

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:

22864-19-20

Child's Name:

D. H.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

07/31/2020

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a middle teenaged student in the North Allegheny School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) under the disability categories of Autism Spectrum Disorder and an Intellectual Disability.² Student has attended school in the District in a program of special education since the 2016-17 school year.

During the 2018-19 school year, the parties had a dispute over programming and Student's Parents filed a Due Process Complaint against the District. In that Complaint, they asserted that the District failed to provide Student with a free, appropriate public education (FAPE) throughout Student's tenure under the IDEA, Section 504 of the Rehabilitation Act of 1973,³ and the Americans with Disabilities Act (ADA),⁴ as well as the federal and state regulations implementing those statutes.

The case proceeded to a due process hearing with most sessions convening virtually by agreement of the parties due to the COVID-19 pandemic.⁵ During the hearing, the Parents raised various challenges to the

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

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

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

⁴ 42 U.S.C. §§ 12101-12213.

⁵ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. Citations to duplicative exhibits may not be to all. References to Parents in the plural will be made where it appears that one was acting on behalf of both.

District program and sought compensatory education, reimbursement for a private evaluation, and a finding of discrimination. The District sought to limit the scope of the claims⁶ and further maintained that its special education program, as offered and implemented, was appropriate for Student such that no relief was warranted.

For the reasons set forth below, the claims of the Parents will be granted in part and denied in part.

ISSUES

1. Whether the scope of the claims should be limited to the time period of March 2017;
2. For the applicable time period, whether the District denied Student FAPE in any respect;
3. If the District did deny Student FAPE, should Student be awarded compensatory education;
4. Whether the Parents are entitled to reimbursement of their privately obtained evaluation; and
5. Whether the District discriminated against Student contrary to Section 504 and the ADA?

FINDINGS OF FACT

1. Student is a mid-teenaged student residing and attending school in the District. Student is eligible for special education under the classifications of Autism and Intellectual Disability. (P-45.)

⁶ The only period of time subject to potential exclusion is the start of the 2016-17 school year through March 5, 2017. (N.T. 27-28; HO-1.) The Parents also explicitly removed the time period of the COVID-19 school closures from all claims. (Parents' Closing at 2 n.1.)

2. Student needs to become more fluent in communicating functionally and independently. (N.T. 732-33, 781.)⁷
3. Student was enrolled in a school district in another state until the end of the 2015-16 school year and was eligible for special education to address academic and functional skills including communication. In the spring of 2016, an Augmentative/Alternative Communication (AAC) evaluation recommended that Student be provided with a device in order to develop independent functional communication skills. (P-1; P-2.)
4. Student enrolled in the District at the start of the 2016-17 school year after the family moved there from the other state. (N.T. 634.)
5. Student receives weekly one-on-one services by a private provider (Private Provider) of speech/language services including on AAC devices. An AAC device was also recommended by the Private Provider, and specifically the one Student has had. In those weekly sessions, Student has worked on functional expressive communication and learning how to use the device effectively. (N.T. 484, 486-89, 639-42, 650-51, 668, 670, 701-02, 721, 723; S-19 at 11-12.)
6. Student does not use the AAC device regularly at home, but typically uses verbal communication. The Parents have been concerned that Student's use of a device where the family has a familiar and consistent routine would impede their current communication and be frustrating for Student. (N.T. 666-68, 686-87.)
7. The District has provided training to the Parents on the AAC device, and specifically on navigating the device. (N.T. 685-86.)

⁷ The record in its entirety supports this finding and is not in dispute.

8. The District has provided numerous training sessions to its staff on the AAC device. (N.T. 39-40, 89-90, 101, 133-36, 192, 204-05, 210, 213, 215, 292-93, 314, 324, 452, 585, 601, 617; S-52.)

2016-17 School Year [redacted]

9. The Individualized Education Program (IEP) team met at the start of the 2016-17 school year and agreed to implement Student's IEP from the other state. (N.T. 179; S-8; S-9.)
10. The IEP from the other state provided for participation in the general education curriculum with accommodations and other supports. Academic goals addressed needs in reading comprehension and mathematics problem solving, subjects for which Student had small group instruction. Speech/language and occupational therapy were identified as related services, with a speech/language goal for expressive language skills. (P-2.)
11. The District sought and obtained consent of the Parents to conduct a reevaluation of Student in September 2016. (S-10.)
12. When Student first enrolled in the District, Student cried frequently and engaged in scripting. Student became frustrated because others had difficulty understanding Student's needs and concerns. (N.T. 636-37.)
13. A Reevaluation Report (RR) was completed and issued in late October 2016. At the time, the Parents' major concern for Student was independent functional communication. (N.T. 388, 395; S-11 at 3-4.)
14. Cognitive assessment was not conducted for the October 2016 RR. (N.T. 396; S-11.)
15. Adaptive functioning was evaluated for the October 2016 RR through rating scales completed by the special education teacher and one of the Parents. Those scales revealed functioning in the extremely low

range by both (< 1st percentile), across domains: communication, functional academics, home/school living, health and safety, leisure, self-care, self-direction, and social skills. Student was able to navigate the school environment better than in the home and the community. (S-11 at 18-19.)

