

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**

Open Hearing

ODR File Number:
File No. 24496-20-21

Child's Name:
M.S.

Date of Birth:
[redacted]

Parent:
[redacted]

Counsel for Parents:
Kimberly A. Caputo, Esquire
McAndrews, Mehalick, Connolly, Hulse and Ryan P.C.
30 Cassatt Avenue
Berwyn, PA 19312

Local Education Agency:
Laboratory Charter School
5901 Woodbine Avenue
Philadelphia, PA 19131

Counsel for LEA:
Alan B. Epstein, Esquire
Spector Gadon Rosen Vinci P.C.
1635 Market Street, 7th Floor
Philadelphia, PA 19103

Hearing Officer:
Cathy A. Skidmore, Esquire

Date of Decision:
April 19, 2021

INTRODUCTION AND PROCEDURAL HISTORY

The student, M.S. (hereafter Student),¹ is an early elementary school-aged student who previously attended Laboratory Charter School (School). Student is currently enrolled in a Pennsylvania school district that has identified Student as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² and having a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.³

This decision follows the Parent's filing of a Due Process Complaint against the School asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 together with the federal and state regulations implementing those statutes. The Parent contended that Student should have been identified as eligible under the IDEA and provided programming based thereon, or alternatively been provided with accommodations pursuant to Section 504; and that compensatory education was owed. The School denied the Parent's assertions and contended that no remedy was due.

Prior to convening the hearing, the School was precluded from introducing any evidence that was not contained in its response to the Parent's record requests.⁴ Following careful review of the rather abbreviated

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used beyond the cover page of this decision. All personally identifiable 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.

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61.

⁴ Hearing Officer Exhibit (HO-) 1, HO-2. The School produced approximately fifty pages of education records for Student.

record,⁵ and for all of the following reasons, the Parent's claims must be granted.

ISSUES

1. Whether the School provided Student with an appropriate educational program during the 2018-19 school year on both procedural and substantive grounds; and
2. If the School did not provide Student with an appropriate educational program during the 2018-19 school year, should Student be awarded compensatory education?

FINDINGS OF FACT

1. Student is an early elementary school-aged child currently enrolled in a Pennsylvania school district. (N.T. 77; P-10.)

Early Education History

2. In the fall of 2017, Student was provided services through an Individualized Family Service Plan/Individualized Education Program (IFSP/IEP). That IFSP/IEP followed expressions of concern with Student's speech/language skills and behavioral challenges. (P-2.)
3. The programming provided by the fall 2017 IFSP/IEP targeted deficits in social skills; compliance with adult directives; self-regulation; and fine motor skills (tripod grasp). Services identified were behavioral support including a behavior plan; a personal care assistant (PCA);

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, and School Exhibits (S-) followed by the exhibit number.

specialized instruction; and occupational therapy. By February 2018, consultative speech/language services were added; and occupational therapy (two hours/month), specialized instruction (ninety minutes/week), and behavioral support (two hours/week), and a full-time PCA were provided. Student attended a preschool program at the time. (N.T. 80, 83-84; P-2; P-3.)

4. The 2017 IFSP/IEP provided that Student was to participate with typical peers throughout the preschool day except when individual therapy was necessary or Student exhibited significant distractibility. (P-2.)

2018-19 School Year

5. Student was enrolled in the School for the 2018-19 school year as a kindergarten student. The Parent noted on the enrollment form that Student had received special education services through an IEP. (S-2.)
6. Student was enrolled in a full day kindergarten program at the School. (N.T. 34-35.)
7. An occupational therapy evaluation was conducted in August 2018. Occupational therapy services were recommended to address fine motor and visual motor weaknesses, including a need to develop a tripod grasp, and sensory processing deficits. Thirty minutes of occupational therapy per week in the natural environment was the suggested level of service. (P-4.)
8. Following completion of the occupational therapy evaluation, a School representative communicated with the Parent about the School's need to pursue authorization for behavioral health services at school, as well as the need to convene a meeting with the Parent to review evaluation reports. No meeting was held with the Parent to discuss special

education and related services to be provided to Student pending the evaluations. (N.T. 86; P-11 at 1.)

