocatello Sch. Dist. #25*, 18 IDELR 83 (SEA ID 1991) (noting that the parents could not fully understand the proposed educational program and participate in the IEP process because, among other things, numeric test scores were neither explained nor self-explanatory).

2021 [redacted] that the PT health form was incomplete yet remained silent.<sup>35</sup>

I agree with the District that medical services provided by licensed physicians for treatment are not related services under the IDEA.<sup>36</sup> However, "school health services," "diagnostic medical services," and "school nursing services" are authorized related services.<sup>37</sup>

"Diagnostic medical services" include tasks like reviewing a file, signing off on the frequency of or administering medications, and signing off on the frequency or duration of related services to ensure a FAPE, which should have been provided as an IDEA-related service.<sup>38</sup> The failure to give the "covered medical services" to complete the health forms as part of the reevaluation or to complete the promised PT and OT services denied the Student a FAPE.<sup>39</sup>

The District's argument that the failure to prepare a seizure or [allergy] reaction plan is not the District's obligation is rejected outright. The Pennsylvania Department of Health, which oversees school nursing, and the Pennsylvania Department of Education (PDE) recognize that IEP teams with school nurses can develop individualized school health plans for students

<sup>35</sup> "3/2021 Comments: Unable to see student due to no updated script. Sent PT script request document via google classroom to parent on 3/23/2021. Will continue to follow up." (S-25 p.2).

<sup>36</sup> See, *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 29 IDELR 966 (U.S. 1999) and *Mary Courtney T. v. School Dist. of Philadelphia*, 52 IDELR 211 (3d Cir. 2009).

<sup>37</sup> IDEA covered related services includes "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and other services." 34 CFR §300.34 (c)(5).

<sup>38</sup> *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 29 IDELR 966 (U.S. 1999), and *Mary Courtney T. v. School Dist. of Philadelphia*, 52 IDELR 211 (3d Cir. 2009) (services of licensed physicians for diagnostic or other purposes are related services under the IDEA), 34 CFR §300.34 (a) Medical services means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

<sup>39</sup> *Upper Rio Grande (CO) Sch. Dist.*, 121 LRP 36510 (OCR 08/05/21). OCR concluded that the principal and nurse placed that burden on the parent's shoulders to evaluate the student when they required her to first obtain additional documentation so the district could complete its evaluation.

with special health care needs.<sup>40</sup> In this instance, aware of these well-published options, the District did not act. An appropriate **ORDER** follows.

### **SCHOOL NURSING - TRANSPORTATION AND THE SAFETY HARNESS**

The IEP includes transportation as a related service. The IEP states the District will transport the Student during the ride with a five (5) point harness. Again, the IEP and the reevaluation lack an AT device harness evaluation for a different point.<sup>41</sup> The failure to have factual data in selecting an appropriate safety harness is prejudicial. Detecting a seizure, removing the harness, and administering the [redaction] medication in the confines of a van or a car requires careful preparation.<sup>42</sup> The wrong harness, the lack of constant monitoring, and the failure to administer the medication will only lengthen the response time.<sup>43</sup> While I take no view on what type of harness the Student needs, I remind the District, the Parent, and the team they must first evaluate the Student, prepare a comprehensive evaluation report and then select a proper harness. The IEP team must consider a standalone "Transportation Health Care plan" or adjust the IEP to provide

<sup>40</sup> PDE's website publically endorses five (5) different types of school nurse health care plans: Individualized Healthcare Plans (IHP); Emergency Care Plans (ECP); Individualized Transportation Plans (ITP); Individualized Education Programs with medical component (IEP); or Section 504 Service Agreements Plans of Care for Student with Special Health Care Needs [eduhttps://www.health.pa.gov/topics/school/Pages/Plans-of-Care.aspx](https://www.health.pa.gov/topics/school/Pages/Plans-of-Care.aspx).

<sup>41</sup> The selection of a mechanical restraint requires a full individual assessment, input from the IEP team and medical authorization. 22 Pa. Code §14.133, 22 Pa. Code § 10.25.

<sup>42</sup> *Boyertown Area Sch. Dist.*, 70 IDELR 188 (SEA PA 2017) (finding that a nonverbal student with a seizure disorder, an intellectual disability, and autism required a nurse or another highly trained individual to accompany the student during transportation as a related service), *Oconee County Sch. Dist. v. A.B.*, 65 IDELR 297 (M.D. Ga. 2015) (bus aide was needed to administer medication on van within five minutes); *Elizabeth Bd. of Educ.*, 66 IDELR 237 (SEA NJ 2015) (medical professional required to provide medical services during minivan transport services) *School District of Philadelphia*, 12 ECLPR 5 (SEA PA 2014), *East Maine Sch. Dist.* 63, 9 ECLPR 55 (SEA IL 2011), *Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Reg. 46,574 (2006) (A child who is medically fragile and needs school health services or school nurse services in order to receive FAPE must be provided such services).

