

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:

26289-21-22

Child's Name:

A.W.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent:

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Hearing Officer:

Charles W. Jelley Esq.

Date of Decision:

1/30/2023

STATEMENT OF THE DISPUTE

The Parent filed the pending Due Process Hearing Complaint alleging failures under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act (504).¹ The Parents contend that under either Act, the District failed to locate, identify, evaluate, and educate the Student in a timely fashion. Parents seek multiple forms of relief, including an award of retrospective and hour-for-hour prospective compensatory education until the District offers a free appropriate public education (FAPE). The District seeks a declaratory ruling that it procedurally and substantively complied with each Act during each school year. Applying the preponderance of evidence standard, I now find the Parents have established, and the administrative record supports a Decision in their favor in part and against the District.

STATEMENT OF THE ISSUES

Whether the District promptly identified the Student's need for special education support and services? If not, what, if any, appropriate relief is necessary?

Whether the District provided the Student with a Free, Appropriate Public Education? If not, is the Student entitled to a compensatory education award?

¹ All references to the Student and the family are confidential. Certain portions of this Decision will be redacted to protect the Student's privacy. The Parent's claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). The Parent also makes denial of education claims under Section 504 of the Rehabilitation Act. References to the record throughout this decision will be to the Notes of Testimony (NT. p.), Parent Exhibits (P- p.) followed by the exhibit number. Finally, Hearing Officer Exhibits will be marked as (HO-) followed by the exhibit number.

Whether appropriate relief includes, an Order for an appropriate educational program moving forward is warranted. If yes, what relief is appropriate? (NT p.26).

At the close of the hearing, the Hearing Officer directed the submission of written closing arguments, and the Parties motioned to extend the decision due date. The motion to extend the decision due date was granted.

THE YEAR IN [redacted] EXPERIENCE [2019-2020 School Year]

1. The Student missed several 16.6 days during the 2019-20 [redacted] school year. The teacher commented that the Student was a quiet [redacted] student who often did not actively participate in interventions to improve [redacted] skills. (P-5 p.2).
2. A review of the [2019-2020] report card indicated strengths in reciting the alphabet, identifying print concepts, and color identification and below-average skills in letter and number identification, letter sound, and rote counting. (P-5 p.2).
3. The Student struggled in [redacted] during the online class at the District's Virtual Learning Academy ("VLA"). (P-5, NT p37, pp.41-42, p.103, pp.644-647, pp.653-654, 704).
4. The Mother found it challenging to understand the Student's speech and articulation at home. The Mother also reports that the speech and language difficulties continued into [the 2020-2021 school year] and have improved somewhat but are still noticeable. (NT pp.649-652).
5. Mother next reports that beginning in [the 2019-2020 school year] into the present, the Student exhibited organizational, social, and academic weaknesses (NT pp.649-655). At home, the Student is anxious and often reports unconfirmed physical ailments. (NT pp.655-657).

**THE [redacted] EXPERIENCE AND THE EVALUATION [2020-2021
School Year]**

6. In October 2020, [redacted], the Parent asked, and the District agreed to complete a comprehensive evaluation. The evaluation included input from the [last year's] teacher, the Mother, and the [current] teacher. The psychologist reported that the Student did not know how to read or count. However, the October regular education summary of performance indicates satisfactory performance. (P-5 p.2).
7. On the Wechsler Intelligence Scale for Children Fifth Edition (WISC V), a comprehensive intelligence assessment, the Student earned a full-scale intelligence quotient (IQ) of 79, in the Very Low range. The Student's standard scores (SS) ranged from a low of 82 in Working Memory to a high of 98 for processing speed. The evaluation report states a SS of 90 to 109 indicates an average IQ. (P-5 p.3).
8. On the Wechsler Individual Achievement Test Third-Edition (WIAT-III), the Student earned the following scores: an Early Reading Skills SS of 56 at the 0.2 percentile; a Math Problem Solving SS of 78 at the 7th percentile; an Alphabet Writing Fluency SS of 60 at 0.4 percentile; a Numerical Operations SS of 75 at the 5th percentile, and Spelling SS of 60 at the 0.4 percentile. (P-5 p.4). Scores between 85-115 fall in the "Average" range, while scores from 55-69 are in the "Low" range, and scores from 70 to 84 are in the "Below Average" range. (P-5 p.4). The psychologist did not assess social, emotional, or executive functioning. (P- 5 p.5).
9. Based on the two assessments, the psychologist concluded that the Student had significant delays in early academic skills related to age and grade level standards. The psychologist concluded that the Student testing profile indicated a severe discrepancy between

intellectual ability and achievement. (P-5 p.9). Based on the single intelligence and achievement scores, the psychologist concluded that the Student had a specific learning disability. The testing discovered delayed early literacy and math skills relative to age, grade level standards, and intellectual development. (P-5 p.6).