9. Student manifested difficulty with social skills, behavioral regulation, and maintaining attention to task in kindergarten. (N.T. 117.)
10. The School conducted an evaluation of Student and issued a Reevaluation Report (RR) in early September 2018. (P-5.)
11. The September 2018 RR summarized Student's early childhood and early intervention services, and noted Student's diagnosis of Oppositional Defiant Disorder (ODD) with a rule out potential diagnosis of Attention-Deficit/Hyperactivity Disorder (ADHD). (P-5 at 1-2.)
12. Parent concerns at the time of the September 2018 RR were for social skill weaknesses, aggressive and tantrum behaviors, noncompliance, a low tolerance for frustration, distractibility and impulsivity, elopement, and mood swings. (P-5 at 2, 7.)
13. Cognitive assessment for the September 2018 RR (Wechsler Preschool and Primary Scale of Intelligence – Fourth Edition (WPPSI-IV)) reflected an average-range Full Scale IQ score with some variability among the composites. Fluid reasoning was a relative strength while working memory was a relative weakness. (P-5 at 5-6.)
14. Assessment of academic achievement for the September 2018 RR (Kaufman Survey of Early Academic and Language Skills) revealed average range scores across subtests and on the global composite. (P-5 at 6-7.)
15. The September 2018 RR concluded that Student met criteria of a child with an Other Health Impairment based on manifestations of ODD; a Section 504 Plan was recommended because Student did not exhibit a need for specially designed instruction. (P-5 at 7-8.)

16. Teacher recommendations for the September 2018 RR were for behavioral support (behavioral services consultant and therapeutic support staff) and a limitation on transitions and changes to routine. (P-5 at 3.)
17. The September 2018 RR set forth a number of recommendations for a Section 504 Plan for Student: small group instruction when possible; multisensory instruction; visual cues and frequent breaks; repetition; organizational strategies; and preferential seating. Other suggestions included alternating tasks between preferred and non-preferred activities; frequent interaction and positive reinforcement; accommodations for verbal directions; a limitation on auditory distractions; notice of transitions; and a peer buddy. (P-5 at 7-8.)
18. The Parent and a School representative communicated in October 2018 about scheduling a meeting to review the evaluation reports and programming concerns. (P-11 at 3.)
19. The School did not draft or propose an IEP or accommodation plan for Student. (N.T. 38-39, 97.)
20. The School works with all kindergarten students on developing social skills, and uses restorative practices to help the children understand their behavior and teach them how to respond to challenges and feelings of frustration. (N.T. 65-68.)
21. Class sizes are small at the School. (N.T. 169.)
22. The Parent tried to arrange for behavioral health services for Student at the School in kindergarten but was not successful. However, home- and community-based services continued to work with Student on social skills, complying with adult directives, and maintaining focus and attention. (N.T. 94, 156-57, 159; P-7.)

23. Student's kindergarten teacher communicated with the Parent about Student presenting with behavioral challenges. On approximately three occasions, the Parent was asked to pick Student up from School that school year. (N.T. 99, 107.)
24. The School completed a second reevaluation of Student in late December 2018. That RR followed the Parent's concerns about the September 2018 RR. (N.T. 61-63, 168-69; P-6; S-5.)
25. Teacher input into the December 2018 RR reflected concerns with Student's behavior (tantrums and outbursts), social skills, and focus/distractibility, with the teacher "relying on [a] new PCA" for behavioral interventions. No concerns were noted for academic performance or motor and self-care skills. (P-6 at 3; S-5 at 3.)
26. On a second administration of the WPPSI-IV for the December 2018 RR, Student attained scores consistent with those in September. (P-6 at 6-8; S-5 at 6-8.)
27. Student's academic achievement was also assessed again for the December 2018 RR (Wechsler Individual Achievement Test – Third Edition). Student scored in the above average range on all reading and mathematics subtests on this instrument. (P-6 at 8; S-5 at 8.)
28. Student's emotional and behavioral functioning was assessed for the December 2018 RR using the Behavior Assessment System for Children – Third Edition rating scales. Student's Parent endorsed concerns with hyperactivity, anxiety, depression, atypicality, social withdrawal, attention problems, adaptability, and activities of daily living. The teacher did not endorse any at-risk or significant concerns on this instrument, however. (P-6 at 8-9; S-5 at 8-9.)
29. The December 2018 RR maintained the conclusion that Student had a disability but did not need specially designed instruction.

Recommendations were for a Section 504 Plan to “continue” (P-6 at 10; S-5 at 10) in addition to frequent check-ins, opportunities for sensory and calming breaks, and reminders of rules. (P-6 at 10; S-5 at 10.)