16. Assessment of academic achievement for the October 2016 RR reflected areas of strength and weakness in reading and mathematics but results overall were well below same-age peers. (S-11 at 17-18.)
17. Student was assessed for speech/language needs for the October 2016 RR. The results revealed deficits in both receptive and expressive language skills. Teachers also reported that Student seldom communicated verbally beyond scripting and echolalia. (N.T. 178-79; S-11 at 8-9, 12-13, 15-16.)
18. Occupational and physical therapy assessment for the October 2016 RR reflected areas of strength and weakness for Student. (S-11 at 22-23, 24-28, 29; S-12 at 1-5.)
19. An assistive technology action plan was included in the October 2016 RR. Among other strategies, device trials were suggested. (S-11 at 20-21.)⁸
20. The October 2016 RR identified Student as eligible for special education based on an Autism classification. It contained recommendations to include specially designed instruction and autistic support for reading/language arts, mathematics, and social skills; and speech/language, occupational, and physical therapy as related services. (S-11 at 23, 30.)
21. An IEP was developed at a meeting held in November 2016. Identified needs were for reading comprehension, written expression,

⁸ There is another version of this plan at P-6. Neither version appears to be complete.

- mathematics, and functional and social communication skills, and speech/language, occupational, and physical therapy. (S-12 at 5-10; S-13.)
22. Annual goals in the November 2016 IEP addressed reading comprehension (at Student's instructional level); written expression (sentence writing); mathematics (functional money and time-telling); speech/language (reciprocal communication, expressive language/self-advocacy including requests for help, and perspective taking); social skills (greeting others); fine motor skills (legible writing); and gross motor skills (strength and coordination). (S-11 at 28-49.)
 23. The November 2016 IEP contained a Positive Behavior Support Plan (PBSP) to address crying behavior. The hypothesized functions for that behavior were to avoid task demands or to provide self-stimulation. The PBSP included a goal to decrease episodes of crying in order to avoid task demands by using a first/then chart, with a strategy to teach Student to ask for help or a break. (S-13 at 22-24, 49-50; S-14.)
 24. Program modifications and items of specially designed instruction in the November 2016 IEP provided for a total communication approach; supports for auditory information; an adapted/modified curriculum; visual supports; concise verbal directions; sensory supports; social stories; a behavior chart; available assistive technology; modeling and prompting; and a full time paraprofessional. (S-11 at 50-52.)
 25. The November 2016 IEP provided for speech/language, occupational, and physical therapy, social work services, assistive technology, and adaptive physical education. (S-13 at 53.)

26. The November 2016 IEP provided that Student would not participate in the general education setting for reading/language arts, mathematics, social skills, and self-help skills; during related services; and when participating in an adaptive special. Student's program was one of supplemental autistic support. The Parents approved the Notice of Recommended Educational Placement (NOREP) for implementing this IEP. (S-13 at 6, 58-59; S-15.)
27. Student trialed several assistive technology devices during the 2016-17 school year with the support of the local Intermediate Unit (IU). (N.T. 180-82, 198, 443, 446, 647; S-51.)
28. In early 2017, the Parents had Student evaluated by the Private Provider. (N.T. 638.)
29. In March 2017, the Parents signed releases permitting the Private Provider to provide certain information to the District, and for the company that made the AAC device to provide certain information to the District. Those releases also authorized the District to provide certain records to the Private Provider. (S-54.)
30. In the spring of 2017, the District completed and issued another RR after the Parents sought assessment of Student's cognitive ability and adaptive functioning, and consented to the evaluation. The RR, issued in April 2017, contained updated information. (P-15; S-16.)
31. Results of Student's cognitive functioning for the April 2017 RR reflected scores in the very low to well below average range across composites and overall; however, nonverbal ability was deemed to be a relative strength. (P-15 at 16-19.)
32. To assess adaptive functioning, the Parents and special education teacher again completed rating scales. As in the fall, Student was

- rated to be in the extremely low range across all areas. (P-15 at 19-21.)
33. The April 2017 RR concluded that Student was eligible for special education on the bases of Autism and an Intellectual Disability. Recommendations remained the same as in the prior RR. (P-15 at 30, 37.)
 34. In the spring of 2017, the IEP team determined that Student was eligible for extended school year (ESY) services for reading/language arts, mathematics, and social skills in speech/language therapy. (S-13 at 2, 55.)
 35. A new IEP was developed in May and June 2017 following review of the April 2017 RR. (S-17; S;18; S-19.)
 36. Identified needs in the May 2017 IEP were for reading comprehension, written expression, functional mathematics, and functional and social communication skills, in addition to speech/language, occupational, and physical therapy. (S-19 at 39-40.)
 37. Annual goals in the May 2017 IEP addressed reading comprehension (at Student's instructional level); written expression (sentence writing); mathematics (functional money and time-telling skills); speech/language and social skills; fine motor skills (legible writing, keyboarding skills); and gross motor skills (strength and coordination). The speech/language goal was for expressive communication using the AAC device, but lacked a baseline or any present level information. The social skills goal was for greeting others, but also lacked a baseline or any present level information. (S-19 at 51-67.)