THE STUDENT'S FIRST IEP

10. On January 2021, the psychologist administered the Aimsweb Plus assessment. The IEP present levels state the Student earned a score in the 1st percentile for Naming Fluency. On the Phoneme Segmentation probe, the Student identified zero (0) phonemes and earned a score at the 2nd percentile. The Student's Letter Word Sound Fluency was at the 1st percentile, and the Nonsense Word Fluency score was at the 3rd percentile. The Student did not demonstrate letter sound identification. (P-7 p.7).
11. Due to the pandemic, when school started for [the 2020-2021 school year], the Parents were allowed to select virtual or in-person education at the elementary school. The Parents selected virtual learning. (P.5 p.1).
12. On or about February 2, 2021, the Parties met to design an individual education program (IEP) (P-7).
13. The present levels repeated the information in the evaluation report. (P-5 pp.5-7).
14. The IEP included a Letter Naming goal, an Initial Sound goal, a Phoneme Segmentation goal, a Quantify Difference Fluency goal, and an Early Numeracy Goal. (P-7 pp 21-23).
15. The IEP included one form of specially designed instruction offering modified assignments and assessments in regular education. The IEP did not include related services. The initial IEP notes the Student was not eligible for extended school-year services (ESY). (P-7 p.25).

16. The IEP described a need for replacement instruction in reading and math that strongly outweighed the benefit the Student would derive from participation in regular classroom instruction, even with substantial modification of the general curriculum and with adapted instruction, instructional grouping, texts, materials, equipment, and assessments. The needed replacement instruction was provided in the special education classroom during reading (60 minutes daily) and math (60 minutes daily) instruction in the regular classroom. (P-7 p.27).
17. The IEP states that the replacement instruction will require direct, explicit teaching of skills that are not within the scope of the grade-level curriculum. The team further concluded that modifying the general curriculum to reduce or eliminate grade level outcomes, together with instruction provided by special education or other staff, provided through technology-assisted learning, would not allow the Student to learn in the regular classroom. The team found that the simultaneous delivery of unrelated parallel instruction would be mutually distracting and deny the Student any meaningful interaction with her peers. The team finally decided that participating in regular education instruction and reading and math activities was inappropriate. (P-7 p.28).
18. The Student was scheduled to receive Supplemental Special Education support for more than 20 percent of the school day and less than 80 percent for two hours daily. (P-7 30).

THE REVISED IEP AND THE INDEPENDENT EVALUATION

19. On February 4, 2021, the Parents' counsel requested an independent educational evaluation. (P-8).
20. On February 5, 2021, the District issued a second invitation to participate in an IEP meeting. (P-8).

21. The IEP team met on February 10, 2021. The IEP reflects the Parents' choice of the Google Live learning pathway instead of attending brick-and-mortar school for in-person instruction. The District ultimately agreed to support the parents' choice for remote learning due to the COVID-19 pandemic (P-10 p.2).
22. On February 10, 2021, the District issued a Notice of Recommended Educational Placement (NOREP). The NOREP states the Student started the school year with five days a week of Virtual Learning Academy (VLA) instruction instead of real-time instruction via Google Live. (P-11 p.2).
23. On or about February 19, 2021, the Parents rejected the IEP and the NOREP. (P-11 p.5). After several back-and-forth emails, the Mother acknowledged on March 19, 2021, that she misunderstood the NOREP. The Mother then returned the NOREP and agreed that the Student should receive "Supplemental Learning Support through Google Live (P11 p.14).
24. Throughout March 2021, the Parents exchanged multiple emails with the Director of Special Education that the Student had difficulties sign-into the Google Live instruction. (P-16, 13, 14, 15, 16).

THE SPEECH EVALUATION

25. On or about June 7, 2021, the Student participated in an Independent Educational Speech and Language Evaluation. The Speech and Language examiner administered the following test: TAPS-4: A Language Processing Skills Assessment Clinical Evaluation of Language Fundamentals-Fifth Edition, (CELF-5) Clinical Evaluation of Language Fundamentals-Fifth Edition, (CELF-5) – Pragmatic Profile Clinical Evaluation of Language Fundamentals-Fifth Edition, (CELF-5)-Observational Rating Scale Goldman-Fristoe Test of Articulation-Third

Edition, (GFTA-3) Oral Motor Assessment Classroom Observation Language sample. (P-17).

26. The summary of the TAPS-4 provides that The Student's Scaled Scores on all subtests fell well within the well Below Average or Low Average. Consequently, the Student's Indexes also fell well within the Below Average range. Based on The Student's performance on the TAPS-4, The Student presents with language processing deficits. (P-17 p.8).
27. On the Clinical Evaluation of Language Fundamentals-Fifth Edition, (CELF-5). The Student's Scaled Scores on each subtest fell within the Average or Below Average ranges. The Student scored within the Below Average ranges on all Composite Language Scores and Index Scores. The Student earned an Average score on the Receptive Language Index. On the Understanding Spoken Paragraphs subtest, a direct measure of listening comprehension, the Student received a Below Average Scaled Score of seven (7). (P-17 pp. 16-18).
28. On the Goldman-Fristoe Test of Articulation-3 (GFTA), the Student's performance fell within the Average for the repetitive production of single syllables for age-based norms. The Student's production of the multisyllabic word was nearly 1 Standard Deviation below expectation. The Student presents with phonological processing errors. A phonological processing error is one kind of speech disorder in which there is difficulty organizing the patterns of sounds or phonemes. (P-17 pp. 16-18).
29. The private examiner concluded that based on the IDEA, the Student meets the eligibility requirements for Speech or Language Impairment. A Speech or Language Impairment is defined in IDEA as "a communication disorder, such as stuttering, impaired articulation, a language impairment or a voice impairment, that adversely affects a

child's educational performance" (34 CFR §300.8 (a)). (P-17 p.24). The examiner concluded that the Student presented with a Language Processing Disorder, Specific Language Impairment, Executive Function Disorder, and a Speech Sound Disorder Language-Based Learning Disability. (P-17 pp.24-25).