30. No meeting convened with the Parent and School representatives to discuss Student’s completed evaluations or programming. (N. 86-89, 97, 106, 147-48.)
31. At least twice in the fall of 2018, the Parent asked about the PCA for Student but was not provided with confirmation that a PCA was in place or who that person was. (N.T. 100-01, 103, 110; P-11 at 3-4.)
32. In March 2019, a School representative communicated with the Parent and mentioned a future conversation about a possible PCA for Student. (P-11 at 5.)
33. Student earned all A grades for the kindergarten school year. (S-6.)
34. While Student was enrolled at the School, the Parent was not aware of any formal procedures available to her to challenge its programming for Student. (N.T. 164-65.)

2019-20 School Year to Present

35. Student enrolled in a Pennsylvania school district in the fall of 2019 when Student was in first grade. (N.T. 77.)
36. The Pennsylvania school district evaluated Student for special education services due to concerns with Student’s behaviors. (P-10 at 8.)
37. The Pennsylvania school district identified Student as eligible for special education under the category of Autism. (P-10.)
38. As of December 2019, Student was performing at or above grade level expectations in the areas of reading, writing, and mathematics.

Student did not have occupational therapy needs at the time; although Student used an immature pencil grasp, Student's fine motor and visual motor skills were age-appropriate. (P-10.)

39. Student's IEP developed in December 2019 by the Pennsylvania school district addressed needs in behavior (compliance and elopement); social skills/pragmatic language; and speech/language (articulation). Adult support was to be provided throughout the school day and Student reportedly had a PCA to assist with transitions and provide redirection as needed throughout the school day. Student's program was one of itinerant learning support, with Student participating in regular education throughout the school day except for weekly speech/language therapy sessions of thirty minutes. (P-9; P-10.)
40. The Parent consented to the Pennsylvania school district's proposal of special education services for Student. (N.T. 78.)
41. Student has been working on developing a tripod grasp since preschool but has not yet mastered that skill. (N.T. 81-83, 134-35.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

The burden of proof is generally considered to consist of two elements: the burden of production and the burden of persuasion. Although the burden of production may vary, the burden of persuasion in this administrative proceeding, as in most areas of the law, 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 must accordingly rest with the Parent who filed the Complaint. 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 assume the role of fact-finders and, thus, bear a 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 both of the witnesses who testified to be credible; that is, each provided an account consistent with her recollection and without any effort to deceive or embellish the facts. However, significant to this case is the understandable lapse in vivid memory of events from several years prior, in addition to the unavailability of School professionals who worked directly with Student during the 2018-19 school year. The weight accorded the evidence was dependent in part on what was (or was not) presented in the documentary evidence.

The findings of fact were made as necessary to resolve the issues; therefore, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of each witness and the content of all admitted exhibits were thoroughly considered, as were the parties’ opening and 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. Nearly forty 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). “A focus on the particular child is at the core of the IDEA.” *Andrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017)(citing *Rowley* at 206-09)(other citations omitted).

An LEA is not obligated to “provide ‘the optimal level of services.’ ” *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. *Andrew F., supra; Ridley, supra; Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Substantive FAPE: IDEA Evaluation Requirements

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

Certain procedural requirements are set forth in the IDEA and its implementing regulations that are designed to ensure that all of 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). IDEA eligibility following an evaluation is determined by a team that includes the parent(s). 20 U.S.C. § 1414(b)(4); 34 C.F.R. § 300.306(a); 22 Pa. Code § 711.24.

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). In other words, procedural deficiencies may warrant a remedy if they impeded parental participation to a substantial degree. 20 U.S.C. § 1415(f)(3)(E).

Section 504 Principles

In the context of education, Section 504 and its implementing regulations require that LEAs “provide a free appropriate public education to each qualified handicapped person in its jurisdiction.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a). Under Section 504, “an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of” the related subsections of that chapter, §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b).

The applicable federal regulations implementing Section 504 require that an evaluation shall be conducted “before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.” 34 C.F.R. § 104.35; 22 Pa. Code § 711.3. Additionally, a parent must be given an opportunity to meet with LEA representatives to discuss any evaluations and accommodations, and be notified of the procedural safeguards that attach. 22 Pa. Code §§ 15.5, 15.6.

Transition from Preschool to School-Age Programming

Students who transition from preschool to school-age programming are entitled to continued provision of the services set forth in an existing IEP while the new LEA undertakes any steps to which the parties have agreed. Critically, an LEA may not make any decisions on placement without convening a meeting that includes the parent(s), and any placement must be based upon the child's IEP. 20 U.S.C. § 1412(a)(5); 34 C.F.R. §§ 300.116, 300.327.⁶ As importantly, an LEA may not change a child's placement without providing specific notice to the parent(s). 20 U.S.C. § 1415(c); 34 C.F.R. § 300.503.