38. The May 2017 IEP again contained a PBSP to address crying behavior. The hypothesized functions for that behavior continued to be avoiding task demands or providing self-stimulation. Student was to be taught to ask for help or a break. (S-19 at 41-43, 68.)
39. Program modifications and items of specially designed instruction in the May 2017 IEP provided for access to the AAC device with encouragement to both verbalize and use the device; supports for auditory information; an adapted/modified curriculum; visual supports; concise verbal directions to include modeling and prompting with a new five-step prompt hierarchy (ranging from pausing to a full modeling); sensory supports; social stories; a behavior chart; supports for written expression tasks; and a full time paraprofessional. The Private Provider and the District together developed the prompt hierarchy. (N.T. 93, 102-03, 212, 766-67; S-19 at 69-71.)
40. The May 2017 IEP contained a post-secondary transition plan for Student to prepare for competitive employment and eventual independent living with support. (S-19 at 44-46.)
41. The May 2017 IEP provided for speech/language, occupational, and physical therapy, social work services, assistive technology, and adaptive physical education. (S-19 at 72.)
42. The May 2017 IEP provided that Student would not participate in the general education setting for reading/language arts, mathematics, and social skills; during related services; and when participating in an adaptive special. Student's program remained supplemental autistic support. The Parents approved the NOREP for implementing this IEP. (S-19 at 78-79; S-20.)

43. The May 2017 IEP determined that Student was eligible for ESY services for reading/language arts, mathematics, social skills, and speech/language therapy. (S-19 at 75-76.)
44. Progress monitoring for the second half of the 2016-17 school year reflected steady progress on the occupational and physical therapy goals; and steady progress on the reading comprehension, written expression, and mathematics goals. Student was reportedly demonstrating an increase in peer interactions, perspective taking, expressing wants and needs, and greeting others with less prompting, but no data was provided on how Student was communicating. Student's performance on the behavior goal was inconsistent and contained no data on whether and how Student was expressing wants and needs in place of crying. (S-45; S-46.)
45. In the summer of 2017, the Parents asked for, and the Private Provider offered to provide, training to District staff on Student's device. The District did not agree to that proposal. (N.T. 287, 289, 353-54, 357-58, 373-74, 490-91, 495; S-21.)

2017-18 School Year [redacted]

46. Student had an AAC device at the start of the 2017-18 school year provided by the District. Training by the local IU was provided to the Parents and District professionals in August 2017. (N.T. 647; S-22; S-52.)
47. Student's IEP was revised in October 2017 with respect to the occupational and speech/language therapy goals as well as the mathematics goal. Post-secondary transition planning was also discussed. The team determined that further evaluation of speech/language needs and occupational therapy/transition interests, as well as a functional behavioral assessment, were necessary. (S-19; S-23; S-24; S-25.)

48. A new RR issued in January 2018. Parent input was extensive and focused primarily on Student's lack of progress on functional communication even with access to the AAC device, in addition to post-secondary transition skills. (S-27 at 2-5.)
49. Speech/language assessment for the January 2018 RR included the Receptive and Expressive One-Word Picture Vocabulary Tests – Fourth Edition, the Clinical Evaluation of Language Fundamentals – Fourth Edition Pragmatics Profile, and a Functional Communication Profile. Results reflected deficits with both receptive and expressive language, and particularly with pragmatic language skills beyond a very basic level. Student reportedly used vocalizations, the AAC device, and gestures to communicate expressively. (S-27 at 25-30.)
50. An FBA Emotional Support Determination conducted for the January 2018 RR specific to Student's crying behavior that was operationally defined. The hypothesized functions of the behavior were to avoid a non-preferred activity or demand or to receive a tangible. (N.T. 600; S-27 at 13-14, 21-25.)
51. A prevocational interest survey was administered for the January 2018 RR. Results were variable but did provide some areas of interest for Student. (S-27 at 31-32.)
52. Recommendations in the January 2018 RR included specially designed instruction for reading/language arts, mathematics, and social skills, in addition to speech/language. A number of strengths were also reported, including reading fluency, mathematics computation, keyboarding, and daily living skills. (S-27 at 17-18, 32-33, 35-36.)
53. Two IEP meetings were held following completion of the January 2018 RR. This RR was also reviewed at the first of those meetings attended

by Private Provider professionals. (N.T. 493, 652-53, 724; S-28; S-30 at 4-7, 10-13.)

54. Identified needs in the January 2018 IEP were for reading comprehension, written expression, functional mathematics, and functional and social communication skills, in addition to speech/language, occupational, and physical therapy. (S-29 at 49.)
55. Annual goals and short term objectives in the January 2018 IEP addressed reading comprehension (at a fourth grade level); written expression (sentence writing with the AAC device or keyboard); mathematics (functional money and durational time skills); speech/language (use of the AAC device for expressive language using syntactically correct sentences across settings; identifying basic concepts receptively); social skills (using pragmatic language to identified levels across environments); fine motor skills (developing cursive writing, keyboarding skills); gross motor skills (strength and coordination to identified levels, navigating the school building); and behavior (use of a first-then chart to replace crying). (S-29 at 62-100.)
56. The January 2018 IEP contained a PBSP to address crying behavior. The hypothesized functions for that behavior continued to be avoiding task demands or providing self-stimulation. One strategy included was to teach Student to ask for help or a break using the AAC device. (S-29 at 50-52, 101.)
57. Program modifications and items of specially designed instruction in the January 2018 IEP were the same as in the prior IEP: access to the AAC device with encouragement to both verbalize and use the device; supports for auditory information; an adapted/modified curriculum; visual supports; concise verbal directions to include modeling and prompting with a new five-step sequence (ranging from