30. The report includes 12 recommendations, six (6) suggested goals, and nine (9) forms of specially designed instruction. (P-17 pp. 25-34).

THE INDEPENDENT PSYCHOLOGICAL EVALUATION

31. On July 25, 2023, an independent psychologist completed a comprehensive neuropsychological evaluation. The evaluation included the following measures: Differential Ability Second Edition (DAS-II), Comprehensive Assessment of Spoken Language-2 (CASL-2), the Expressive Vocabulary Test (EVT-3), the Comprehensive Test of Phonological Processing Second Edition (CTOPP-2), the Kaufman Test of Achievement Third Edition (KTEA-3) and the Behavioral Assessment System for Children Third Edition (BASC-III). (P-18).
32. On the DAS-II, the Student exhibited average verbal skills (Verbal SS = 99), average to low average nonverbal reasoning functions (Nonverbal Reasoning SS = 90), and low average spatial functions (Spatial SS = 86). Her working memory (Working Memory SS = 51) was very low, whereas overall processing speed skills were within the average range (Processing Speed SS = 97). (P-17 p.6).
33. On a subtest of the CASL-2, the Student exhibited low-average skills regarding grammar, sentence construction, and overall verbal organization skills. (P-17 p.6).
34. . The Student scored in the low range on a KTEA-3 assessment of Oral Expression. The KTEA-3 results note primary weaknesses in auditory working memory, retrieval, organization of thoughts, and

grammar/understanding parts of speech were documented. (P-17 p.7).

35. On the Kauffman Test of Educational Achievement and the Comprehensive Test of Phonological Processes –2. The Student's reading comprehension was below age and grade expectations. The examiner noted delays in letter/word recognition, phonological processing, visual/orthographic retrieval, and auditory working memory impeded performance. (P-18 pp.10-12).
36. The CTOPP-2 identified significant weaknesses concerning phonological awareness, phonological working memory, phonological memory, phonological awareness, and rapid symbol naming. (P-18 pp.10-12).
37. On the Mathematic Computation subtest, the Student received a low average score on a math reasoning task involving visual stimulus pictures and verbally mediated responses (Math Concepts & Applications). The Student struggled with number concepts, time/money concepts, and measurement. (P-18 pp.10-12).
38. The Student scored within the low range compared to same-aged peers on Spelling. The scores represent difficulties with encoding/sound-symbol correspondence and retrieving high-frequency spelling patterns. The Student exhibited borderline skills when asked to write sentences, partial phrases, and an essay on the KTEA-3 Written Expression subtests. The examiner reports the Student could not write or spell their last name, sometimes reversed letters when writing, and could not write words or sentences. (P-18 pp.10-12).
39. On the BASC-3, the Student's Total Composite was typical across both teacher forms. One Parent's Total Score was typical, and the other was mildly elevated. When both parent forms were reviewed, concerns emerged at home regarding organizing, prioritizing, and

activating work, managing frustration, modulating emotions, utilizing working memory, and activating recall. The Parents' BASC-3 forms were unremarkable. Like the Parents, One teacher's form was unremarkable, while the second teacher reported "at risk" level concerns regarding social/coping skills. (P-18 p.11).

THE INDEPENDENT OCCUPATIONAL EVALUATION

40. An independent occupational therapist issued a report on or about August 1, 2021. The report describes the Student's sensory-motor performance, sensory processing abilities, gross and fine motor skills, and visual-spatial abilities relating to functional skills and activities across the school day. The Wide Range Assessment of Visual Motor Abilities (WRAVMA) and the M-FUN Visual-Motor Scale were administered to assess gross and fine motor skills, visual-motor, and visual-spatial abilities. The Student's performance on the WRAVMA and M-FUN Visual Motor Scale indicates Visual-Motor and Visual-Spatial deficits in the Low range of performance and Below Average range of performance, respectively. The M-FUN participation checklists identified motor deficits in the Low range of performance and Below Average range of performance. The Student's score on the M-FUN Home Checklist falls in the Below Average range. The Student's score on the Test Observation Checklist fell in the Far Below Average score range. The Student presents with Fine Manual Control and Manual Dexterity in the Below Average range of performance.
41. The report included multiple recommendations like teaching handwriting explicitly, modifying assignments to support task completion, and shortening assignments. The OT report notes the Student needs improved strength, stability, balance, and coordination to improve sensory processing abilities, executive functioning, visual tracking, and visual motor abilities. The report states that the Student

will require direct intervention, adaptive/supportive seating, and positioning for sustained attention and endurance for learning. The examiner recommended that the team consider a period of intensive Occupational Therapy intervention - up to 40 weeks - at least three (3) times per week for 45 minutes each session. The examiner also recommended direct, weekly consultation with classroom teachers and the educational team, including Parents, for at least 60 minutes and up to 120 minutes per month. (P-19).