<sup>43</sup> *Susavage v. Bucks Cty. Sch. Intermediate Unit No. 22*, Nos. 00-6217, 22, 2002 U.S. Dist. LEXIS 1274 (E.D. Pa. Jan. 22, 2002)(suffocation death of disabled student on a van causally linked to the failure to perform an assistive technology evaluation in selecting a mechanical safety harness).

the school nursing services.<sup>44</sup> The elements of a legally sufficient "Transportation Health Plan" are absent.

### **THE IEP FAILED TO INCLUDE EXTENDED SCHOOL SERVICES**

Acknowledging that some students may require programming beyond the regular school year, the federal legislature deemed that Extended School Year (ESY) services are to be provided to an eligible child if necessary to assure that the child receives a FAPE. 34 CFR §300.106(a)(2). Pennsylvania regulations provide additional guidance for determining ESY eligibility.<sup>45</sup> Without tracking data, the September 2020 and August 2021 IEP teams decided that the Student did not display signs of regression/recoupment, lack of mastery, or progress towards self-sufficiency. The record is also preponderant that the District never issued prior written notice when denying ESY services. Applying 22 Pa. Code § 14.132(a)(2) (i)–(vii) to these facts, I now find that the failure to offer ESY services is another standalone violation that denied the Student a FAPE. Therefore, I now find, in part for the Student and against the District, in part for the District, I will now discuss what appropriate relief is necessary.

### **COMPENSATORY EDUCATION IS APPROPRIATE RELIEF.**

The Parent now seeks a prospective placement, compensatory education, and a comprehensive evaluation. The Mother did not meet her burden that a prospective placement is appropriate. However, the Parent did meet her burden of proof regarding an award of compensatory education. Therefore, prospective relief is denied.

<sup>44</sup> For free on Demand Seizure First Aid Training for School Personnel visit Epilepsy Alliance America <https://www.epilepsyallianceamerica.org/rescue-medications/> (last visited on April 5, 2022). Anyone working with the Student must learn the basics of epilepsy and how to recognize and respond to a seizure. All school personnel – teachers, administrators, nurses, bus drivers, coaches, aides, and custodians will benefit from seizure recognition and emergency management training. This type of support for personnel would address specifics in the school-setting and during transportation.

<sup>45</sup> 22 Pa. Code §14.132 (a)(2) (i)–(vii) be taken into account. 22 Pa. Code § 14.132(a)(2) (i)–(vii).

First, applying the case law once the denial of FAPE is established, the hearing officer must determine when the district either knew or should have known of the denial of a FAPE. After reviewing the record, the testimony, and the exhibits, I now find that the District either knew or should have known of the denial in September 2020.

Second, the hearing officer must determine whether a qualitative or quantitative analysis will make the Student whole. In this instance, I now find a modified quantitative hour-for-hour approach will create an equitable bank of compensatory education time that will make the Student whole.

Third, the hearing officer must calculate the value of the reasonable rectification period. Case law describes the reasonable rectification period as an affirmative defense. The District here neither asserted the defense nor did it put any evidence about that calculation into the record; therefore, I now find the defense was waived.

Fourth, once the reasonable rectification period is set, the hearing officer must then equitably reduce the total award of the compensatory education by the value of the reasonable rectification period. Absent evidence, the fourth step is waived.

In crafting the relief, the hearing officer must follow the overarching principle that "appropriate relief" must make the student "whole." Appropriate relief, in this instance, includes limited prospective relief in the form of a diagnostic evaluation and compensatory education. The particulars of the diagnostic evaluation are described above. I will now calculate the compensatory education relief.

### **THE COMPENSATORY EDUCATION CALCULATION**

The IEP called for 1545 minutes a week of instruction, including speech therapy, OT, PT, one-on-one support, and transportation. Therefore, based on the denial's scope and magnitude, the Student is awarded 1545 minutes



a week of compensatory education for each week the District was in session for the 2020-2021 and the 2021-2022 school year. To calculate the total award amount, the District is directed to provide the Parent with a school calendar identifying the number of weeks the District was in session each year. The Parties should then reduce the number of school days or minutes by the number of days the Student was absent due to illness, or the school was closed for all other students. To calculate the total award of compensatory education for each year, the Parties should multiply the number of weeks the District was in session by 1545 minutes. Compensatory education will continue to accrue until the District offers a new IEP and a NOREP.