- pausing to a full modeling); sensory supports; social stories; a behavior chart; supports for written expression tasks; and a full time paraprofessional. (S-29 at 102-04.)
58. The January 2018 IEP contained a post-secondary transition plan for Student to prepare for competitive employment and eventual independent living with support. (S-29 at 54-56.)
 59. The January 2018 IEP provided for speech/language, occupational, and physical therapy, social work services, assistive technology, and adaptive physical education. (S-29 at 105.)
 60. The January 2018 IEP provided that Student would not participate in the general education setting for reading/language arts, mathematics, and social skills; during related services; and when participating in an adaptive special. Student's program again was for supplemental autistic support. The Parents approved the NOREP for implementing this IEP. (S-29 at 112-13; S-30 at 16-20.)
 61. The January 2018 IEP determined that Student was eligible for ESY services for reading/language arts, mathematics, social skills, and speech/language therapy. (S-29 at 107-10.)
 62. The District again declined the services of the private provider in the fall of 2017. (S-26.)
 63. Student attended the District's ESY program in the summer of 2018. (N.T. 297; S-30 at 16-19.)
 64. Progress reports for the first half of the 2017-18 school year reflected that Student made steady progress on the occupational and physical therapy goals; made inconsistent but overall slight progress on the reading comprehension goal; and made limited to no progress on the written expression and mathematics goals. Student's progress on the speech/language goal cannot be ascertained from the reports, and

little of the data reflected how Student was communicating. Progress on the social skills goal appeared to reflect an increase in greeting others, but no information reflected how Student was doing so. Student reportedly met the behavior goal but the reports contained no data on whether and how Student was expressing wants and needs in place of crying. (S-48.)

65. Progress reports for the second half of the 2017-18 school year reflected that Student made steady progress on the occupational therapy goals; significant progress toward mastery of the physical therapy goal; slow to steady progress on the reading comprehension goal; steady progress on the mathematics goals; and limited to no progress on the written expression goal. Student did not make progress on the speech/language goals and there was no information reflecting how Student was communicating. Progress on the social skills goal appeared to reflect an increase in interacting with others, but no information reflected how Student was doing so. Student reportedly met the behavior goal but there was no data on whether and how Student expressed wants and needs in place of crying. (S-50.)

2018-19 School Year [redacted]

66. In the fall of 2018, Student completed a post-secondary transition survey to identify areas of interest for possible future employment. (S-31 at 32.)
67. Also in the fall of 2018, the District arranged for an assistive technology evaluation. New recommendations from that evaluation included use of the AAC device for expressive communication and language development, and opportunities for using the AAC device throughout the day. Student needed to develop and use vocabulary beyond labeling. (S-43 at 21-22.)

68. During the 2018-19 school year, Student participated in a vocational education program at school that involved completing tasks throughout the building. (S-31 at 33.)
69. In December 2018, the private provider again offered to provide training to District professionals on the AAC device (at significant cost), and again the District declined. (S-55 at 22-25.)
70. Progress monitoring for the first half of the 2018-19 school year reflected inconsistent progress on the reading comprehension, written expression, and mathematics goals; and some progress on the occupational and physical therapy goals. Student also exhibited limited but inconsistent performance on the speech/language and social skills goals. Student reportedly maintained mastery of the PBSP goal, but there was no indication of whether Student used a replacement behavior. (S-31 at 11-31.)
71. A new IEP was developed for Student in January 2019, and at the time Student's inconsistent progress on goals and objectives was a concern. The Parents intended to but were not able to attend the meeting. (N.T. 100, 110; P-38; S-31; S-32; S-34.)
72. Identified needs in the January 2019 IEP were for functional reading including comprehension, functional mathematics, and functional and social communication skills, in addition to speech/language, occupational, and physical therapy. At the time, Student still required prompting to assist with Student's communication via the AAC device and vocalizations. (S-31 at 38.)
73. Annual goals and short term objectives in the January 2019 IEP addressed reading comprehension (at Student's level); mathematics (solving word problems); speech/language (use of various modalities for expressive language; identifying basic concepts receptively across

settings; and following directions); pragmatic language (demonstrating social skills with identified accuracy across environments); life skills (locating and using information presented); fine motor skills (developing cursive writing, keyboarding skills); gross motor skills (strength and coordination to identified levels); and behavior (use of a first-then chart to replace crying). (S-31 at 57-84.)

74. The January 2019 IEP contained a PBSP to address crying behavior. The hypothesized functions for that behavior continued to be avoiding task demands or providing self-stimulation. One strategy included was to teach Student to ask for help or a break using any mode of communication. (S-31 at 39-41, 85.)
75. Program modifications and items of specially designed instruction in the January 2019 IEP provided for access to the AAC device; supports for auditory information; an adapted/modified curriculum; visual supports; the five-step prompt sequence (ranging from pausing to a full modeling); wait time; sensory supports; social stories; a behavior chart; supports for written expression tasks; pass/fail grading; and a full time paraprofessional. (S-31 at 86-88.)
76. The January 2019 IEP contained a post-secondary transition plan for Student to prepare for competitive employment following supported training, and to gain additional independent living skills. (S-31 at 42-51.)
77. The January 2019 IEP provided for speech/language, occupational, and physical therapy, social work services, assistive technology, and adaptive physical education. (S-31 at 88.)
78. The January 2019 IEP provided that Student would not participate in the general education setting for reading/language arts, mathematics,

vocational education, and social skills; during related services; and when participating in an adaptive special. Student's program was one of supplemental autistic and life skills support. The Parents approved the NOREP for ESY services implementing this IEP. (S-31 at 95-97; S-36.)