THE OFFER OF EXTENDED SCHOOL SERVICES

42. On April 19, 2021, the District determined the Student was eligible for summer 2021 Extended School Year (ESY) programming. The ESY determination states that even with appropriate data collection and current progress monitoring before and after extended breaks/holidays, the Student displayed evidence of reverting or decreased cognitive ability in reading and math. The ESY IEP included goal statements for quantity total, phoneme segmentation, quantity differences, initial sounds, and letter naming Fluency. P-25 pp.41-43).
43. On August 19, 2021, the District invited the Parents to an IEP meeting. The invitation indicated that the team would "Review of Independent Evaluation; revise IEP as necessary." (P-20 p.2).
44. On August 30, 2021, the IEP team met and revised to reflect a return to in-person instruction. (P-25). The team did not agree to a change from online to in-person learning. *Id.*
45. On October 29, 2021, the IEP team met, and the Parent agreed to the following IEP changes. The IEP now included a new form of specially-designed instruction call for "Preferential setting in regular education classrooms." The team added Word Reading Fluency (WRF), Math Facts Fluency - 1 Digit, and Math Fact Fluency - Tens (MFF-T) goal statements. A goal for Speech and Language and Occupational

Therapy was also added. (P-25 p.25). The team did not discuss the independent psychological report. *Id.*

46. The October IEP included multiple goals targeting Word Reading Fluency (WRF), Math Facts Fluency - 1 Digit (MFF-1D), Math Fact Fluency - Tens (MFF-T), Letter Naming Fluency assessment, Initial Sound assessments, Quantity Difference Fluency, Phoneme Segmentation, and Quantity Total Fluency assessments. All goal statements were based on AimswebPlus probes. The IEP included Speech and Language therapy. The IEP notes the Speech therapist will meet with the Student one (1) time(s) per 6-day cycle for 30 minutes/session. P-25 p.39). The OT meet with the Student 28 time(s) per year for 30 minutes/session 28 sessions/IEP year. (P-25 p.39-40).
47. The IEP included one form of specially designed instruction for modified assignments and assessments in the regular education classroom. The OT was scheduled to meet with the Student 28 time(s) per year for 30 minutes/session 28 sessions a school year. (P-25 p.39-40).

THE NOVEMBER 2021 IEP REVISIONS

48. On or About November 2, 2021, the IEP team met and added an OT Goal statement for the 2021-2022 school year. (P-25, p.10). The record is unclear if the OT was present at the IEP meeting. The IEP notes the OT and the Speech therapist did attend the October 29, 2021, IEP meeting. Following the private evaluation template, the OT worked on handwriting instruction. Neither the IEP nor the record states how the team considered the private OT report or rejected the private OT recommendations. The IEP team allocated occupational therapy services for 28 sessions per IEP year in 30-minute increments. The IEP notes the number of sessions would stay the

same until the District completes the OT assessment conducted by the school-based occupational therapist. The District never completed the OT assessment. (P-25).

49. The IEP states that as of November 2, 2021, the IEP team agreed with the results of speech IEE indicating that the Student made several substitutions. The IEP stated the Student would be seen for school-based speech and language therapy for 30 minutes 1 time per 6-day cycle until updated articulation assessments were completed. The IEP does not state how the team calculated the minutes or sessions. (P-25).
50. The November 2021 revision added one new form of specially-designed instruction. The addition incorporated the use of multisensory-based techniques and strategies to be monitored by the occupational therapist. The new form of specially-designed instruction did not include a progress monitoring schedule or a rubric to determine progress. (P-25 p.39).
51. The October and November 2021 Aimsweb data showed little to no change over the baseline. (P-25 pp.25-33).
52. On November 2, 2021, the District issued a NOREP seeking permission to add speech and OT services. After several back-and-forth emails, the Parent signed the NOREP on or about January 10, 2022. The returned NOREP noted that the Parents did not believe the IEP was adequate. (P-27 p.2).

THE FEBRUARY 2022 IEP MEETING

53. On or about February 9, 2022, the IEP team met to develop an IEP for the second half of [redacted]grade and into the [2022-2023 school] year. The present levels include statements that the Student was earning passing grades in all subjects. The present reading levels next state the Student was able to read nine (9) words with an accuracy of

47%. When using winter normative data, a score of 9 places the Student at the 6th percentile, at the first-grade level. In Math Fact Fluency, the Student could answer ten (10) correctly with an accuracy of 71%. Using winter normative data, a score of 10 places the Student at the 18th percentile, at the 1st-grade level. In Math Fact Fluency – Tens (MFF-T), using the AimswebPlus probe, the Student could answer 0 correctly with an accuracy of 0%. A score of 0 places the Student at the 8th percentile, at the first-grade level, when using winter normative data. (P-25 pp.8-12).