The Pennsylvania Department of Education has issued extensive guidance for LEAs to which a now-school-age child is transitioning:

All children currently eligible for special education in Preschool Early Intervention and registered with the school district or charter school remain eligible for special education in their school district or charter school unless the school district, charter school, or Preschool Early Intervention program completes a reevaluation that determines the child is no longer eligible for special education. All eligible students must have an IEP in place by the beginning of the school year.

Basic Education Circular, Early Intervention Transition: Preschool Programs to School-Aged Programs, July 1, 2003 (last reviewed October 19, 2009), Attachment 4.⁷ The parent(s) and school district or charter school may agree to implement the early intervention IEP,

⁶ Citations to specific sections of the IDEA and its implementing regulations throughout this section of the decision are not exhaustive; indeed, the IDEA as a whole contemplates, if not mandates, parental participation and collaboration throughout its text.

⁷ Available at <https://www.education.pa.gov/Policy-Funding/BECS/Purdons/Pages/EITransitionPreschool.aspx> (last visited April 16, 2021).

or adopt it with revisions determined by the team. *Id.* “[T]he Pennsylvania Department of Education is responsible for ‘the delivery of early intervention services for all eligible young children between three years of age and the age of beginners,’ responsibility which then merges with the Commonwealth’s duty to provide a FAPE to school-aged children. *Jalen Z. v. School District of Philadelphia*, 104 F. Supp. 3d 660, 680-81 (E.D. Pa. 2015)(citations omitted). The new LEA is that to which the now-school-age child enrolls.

Ordinarily, when a dispute arises between parents and an LEA on the services to which a child is entitled, the last-agreed upon IEP serves as the pendent program and placement until that dispute is fully resolved. 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a). This general rule also applies for a child transitioning to school-aged programming from preschool early intervention services. *See generally M.R. v. Ridley School District*, 744 F.3d 112, 124 (3d Cir. 2014).

The Parent’s Claims

The Parent first contends that Student was not provided with an appropriate plan for transitioning to the School, and that Student’s then-existing IEP from early intervention should have been implemented at the start of the 2018-19 school year. The record in this case, scant though it is, reveals that despite Student’s eligibility under the IDEA upon transition to school-aged programming, the School did not implement Student’s existing IFSP/IEP. Instead, the School proceeded with an evaluation. There is no indication that the School sought, let alone obtained, the Parent’s consent to proceed in this fashion. The absence of documentation in this case supports the persuasive testimony that no such notice was requested, nor did any discussion occur to consider options for Student while that evaluation was completed. As such, the PDE guidance for LEAs for implementation of the

existing early intervention IEP at the start of the 2018-19 school year was wholly disregarded, and the Parent was denied the opportunity to participate in this decision-making.

It is of no moment in this case that the Parent failed to file a Due Process Complaint in the fall of 2018 and thereby invoke pendency protections. The Parent's testimony on her lack of knowledge of available procedures was also persuasive, and further was not contradicted by any other evidence in the record. In any event, even beyond the pendency provisions, the evidence is preponderant that Student was eligible for special education at the start of the 2018-19 school year, yet no such services were implemented by the School. These circumstances amount to a denial of FAPE on both procedural and substantive grounds.

The School did complete its evaluation of Student and issued an RR in September 2018. That RR met the requisite substantive criteria for an evaluation under the IDEA and Section 504, making specific recommendations for a number of instructional strategies and related accommodations to address behavior and focus/attention through a Section 504 Plan. Once again, however, no meeting was held with the Parent to review and discuss its findings, nor was a plan developed. The evidence is preponderant that Student was not afforded the benefit of individualized accommodations and related services for Student's disability-related needs in the fall of 2018 despite the recommendations [in the] September 2018 RR. Furthermore, the Parent was still denied the opportunity to participate in decisions about Student's program.

The December 2018 RR did not result in any change to Student's eligibility determination, nor to the recommended Section 504 Plan. The reference in the December 2018 RR to a continuation of such a Plan is both puzzling and disconcerting, as is reference to the teacher's mention of reliance on a PCA that had yet to be arranged. Even assuming that the

School correctly determined that Student was not eligible under the IDEA,⁸ Student still had a need for individualized accommodations. In short, the events surrounding the December 2018 RR served only to perpetuate the procedural and substantive FAPE denial for Student from the start of the school year.

It is a testament to Student that Student attained excellent grades and was successful in that domain despite some behavioral challenges noted by the teacher. Were academics the sole area that educational programming is designed to address, the School's contention that no denial of FAPE occurred might merit consideration. However, as has been long recognized, education is much more than academics; an appropriate program encompasses "all relevant domains under the IDEA, including behavioral, social, and emotional." *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474, 483 (M.D. Pa. 2010)(citation omitted). The denial of FAPE is clear and warrants relief.