79. The January 2019 IEP determined that Student was eligible for ESY services for reading/language arts, mathematics, social skills, and speech/language therapy. (S-31 at 90-94.)
80. In the spring of 2019, the Parents asked that Student also attend a summer program through the Private Provider in 2019. The District did not agree to that request. (S-38; S-40 at 6.)
81. In the spring of 2019, the Parents requested an independent educational evaluation (IEE) for speech/language and assistive technology by their Private Provider at public expense. The District initially agreed but it and the Private Provider could not reach agreement on the terms for conducting the evaluation. The Parents later withdrew their request. (N.T. 300-01, 376; S-6; S-55 at 31.)
82. Student attended the camp through the Private Provider in the summer of 2019. The camp is approximately one week in duration and promotes use of AAC devices in various settings. (N.T. 297, 514-15, 655.)
83. The clinic performed the private evaluation (styled an "Augmentative and Alternative Consultation (AAC) Report") and issued a report in July or August 2019. The report included a description of an observation at school. (N.T. 501, 664; P-43.)
84. The private report summarized results of assessment of Student's receptive and expressive language abilities, reflecting below average range scores for both. Specific areas of weakness included Student's

use of only limited linguistic structures. The report recommended that Student use the AAC device throughout the day. (P-43 at 4-8.)

85. The private report made a number of recommendations that were focused on Student's communication development, including ongoing training for District staff related to the AAC device. (P-43 at 19-20; see *also* N.T. 508-12.)
86. The private evaluation was not provided to the District until after the due process complaint was filed and a hearing scheduled. (N.T. 381.)
87. Progress monitoring for the second half of the 2018-19 school year reflected inconsistent, limited progress on the reading comprehension goal; limited progress on the mathematics goal; inconsistent progress on the life skills goal; and limited progress on the occupational and physical therapy goals. Student also exhibited limited but inconsistent performance on the speech/language and social skills goals, and no information was provided on how Student was communicating. Student maintained the decrease in the crying behavior but there was still no indication of whether Student used a replacement behavior. (P-42.)

2019-20 School Year [redacted]

88. Student was in a class of six [redacted] students during the 2019-20 school year. (N.T. 36.)
89. Student at times cried at school during [redacted] grade, usually during one of the general education classes, but that behavior decreased over the course of the school year. (N.T. 44-45, 72-73, 425-26, 430, 435.)
90. The District completed an RR in December 2019 that consisted of a record review. The District members of the IEP team determined that

additional assessments were not necessary at that time. (N.T. 155-56; P-45.)

91. A new RR issued in December 2019 following the record review and receipt of the private evaluation. Parent input focused primarily on Student's need to develop functional communication. (P-45 at 2.)
92. The December 2019 RR incorporated the entire report of the private evaluation. It also included a summary of previous evaluation results, and input from teachers and related service providers. Student's eligibility for special education remained Autism and Intellectual Disability. (P-45.)
93. Recommendations in the December 2019 RR included specially designed instruction for reading/language arts, mathematics, and functional communication, in addition to vocational and independent living skills. Continued speech/language, occupational, and physical therapy in addition to social skills were also recommended. A number of strengths were also reported, including organizational and daily living skills. (P-45.)
94. A meeting convened to discuss the results of the December 2019 RR. (N.T. 164-65.)
95. Progress monitoring for the first half of the 2019-20 school year reflected that Student essentially maintained skills on IEP goals since the end of the prior school year. (P-44.)
96. A new IEP was developed for Student in January 2020 at a meeting attended by one of the Parents. (S-42; S-43.)
97. Identified needs in the January 2020 IEP were for reading comprehension, mathematics problem solving, and functional and social communication skills, in addition to speech/language,

- occupational, and physical therapy. At the time, Student required use of the AAC device across environments. (S-43 at 30-31.)
98. Annual goals and short term objectives in the January 2020 IEP addressed reading comprehension including drawing inferences (at Student's level); mathematics (solving word problems); speech/language (use of the AAC device for expressive language to form multiple word sentences; expressively responding to prompts with multiple words; pragmatic language across environments including conversational turn-taking and perspective-taking; receptive language including following directions); fine motor skills (using cursive writing, keyboarding skills); and gross motor skills (strength and coordination to identified levels. (S-43 at 49-68.)
99. The January 2020 IEP indicated that a PBSP to address crying behavior was no longer necessary because Student was doing so much less frequently by that point in the school year and Student had mastered the behavioral goal. (S-43 at 18-19.)
100. Program modifications and items of specially designed instruction in the January 2020 IEP provided for access to the AAC device across settings; prompting and modeling of verbal peer interactions; supports for auditory information; visual supports; the five-step prompt sequence (ranging from pausing to a full modeling); wait time; supports for written expression tasks; pass/fail grading; and a full time paraprofessional. (S-43 at 69-71)
101. The January 2020 IEP contained a post-secondary transition plan for Student to prepare for competitive employment following supported training, and to gain additional independent living skills. (S-43 at 32-43.)

102. The January 2020 IEP provided for speech/language, occupational, and physical therapy, social work services, assistive technology, and adaptive physical education as related services. (S-43 at 71.)
103. The January 2020 IEP provided that Student would not participate in the general education setting for reading/language arts, mathematics, and vocational education; during related services; and when participating in an adaptive special. Student's program was one of supplemental autistic and life skills support. Student's program was for supplemental autistic and life skills support. (S-43 at 74-75.)
104. The January 2020 IEP determined that Student was eligible for ESY services. (S-43 at 73.)