54. As of February 8, 2022, the Student was absent for 21 out of 100 school days for the 2021-2022 school year. (P-25 p.12).
55. The February 9, 2022, IEP included goal statements for Word Reading Fluency, Math Fact Fluency one digit, Math Fact Fluency Tens, and Speech and Language articulation while in speech class, along with one OT letter production and production goal of writing a legible sentence. (P-30 p.30).
56. The specially designed instruction listed modified assignments and assessments and preferential seating as specially-designed instruction. The team deleted the OT multisensory-based techniques and strategies SDI. (P-30 p.32).
57. The February IEP team concluded the Student was eligible for ten days of extended school-year services in June and ten days in August 2022. (P-30 pp.34-36).
58. Like the previous IEP, the Student was scheduled to receive two hours a day of replacement instruction in reading or math. (P-38 p.40).

GENERAL LEGAL PRINIPLES

BURDEN OF PROOF AND WITNESS CREDIBILITY

Generally, the burden of proof consists of two elements: the burden of production and the burden of persuasion. In special education due process

hearings, the burden of persuasion lies with the party seeking relief. The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. In this case, the Parents are the party seeking relief and must bear the burden of persuasion.²

During a due process hearing, the hearing officer makes "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses."³ Explicit credibility determinations give courts the information that they need in the event of a judicial review. While no one-factor controls, a combination of factors causes me to pause and comment on particular testimony.⁴

On multiple instances, the District's witnesses' testimony was somewhat inconsistent when contrasted with the positions taken by the witnesses at other times in the written reevaluation reports, emails, letters, and IEPs. At other times the witnesses' injected retrospective information that was not shared during meetings. At other times certain witnesses were overly focused on shifting the Student's disability-related circumstances onto the family's plate. Certain witnesses would shift topics, this behavior, on both sides. The tendency to shift topics affected the degree of frank openness otherwise expected from a witness. Based on my observations and recollection, the testimony of certain witnesses, at times, on direct was delivered in a rapid, somewhat preplanned fashion. On the other hand, when

² *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

³ *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).

⁴ A fact finder's determination of witness credibility was based on many factors. Clearly, the substance of the testimony, the amount of detail and the accuracy of recall of past events affect the credibility determination. Whether the witness contradicts him or herself or is contradicted by the testimony of other witnesses can play a part in the credibility determination. When the testimony is delivered in a persuasive fashion factors like body language, eye contact, and when the responses are direct or appear to be evasive, unresponsive or incomplete are important in determining persuasiveness. *Id.*

the opposing party proffered questions, I noticed multiple hesitations or a reluctance to be candid on cross. Therefore, I now find the testimony of several District and Parent witnesses was not otherwise clear, convincing, or cogent.

Although the teachers worked with the Student, based on their lack of familiarity with the IDEA and Section 504 eligibility standards and their otherwise incomplete responses, I will give their testimony less weight on suspicion of the need to refer the Student for a timely evaluation.

Sometimes I found some of the testimony either cold or not responsive to the call of the question asked.

On the Parent's side, the Student's independent speech evaluator's testimony about her conclusions was cogent. The testimony explained the assessment tools' educational significance in light of her direct observations. Her testimony about the assessment results explained the meaning of the data and provided a working man-like basis for each recommendation. At other times, the independent speech examiner's testimony went beyond the reason for the referral; therefore, her testimony about what staff should provide the recommended specially designed was not helpful as the case law delegates these decisions to the District. Therefore, I will give this portion of her testimony little to no weight.

The psychological IEE testing cleared up the pending eligibility questions left open in the District's evaluation. The IEE explained the basis of the learning disability eligibility, the Student's overall weakness, and the concomitant need for specially designed instruction. The IEE report included a variety of assessments that explored all areas of suspected disability. The IDEA eligibility topic and the conjoined determination on the need for specially-designed instruction. I will also give the private psychologist's report more weight than the District psychologist's report and staff input.

I gave the testimony of the District's psychologist, medium weight, regarding her testing results, data collection, and test selection. The lack of a direct observation tainted the report. Using a single assessment of ability and achievement and no other measures reduced the persuasiveness of her conclusions about her assessments.

As for the dueling Occupational Therapist testimony, each offered vastly differing explanations regarding the Student's circumstances. The variations in testimony were noteworthy. The private examiner administered a variety of assessments and used those assessments to reach a reasoned conclusion. On the other hand, the District's OT administered no assessments and worked with the Student addressing needs identified in the private OT evaluation. Curiously, the District's OT did not outright disagree with the private findings.

The District's psychologist and the special education director's testimony about the limited review of each IEE contradict the regulations. The failure to hold a team meeting to review the three IEEs further reduced the persuasiveness of the testimony on the required "consideration" factor in reviewing private testing. Absent a full team meeting, the testimony is not corroborated by a team review of existing data; therefore, while informative, it lacks significant weight. Therefore, I will now give each witness's conclusions about each IEE less weight.