Compensatory Education

Compensatory education may be an appropriate remedy where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has also endorsed an alternate approach, sometimes described as a "make whole" remedy, where the award of compensatory education is

⁸ The limited record in this case prevents a full analysis of IDEA eligibility beyond the fall of 2018.

crafted “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

There was no evidence presented in this case that would guide or support a “make whole” compensatory education award. The standard method of providing an award for the period of the deprivation shall therefore be applied to craft the remedy.

The Parent suggests that an award of full days of compensatory education is warranted, which can be appropriate in some cases. *See Keystone Central School District v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (M.D. Pa. 2006)(explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education, affirming an award of full days). However, the remedy must be equitable under the circumstances and, here, this hearing officer does not conclude that the evidence establishes that Student was denied FAPE across the school day. As the School observes, Student’s academic performance was extremely strong during the school year in question. Moreover, that trend continued through Student’s enrollment in the Pennsylvania school district.

Student was entitled to the services in the 2017 IFSP/IEP until the School could complete its evaluation and, together with the Parent, determine the program to be provided for kindergarten. Although the School’s initial evaluation was finalized in September 2018, this hearing officer concludes that the failure to hold a meeting with the Parent and discuss the services the School would and would not provide constitutes a

material impediment to her ability to participate meaningfully, and precludes a conclusion that the denial of FAPE ended with the September 2018 RR. Student shall accordingly be awarded compensatory education in the form of the services provided as of February 2018 beyond September 2018 as specified below. There is also no basis to exclude any reasonable rectification period in this case.

By December 2018, the teacher continued to report concerns that would have been effectively addressed by many of the same services. At that point, however, occupational therapy was no longer recommended, nor was specially designed instruction suggested as a continuing need. Rather, by that time, Student's needs unquestionably were solely behavioral in nature. Had a team convened to discuss the December 2018 RR and make appropriate revisions, any changes to the program would have almost certainly been implemented by the start of the second semester, allowing for a holiday break. Thus, the compensatory education award for the second semester of the 2018-19 school year shall not reflect occupational therapy services or specialized instruction.

Student shall be awarded thirty minutes of compensatory education for missed weekly occupational therapy services for a period of eighteen weeks⁹ as recommended by the August 2018 occupational therapy evaluation¹⁰ for a total of nine hours. Student will also be awarded for ninety minutes of compensatory education for missed weekly specialized instruction for the same period of eighteen weeks, for a total twenty seven hours. This portion of the remedy is limited to the first half of the 2018-19 school year as noted above.

⁹ Public school terms generally require 180 days of instruction, or approximately thirty six weeks for the entire school year. 22 Pa. Code § 11.1.

¹⁰ The level and form of occupational therapy services appears to have varied over the course of the 2017-18 school year. (P-2.) The School's August 2018 recommendation is deemed to be more current for purposes of the remedy.

Student shall also be awarded two hours per week of compensatory education for the lack of behavioral support for the entire 2018-19 school year, as was provided as of February 2018 and remained a need throughout the school term. In addition, this latter remedy shall be supplemented to provide relief for the absence of a PCA, balancing Student's academic success with the noted behavioral challenges that were apparent with transitions during the school day. Accordingly, this element of the award shall be increased to a total of three hours per week for the entire 2018-19 school year, for a total of one hundred eight hours.

The total award of compensatory education is, thus, one hundred forty four (144) hours. The award of compensatory education is subject to the following conditions and limitations. Student's Parent may decide how the hours of compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's educational and related services needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns twelve (12) years of age. The compensatory services shall be provided by appropriately qualified professionals selected by the Parent. The cost to the School of providing the awarded hours of compensatory services shall be limited to the average market rate for private providers of those services in the county where the School is located.

CONCLUSIONS OF LAW

1. The School denied Student FAPE during the 2017-18 school year on procedural and substantive grounds under the IDEA and Section 504.
2. Student is entitled to an equitable compensatory education remedy for the denial of FAPE.

ORDER

AND NOW, this 19th day of April, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The School denied Student FAPE during the 2017-18 school year on procedural and substantive grounds.
2. Student is awarded a total of one hundred forty four (144) hours of compensatory education, subject to the conditions set above including the determination of such services by the Parent and the expiration of the availability of those hours when Student reaches the age of twelve (12).
3. 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**.

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 24496-20-21