Other General Communication Performance

105. The District's total communication approach permitted Student to choose the mode of communication (gestures, verbalizations, or the AAC device). Student used all of these modes during the time period in question. (N.T. 38, 41, 44, 58, 69, 71, 90-91, 105, 113, 116, 124, 227, 238, 256, 457, 581-82, 586, 588, 599.)
106. Throughout the time period in question, Student did not independently communicate with peers or others in the community during school outings, and generally required prompting. (N.T. 46-47, 50, 80, 83, 87, 95-96, 106, 445, 451, 598.)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. It should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The burden of persuasion in

this case therefore rests with the Parents who filed this administrative proceeding. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible as to the facts, and the relatively few inconsistencies in the testimony may be attributed more to lack of specific recall or differing perspectives rather than on any intention to mislead. The weight accorded the evidence, however, was not equally placed. The documentary evidence in particular was critical to understanding the issues and engage in efficient fact-finding, particularly where memories were not precise. The testimony that was not fact-based was accorded limited weight since resolution of the issues required consideration of the entire record rather than on any single witness' unique perspective, and further required analysis of relevant legal standards.

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

General IDEA Principles: Substantive FAPE

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Many years ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with the procedural obligations in the Act.

The state, through its local educational agencies (LEAs), meets the obligation of providing FAPE to eligible students through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). Fairly recently, the U.S. Supreme Court observed that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). “A focus on the particular child is at the core of the IDEA.” *Id.*, ___ U.S. at ___, 137 S. Ct. at 999, 197 L.Ed.2d at 349-50 (2017)(citing *Rowley* at 206-09)(other citations omitted).

Individualization is the central consideration for purposes of the IDEA; the crucial and primary focus of a child’s IEP is to respond appropriately to identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the

law demands services are reasonable and appropriate in light of a child's unique circumstances, and not necessarily those that his or her "loving parents" might desire. *Andrew F., supra; Ridley, supra; see also Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard must be based on information "as of the time it was made." *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *see also Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same). Nonetheless, the IEP team is required to monitor the student's response to the programming that is provided, including progress toward IEP goals, in order to make appropriate revisions as may be necessary. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320, 324.

Substantive FAPE: IDEA Evaluation Requirements

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

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

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

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

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

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

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

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

20 U.S.C. § 1414(b)(2); *see also* 34 C.F.R. §§ 300.303(a), 304(b). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3). Any evaluation or reevaluation must also include a review of existing data, including that provided by the parents, in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a).

When parents disagree with an LEA’s educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. §

300.502(b). Here, the Parents obtained the private evaluation on their own and now seek reimbursement. The evaluation standards above, however, still govern the issue in this context.

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family has “a significant role in the IEP process.” *Schaffer, supra*, 546 U.S. at 53. Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). Procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E).

Full participation in the IEP process does not mean, however, that an LEA must defer to parents’ wishes. *See, e.g., Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999)(noting that IDEA “does not require school districts simply to accede to parents' demands without considering any suitable alternatives,” and that failure to agree on placement does not constitute a procedural violation of the IDEA); *see also Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D. Md. 2002)(explaining that “parents who seek public funding for their child's special education possess no automatic veto over” an LEA’s decision). If the parties are not able to reach a consensus, it is the LEA that must make a determination, with parents afforded procedural safeguards if they do not agree. *Letter to Richards*, 55 IDELR 107 (OSEP 2010); *see also* 64 Fed. Reg. 12406, 12597 (1999)(same).

General Section 504 And ADA Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which

substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

Intentional discrimination, however, requires a showing of deliberate indifference, which may be met by establishing “both (1) knowledge that a federally protected right is substantially likely to be violated ... and (2) failure to act despite that knowledge.” *S.H. v. Lower Merion School District*, 729 F.3d 248, 265 (3d Cir. 2013). Importantly, “deliberate choice, rather than negligence or bureaucratic inaction,” is necessary to establish such a claim. *Id.* at 263.

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

IDEA Statute of Limitations

The IDEA expressly provides that a party “must request an impartial due process hearing on their due process complaint within two years of the date the parent or public agency knew or should have known about the alleged action which forms the basis of the complaint.” 20 U.S.C. §

1415(f)(3)(c); see also 34 C.F.R. § 300.511(e). In other words, "[t]he IDEA statute of limitations is triggered when the [filing party] knew or should have known about the action that forms the basis of the complaint." *J.L. v. Ambridge Area School District*, 2008 U.S. Dist. LEXIS 54904, **28-29, 2008 WL 2798306, *10 (W.D. Pa. July 18, 2008). There are two exceptions to the statute of limitations, but neither was raised in this case.

Hearing officers must "make determinations, on a case by case basis, of factors affecting whether the parent 'knew or should have known' about the action that is the basis of the complaint." *J.L. v. Ambridge Area School District*, 622 F.Supp.2d 257, 266 (W.D. Pa. 2008) (quoting 71 Fed. Reg. § 46540-01 at 46706 (August 14, 2006)). This is a "highly factual inquiry." *Id.* The Third Circuit recently reaffirmed the importance of the knew or should have known date in *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 606 n. 4 (3d Cir. 2015).

The Parents' Claims

The issues shall be addressed in logical order, beginning with the scope of the claims. The remaining issues will follow, with the evaluation issue next since programming decisions must be based on evaluations. The discussion of the claims of a denial of FAPE and discrimination under Section 504 and the ADA will be presented in that order.