Finally, I found the Mother's testimony choppy and disjointed. It seemed like; for some unknown reason, the Mother was reluctant to speak out. I could not discern if she found the process overwhelming or if something unrelated was troubling her. Sometimes she could not relate or recall basic foundational facts about this Student. I understand the Student has siblings, and the crossover effect is sometimes confusing. I further understand that life during and after the pandemic was disrupted; however, after reviewing

the testimony and my notes, I am left with a feeling that, at times, she was guarded in her candor.⁵

IDEA FAPE PRINCIPLES AND PARENT PARTICIPATION

The IDEA requires each state to provide eligible children with a "free appropriate public education" (FAPE) for special education services.⁶ FAPE consists of both special education and related services. In *Board of Education v. Rowley*, 458 US 176 (1982), the Supreme Court held that the FAPE mandates are met when IEP services provide personalized instruction and comply with the Act's procedural obligations. The District meets its FAPE obligation by providing an IEP which is "'reasonably calculated to enable the child to receive 'meaningful educational benefits in light of the student's 'intellectual potential.'"⁷ IEPs are ".... constructed only after careful consideration of the child's present levels of achievement, disability, and growth potential." *Id.* Individualization is, thus, the central consideration for purposes of the IDEA. Nevertheless, a district is not obligated to "provide 'the optimal level of services,' or incorporate every program requested by the child's parents."⁸ All the law expects is appropriate services in light of a child's unique circumstances, not those necessarily sought after by "loving parents." *Id.* The assessment of whether a proposed IEP meets the *Rowley* and *Endrew* standard is based on information "as of the time it was made;" this commonsense rule is commonly known as the "snapshot rule."⁹ While an IEP must aim for progress, progress is not measured by what may be ideal. *Id.*

⁵ NT p. 657, p.670, NT p. 671 (does not recall communication with school psychologist about the evaluation), NT p. 666 (confusion regarding communication with school principal), NT p. 672, NT p. 673 (not sure whether or when medical information was provided to the District).

⁶ 20 U.S.C. § 1412.

⁷ *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

⁸ *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

⁹ *Fuhrman v. East Hanover Bd. of Educ.* 993 F.2d 1031, 1041 (1993).

IDEA EVALUATION REQUIREMENTS

The IDEA evaluations or reevaluations have twin purposes. First, the evaluation should determine whether or not a child is a child with a disability, and second, the evaluation must "determine the educational needs of such child."¹⁰ The IDEA defines a "child with a disability" as a child who has been evaluated and identified with one of several specific disability classifications and, "by reason thereof, needs special education and related services."¹¹ An appropriate evaluation or a reevaluation includes a "[r]eview of existing evaluation data." *Id.* The review of the existing data must include all existing "evaluations and information provided by the parents," "current classroom-based, local, or State assessments, and classroom-based observations," and "observations by teachers and related services providers." *Id.* "Upon completion of the administration of assessments and other evaluation measures[,] the determination of whether the child is a child with a disability . . . and a team shall make the educational needs of the child of qualified professionals and the parent of the child."¹²

Districts must (1) use a variety of assessment tools and strategies; and (2) the assessment tools should assist the team in developing the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum.¹³ The evaluation team should not use any single measure or assessment tool as the sole criterion for determining whether a child is a child with a disability. *Id.*

In Pennsylvania, districts must provide a reevaluation report to the parents describing the results within sixty (60) calendar days of receipt of the

¹⁰ 20 U.S.C. §1414(a)(1)(C)(i).

¹¹ 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a).

¹² 34 C.F.R. § 304(c)(4); 20 U.S.C. § 1414(b)(3)(B). A full IDEA 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[.]"

¹³ 34 C.F.R. § 300.8.

Parent's consent, excluding summers.¹⁹ Once the report is completed, "[a] group of qualified professionals and the child's parent determines whether the child is a child with a disability ... and the child's educational needs." Although the evaluation team should strive to reach a consensus, under 34 CFR §300.306, the public agency is responsible for determining whether the child has a disability.

Parental disagreement with the conclusions of a district evaluation does not, in and of itself, establish that the District's evaluation is inappropriate. The usual remedy when an evaluation does not meet the requisite criteria is either a reevaluation or an IEE request. When an evaluation is conducted per 34 CFR 300.304 through 34 CFR 300.311, and the child was not assessed in a particular area, the Parent has the right to request an IEE. When parents present an IEE, the District must consider the report. The IEP team must consider the evaluation results if it meets agency criteria. *Id.* The term "consider" does not mandate the local agency accept the recommendations in the independent report; however, the team must "consider" the existing data.¹⁴ The term "consider" is not defined in either state or federal law. The final "action" after the review is shared when the district issues prior written notice of what "actions" the District will or will not take.¹⁵

SECTION 504 CHILD FIND

Section 504 and Chapter 15 contain their child find requirements that appear similar to, but are much broader in scope than, the IDEA requirements. Section 504 requires districts to evaluate students who, because of handicap or impairment, need or are believed to need special education or related services. Unlike the IDEA, a Section 504 assessment generally won't require

¹⁴ 34 C.F.R. § 300.502(c); *L.T. v. Mansfield Twp. Sch. Dist.*, Civil Action No. 04-1381(NLH), 2009 U.S. Dist. LEXIS 21737 fn.6 (D.N.J. Mar. 17, 2009) (district should a meeting to consider the new information, as parent input, to determine if a revision to the IEP in needed).