#### **AWARD OF COMPENSATORY EDUCATION FOR LOST ESY SERVICES**

Although the Student was eligible for ESY schooling, the District never offered it, and the Student never received ESY services. To remedy this omission, for the 2020-2021 school year, I will award 1545 minutes a week of ESY compensatory education for six (6) weeks.

To remedy the ESY omission for the 2021-2022 school, I will also award 1545 minutes a week for six (6) weeks. Therefore, the total equitable award for the ESY violation equals 12 weeks multiplied by 1545 minutes each week.

#### **THE AWARD OF COMPENSATORY EDUCATION TRANSPORTATION TO AND FROM SERVICES**

The school year IEP called for the Student to receive transportation to and from school. The District is **ORDERED** to reimburse the Mother for out-of-pocket expenses or transport costs to and from any compensatory education provider.

#### **RECORDKEEPING, MANAGEMENT, AND PAYMENT FOR COMPENSATORY SERVICES**

The Student may use the compensatory education bank of time for any developmental, corrective, remedial, specially-designed instruction, including related services, transition services, supplemental or auxiliary aids, as defined in the IDEA or Section 504.

Each year, in January, the District should report any unused hours to the Student and the Parent.

The Parent can select the compensatory education service provider at her sole discretion.

The District should reimburse the Parent selected compensatory education provider at the rate regularly charged, for each service, by the provider.

To the extent the Student or the Parent incurs travel costs to and from the provider, the District should reimburse the Parent or the Student for all mileage or transportation expenses at the District's rate for travel reimbursement.

Any unused compensatory hours remaining by age 23 will revert to the District and are otherwise forfeited.

### **FINAL ORDER**

**AND NOW**, this April 8, 2022, the District is now **ORDERED** as follows:

1. The Parent's claim that the District failed to complete a full comprehensive evaluation of the Student's needs is **GRANTED**. To remedy the failure to conduct a thorough evaluation, the District is directed to fund a 100-day diagnostic evaluation and transportation to and from the evaluation. The particulars of the evaluation, selection of the provider, the reevaluation timeline, and the offer of a FAPE are described above and incorporated by reference herein as though fully set forth at length

2. The Parent's claim the District failed to provide a free appropriate public education for the 2020-2021 and 2021-2022 school years is **GRANTED** in full.
3. To remedy the two school year violation of a free appropriate public education, the District is now **ORDERED** to provide 1545-minutes a week of compensatory education for each week for school year, during the 2020-2021 the 2021-2022 school years.
4. To remedy the failure to provide ESY services for the 2019-2020 and the 2021-2022 school year, the District is **ORDERED** to provide 1545-minutes a week for 24 weeks.
5. The District is **ORDERED** to pay the total costs for all billed compensatory education services at the rate charged by the service provider selected by the Parent, at the rate charged for each service(s). All invoices for compensatory education services or travel should be paid within 45-days of receipt.
6. The Parent is authorized to select the individual(s) or the provider for all make whole compensatory education services.
7. The compensatory education hours described here may take the form of any developmental, corrective, remedial, or specially-designed instruction, including related services, transportation services to and from the service provider, transition services, supplemental or auxiliary aids, as these terms are defined in the current or future regulations implementing the IDEA or Section 504.
8. The Parent is also permitted to self-fund and then obtain immediate reimbursement, within 30-days, for all out-of-pocket costs associated with providing the compensatory education services or transportation described herein.
9. The District is now **ORDERED** to fund a 100-day diagnostic evaluation by a provider selected by the Parent.

10. Within five (5) school days of this **ORDER**, the Parent can select the diagnostic placement at her sole discretion. By the close of business on the fifth (5<sup>th</sup>) day, the Parent must notify the District, in writing, of her selection.
11. Once on notice of the Parent's selection, the District will have ten (10) school days to arrange for the diagnostic evaluation.
12. The District is directed to provide and pay for transportation to and from the diagnostic placement. The District is further **ORDERED** to pay the total cost of the diagnostic evaluation and the daily transportation charge to and from the placement.
13. The agency/entity providing the reevaluation should issue interim status reports to both Parties every 20-days.
14. The agency/entity providing the reevaluation should invoice the District every 30-days. The District is **ORDERED** to pay all invoices within 45-days.
15. Any unused compensatory education hours remaining after the Student reaches age 23 will revert to the District and are otherwise forfeited.
16. All other claims for appropriate relief, causes of action, or affirmative defenses are now dismissed with prejudice.

s/ Charles W. Jelley, Esq. LL.M.  
Special Education Hearing Officer  
**ODR FILE No. 25211-20-21**  
April 8, 2022