Temporal Scope of the Claims

The Parents' argument that the claims should encompass the start of the 2016-17 school year is based on an asserted "knew or should have known" date when they received the Private Provider's 2019 evaluation. However, this portion of their closing is rather brief and undeveloped, possibly because there are few if any facts in the record on which to base such a conclusion. In any event, the Parents had engaged the services of the Private Provider that conducted an initial evaluation in early 2017, and

its professionals participated in programming decisions for Student at that time to the point that it offered, and the Parents' requested, that District staff be trained on Student's AAC device by them. The District declined. At that point, the Parents knew, or had reason to know, that there may be concerns with the District's ability to properly implement the AAC device at the start of the 2017-18 school year and beyond. Indeed, the Parents' primary concerns with Student's educational programming and needs went unchanged throughout Student's tenure with the District. However, the Parents' Complaint was filed more than two years after the point in time that they were first on notice of those facts that form the basis of their Complaint. As such, the claims prior to March 5, 2017 must be dismissed.

District Evaluation and the Private Evaluation

The Parents seek reimbursement for the private evaluation by the Private Provider that was limited to speech/language abilities and needs. The District's RR from January 2018 was challenged at the hearing only with respect to its assessment of Student's speech/language and related assistive technology needs. Its own January 2018 RR utilized a variety of assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student, all relating to areas of suspected disability. With respect to related services, speech/language needs were among those expressly assessed using a variety of instruments. These assessments, together with observations by providers and input from the Parents, yielded formal and informal testing results that appropriately guided programmatic decisions. All of this evidence supports the conclusion that the District's January 2018 RR was sufficiently comprehensive to identify Student's special education and related service needs as required by the IDEA with respect to speech/language and assistive technology.

It is true that the IEE provided a body of additional information about speech/language needs including those related to the AAC device. However, the mere fact that the District could have conducted additional assessments or changed the focus of its recommendations is not a basis for awarding public funding of the private evaluation. The record reflects that the Parents did not question the January 2018 RR until more than a year after its completion. Moreover, the private evaluation was not shared with the District immediately, but rather was provided following the filing of the Complaint in this case. The IDEA and its implementing regulations embrace a collaborative approach to educational programming decisions, which includes a requirement for IEP team consideration of an IEE. Providing a report long after it was available to parents defeats that purpose and does not support reimbursement. *See L.M. ex rel. M.M. v. Downingtown Area School District*, 2015 U.S. Dist. LEXIS 49336 *75, 2015 WL 1725091 (E.D. Pa. 2015)(citing *M.S. v. Mullica Township Board of Education*, 485 F. Supp. 2d 555, 575 (D.N.J. 2015), *affirmed*, 263 F. App'x 264 (3d Cir. 2008), and denying reimbursement of an IEE that was not pursued as part of the collaborative IEP process). For these reasons, while the Parents were free to and did obtain an IEE at their own expense, on this record they are not entitled to funding at District expense.

Issue of Denial of FAPE

The Parents' primary focus during this proceeding has been Student's functional communication deficits. The record as a whole more than preponderantly supports a finding of a substantive denial of FAPE with respect to that area of need.

The evidence presented and most particularly the progress monitoring reports yield little information from which one can glean an understanding of how Student's functional communication skills may have improved, if at all, since the spring of 2017. However, at the outset, the District cannot be

faulted for advancing a total communication approach with Student, a methodology with which the Private Provider professionals did not disagree (N.T. 780-81) and a matter that is typically left to the discretion of the LEA. *Lachman v. Illinois Board of Education*, 852 F.2d 290, 297 (7th Cir. 1988); *J.G. v. New Hope-Solebury School District*, 323 F. Supp. 3d 716, 723 (E.D. Pa. 2018).

It was certainly appropriate for the IEP team to discuss and respond to concerns with Student's performance at school in January 2019. Still, the record establishes that Student was not truly learning to communicate functionally and effectively using any form of expressing self during the time period in question. Indeed, Student's various IEPs reflected a wholly inconsistent and ever-changing plan for Student to communicate across settings, and even across adults at school, strongly supporting the conclusion that various staff members implemented the communication aspects of Student's IEPs very diversely and at the discretion of the individual adult. While programming changes and IEP revisions can certainly be necessary when a student is not meeting expectations, the variable implementation of Student's communication-related goals and specially designed instruction could not be, and was not, overcome. Thus, contrary to Student's very real, obvious, and well-known need for reliable, consistent use of a means of communication across all environments, the approach taken here lacked cohesion and uniform structure that would promote generalization and authentic functional expression. Furthermore, throughout the time period in question, Student did not communicate with peers or others in the community independently, a skill that at Student's age is vital. When viewed in its entirety, the record wholly supports the conclusion that the District did not offer or implement programming that was reasonably calculated to yield meaningful educational benefit in the area of functional communication in light of Student's individual circumstances and based on information known to the IEP team.

Moreover, no data was compiled to show how Student would express self, something that was and is critical in this case where some goals were based on use of the AAC device. This deficiency is also evident in the progress reported on the behavior goal where no data was provided on whether and how Student would communicate needs in light of Student decreasing crying behavior. While it is apparent from the testimony that the District's teachers, related service providers, and paraprofessionals have all necessary qualifications, the lack of documented, reliable progress monitoring data cannot be overlooked. Simply stated, Student has not been provided with a sufficient educational plan for developing functional communication skills, which are a significant deficit for Student that is paramount as Student approaches adulthood. All of these flaws are fatal and amount to a clear substantive denial of FAPE.⁹

Not all of Student's programming was substantively deficient, however. Student made meaningful strides on annual goals and short-term objectives targeting other needs that, even with some inconsistency, were overall commensurate with Student's circumstances and potential in this hearing officer's estimation. The substantive denial of FAPE does not extend beyond functional communication, which again was the emphasis of the Parents throughout the hearing.