¹⁵ 34 C.F.R. § 300.503.

much scientific, medical, or statistical evidence. 28 C.F.R. §35.108 (d)(v), 35 C.F.R §34.136.

SECTION 504 FAPE REQUIREMENTS

Section 504 requires that districts comply with specific procedures in providing services to students with disabilities. Section 504 requires adherence to the FAPE provisions found at 104.33, the evaluation and placement standards at 34 CFR § 104.35, the educational settings requirements at 34 CFR 104.34, and the procedural safeguards at 34 CFR 104.36. In particular, Section 504 FAPE requires the provision of regular or special education, including related aids and services that "are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met." 34 CFR §104.33(b)(1)(i). Section 504's FAPE standard supports and reinforces the nondiscrimination directive at 34 CFR §104.4. Section 504 regulations at 34 CFR §104.33 (b)(2) state one way to meet the Section 504 requirements. Therefore, compliance with the IDEA, more often than not, satisfies Section 504's FAPE requirements.

APPROPRIATE RELIEF

In this instance, both Parties seek appropriate relief within the meaning of the IDEA.¹⁶ The Parent seeks compensatory education until a revised appropriate IEP is offered and any other relief appropriate. At the same time, the District desires a declaratory finding that its program and placement offered a FAPE.¹⁷

¹⁶ *Sch. Dist. of Phila. v. Post.*, 262 F. Supp. 3d 178, 197 (E.D. Pa. 2017) (citing 20 U.S.C. § 1415(i)(2)(C)(iii)).

¹⁷ *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) (comparing the make-whole versus the hour-for-hour approach)

**DISCUSSION, ANALYSIS, AND CONCLUSIONS OF LAW
THE IDEA [2019-2020 SCHOOL YEAR] TO [2020-2021 SCHOOL
YEAR]
CHILD FIND CLAIM**

I have reviewed the Parties' competing analysis, the exhibits, the testimony, and briefs in reaching the following Conclusions of Law. The record does not support the Parents' reliance on events during the [2019-2020 school year] experience as a triggering event that the Student was IDEA eligible as of the first day of [the 2020-2021 school year]. Virtual learning interfered with the traditional face-to-face observations, interactions, and experiences that create the basis for a reasonable "suspicion." The applicable screening regulations at 22 Pa Code 14.122 suggest that districts have a reasonable time to engage in early intervening services. The shutdown and reopen cycle obstacle was an intervening factor that interfered with "reasonable time" allowed to form a suspicion. Stated another way, even if the Student was in school, not all struggling children require an assessment.

Based on the whole record, I now find that by late September to mid-October 2020, or somewhere between 45 to 60 days, a reasonable person, based on the profile, would have suspected a disability. Based on the date the District received the Parents' consent, I also find that the District completed the evaluation promptly. This conclusion does not end the analysis.

**THE SPECIFIC LEARNING DISABILITY EVALUATION FAILED TO
INCLUDE A VARIETY OF ASSESSMENTS**

IDEA and state regulations require that District use a variety of assessment tools when completing comprehensive evaluations. In this instance, contrary to the variety of assessment rule, the psychologist used one measure to assess intelligence and one to assess achievement; nothing more was done,

and nothing more was considered. In relying on one assessment, the District also violated the rule that no single measure can be used to determine eligibility or educational need. These early procedural violations created a series of forward-rolling substantive violations.

As part of the initial evaluation, a child must be observed in the classroom setting to document the child's academic performance in the areas of difficulty.¹⁸ Contrary to the regulations, the initial evaluation here failed to include an observation of the child's learning environment/setting; this omission caused a failure to document the child's academic performance and behavior relating to the learning disability.¹⁹ While the evaluation report noted an observation statement from the [redacted] teacher, her comments that the Student "was quiet" and the Student "often resisted [redacted] teacher's attempts to provide individualized intervention in the [redacted] setting" are subjective opinions. The teacher observation comments fail to include objective data, commonly collected during early intervening services, like the frequency, type, or what supports the Student's resisted. Finally, the teacher's observation did not provide objective academic performance, attention, speech, or fine motor measures.

Here, the lack of an observation also interfered with the group's decision on whether the child had a specific learning disability. To the extent the District argues that the teacher's observation is a reasonable substitute, I disagree. Next, the requirement for classroom-based observations for purposes of evaluation is separate from observations by teachers.²⁰ Finally, there is no

¹⁸ See, *Doe v. Cape Elizabeth Sch. Dist.*, 832 F.3d 69, 73 (1st Cir. 2016), *Dougall v. Copley-Fairlawn City Sch. Dist. Bd. of Educ.*, 2020 U.S. Dist. LEXIS 13560, 2020 WL 435385, at *28 (N.D. Ohio Jan. 28, 2020).