With respect to procedural FAPE, the Parents argue that the District interfered with their ability to meaningfully participate in programming decisions because it declined to provide for the evaluation by the Private Provider. The evidence, however, establishes that the District did agree to fund that evaluation, but the impediment was a lack of agreement on the terms of engagement. There was nothing improper in the terms that the

⁹ Although the Parents contend that the District caused a delay in obtaining the AAC device and that doing so compounded Student's inability to communicate, the record is preponderant that trials over time were necessary to identify the appropriate tool for Student.

District sought. While the circumstances are unfortunate, the Parents were free to, and did, obtain the evaluation they sought, and eventually provided it to the District. Their delay in doing so was not caused by anything that the District did or failed to do. There has therefore been no procedural denial of FAPE in this case.

Section 504 and ADA Discrimination

Despite the foregoing conclusion on a substantive denial of FAPE, this hearing officer cannot conclude that the District acted with deliberate indifference toward Student. Here, the evidence is simply insufficient to reflect that anyone in the District made the deliberate choice to ignore Student's documented needs and program for them ineffectively. Rather, the actions of the District here amount to nothing more than a failure to take appropriate corrective actions, rather than choosing not to do so. As such, this claim fails.

Remedies

As one remedy for the FAPE denial found above, the Parents seek compensatory education, which is an appropriate form of relief where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and then fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has also endorsed an alternate approach, sometimes described as a "make whole" remedy, where the award of compensatory education is crafted "to restore the child to the educational path he or she would have traveled" absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of*

Columbia Public Schools, 401 F.3d 516 (D.C. Cir. 2005) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014) (accepting the *Reid* Court's more equitable, discretionary, and individually tailored calculation of this remedy). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

There evidence presented in this case does not point to any specific "make whole" compensatory education award. The standard method of providing an award equal to the amount of the deprivation shall therefore be utilized.

As discussed above, this hearing officer concludes that the District denied Student FAPE on substantive grounds with respect to communication programming. The scope of the claims begin with March 2017. However, the District along with the IU were in the process of trialing devices, including the one chosen for Student, during the 2016-17 school year. It was not until the May 2017 IEP meeting that a program was developed that incorporated the device, which is also when it could be procured. Thus, logically, the starting point for the compensatory education is the beginning of the 2017-18 school year.

The Parents suggest that full days of compensatory education are warranted, which is appropriate in some cases. See *Keystone Cent. School District v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education, affirming an award of full days). Student's communication deficits certainly impacted Student throughout the day. However, the remedy must be equitable under the circumstances and, here, must also consider that Student did not use the device at home, so the total communication approach was not consistent inside and outside of the school day. On

balance, then, the compensatory education remedy shall be three hours¹⁰ for each day that Student attended school during the 2017-18 and 2018-19 school years as well as the 2019-20 school year through the date of the school closures due to the COVID-19 pandemic.

The award of compensatory education is subject to the following conditions and limitations. Student's Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product or device that furthers Student's educational and related services needs, including training for the Parents. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age twenty four (24).¹¹ The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

The District shall also be directed to reconvene the IEP team to develop a new program that contains measurable annual goals with explicit

¹⁰ See 22 Pa. Code §§ 11.1 and 11.3(a)(providing for 990 hours of instruction in a school term of 180 days at the secondary level). Each school day at the secondary level is therefore 5.5 hours, and 3 hours is approximately half of that duration.

¹¹ This time period is intended to account for unknown circumstances lying ahead including the possibility of continued and lengthy restrictions because of the COVID-19 pandemic.

progress monitoring requirements that permit all members of the IEP team to assess on an ongoing basis how Student is developing and using effective functional communication skills at school. The District members of the team may also consider whether the training offered by the Private Provider may be beneficial in ensuring that Student's AAC device is used appropriately by Student and its staff throughout the school day.

CONCLUSIONS

Student was denied FAPE on substantive grounds with respect to Student's functional communication needs for a portion of the time period in question, but not on procedural grounds. The District shall provide a specified number of hours of compensatory education, but need not reimburse the Parents for the private evaluation. The District did not act with deliberate indifference under Section 504 and the ADA.

ORDER

AND NOW, this 31st day of July, 2020, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The scope of the Parents' claims is limited to the period March 5, 2017 through the date of the school closures resulting from the COVID-19 pandemic.

2. The District denied Student FAPE for the entirety of the 2017-18 and 2018-19 schools years, and from the start of the 2019-20 school year through the date of the COVID-19 school closures.
3. Student is awarded three (3) hours of compensatory education for each day that Student attended school those years identified in ¶ 2 hereof in order to remedy the denial of FAPE. All of the conditions and limitations on that award set forth above are expressly made a part hereof as though set forth at length.
4. The District shall convene a meeting of Student's IEP team to include the Parents within fifteen calendar days of the date of this order to develop a new IEP for Student that includes, at a minimum, measurable annual goals and short term objectives for functional communication skill deficits at specified levels of expectation with explicit requirements for progress monitoring as set forth above.
5. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 22864-19-20