¹⁹ 34 C.F.R. § 300.310(a); see also § 300.305(a)(1)(ii) (requiring an IEP Team to review classroom-based observations for purposes of an initial evaluation).

²⁰ 34 C.F.R. § 300.305(a)(1)(ii), § 300.305(a)(1)(iii).

indication that the team decided to substitute the teacher's curt opinion for the particulars required in a classroom observation.

The proposed substitution fails to satisfy the observation requirements under 34 C.F.R. § 300.310(a).

These rolling procedural flaws contributed to a team-wide lack of understanding about the scope of the suspected disabilities. These violations caused a knock-on effect of limiting the Parents, the evaluation team, and the IEP team's meaningful participation. The lack of understanding of the nature of the disability resulted in an incomplete understanding of the extent of the Student's learning disability and the need for additional specially-designed instruction. This series of procedural violations created substantive violations that denied the Student a FAPE. Lastly, as discussed further below, the violations resulted in a miscalculation of the frequency, intensity, and amount of specially-designed instruction needed to provide a FAPE.

**THE DISTRICT'S ANALYSIS OF THE EVALUATION REPORT DATA
UNDERSTATES THE MAGNITUDE OF THE SPECIFIC LEARNING
DISABILITY**

22 Pa Code §14.125 of the Pennsylvania Special Education Regulations, in conjunction with IDEA regulations at 34 C.F.R. §300.309, identify four factors teams must consider when identifying a student as eligible for special education under this specific learning disability category. A comprehensive specific learning disability evaluation includes an assessment of (1) oral expression, (2) listening comprehension, (3) written expression, (4) basic reading skills, (5) reading fluency skills, (6) reading comprehension, (7) mathematics calculation, or (8) mathematics problem solving §14.125(a)(1). An evaluation team must consider several exclusionary factors, like a lack of instruction. Simply put, an eligible student must meet each assessment area for each definition factor to qualify as a student with a specific learning disability.

The District psychologist stated that the District used a severe discrepancy formula to determine if a Student was eligible. Applying a 1.5 standard deviation rule, the examiner looked for a 22-point discrepancy between ability and achievement to determine if the Student met the criteria for a Specific Learning Disability. (N.T. 97). Applying the District's 22-point formula, the following achievement scores are severely discrepant when compared to the Student ability score: a 36-point difference in Early Reading Skills, a 32-point difference in Spelling, a 35-point difference in Written Expression, a 32 point difference in Alphabet Writing Fluency. The examiner also noted a 17-point difference in Numerical Operations and a 14-point difference in Math Problem Solving. (P-5). After reviewing the data, the psychologist concluded, and the IEP team agreed that the Student had a specific learning disability in Basic Reading Skills and Math Calculation. When asked why using the District's 22-point formula, the District psychologist could not explain why the significantly discrepant scores in Written Expression, Reading Fluency, and Reading Comprehension was left out of the specific learning disability identification. When asked how the Student qualified as a person with math needs, with a 17-point and 14-point difference, the response was not cogent. (P-5).

The independent evaluator, on the other hand, after observing the Student and administering a different but similar battery of nationally normed ability and achievement assessments, concluded that the Student exhibited skills well below age and grade expectations. The independent report notes discrepant phonics, encoding/decoding, non-word reading, word reading, letter and sound fluency/accuracy, reading comprehension, math calculation, applied math problem solving, Spelling, and written expression skill sets. The independent psychologist's virtual classroom observation helped to fill in missing data about how the Student's skill deficits adversely affected educational performance in real-time.

In some ways, the independent evaluation confirmed part of the District's global learning disability findings. In other ways, it drilled down on the District's omissions that although the Student had discrepant scores and weaknesses, several disability-related weaknesses were not identified. Oddly, the eligibility omissions went unnoticed by the IEP team, which in turn caused the IEP team to design and offer an insufficient quantity of specially-designed instruction. I now find that these violations denied the Student a FAPE and interfered with the Parents' participation. More about follow along IEP team's omissions violation follows later.

THE DISTRICT DID NOT PROPERLY CONSIDER THE IEE RESULTS

Districts are expected to "consider" the results of District funded and privately funded independent evaluators' work product. The IEE examiner, the District psychologist, and the special education director reviewed the psychological evaluation. Neither the record nor the documents cogently explain how the District first "considered" and then rejected the examiner's eligibility findings and recommendations. Furthermore, the record reflects that the IEE psychological information was not discussed, weighted, or presented to the team. Accordingly, I now find the District failed to "consider" the examiner's results.

I am not saying that every team member must read the report. Also, I am not saying that the District was required to accept the examiner's conclusions. I am, however saying, confronted with two fundamentally different eligibility conclusions in several areas of suspected disability; something more than a two-person sit-down was required. The plain meaning of the word "consider" is "to reflect on: think about with a degree of care or caution." Webster's Third New International Dictionary 483

(1986).²¹ A two-person staff review, with no contemporaneous notes, interfered with an open-minded team discussion of the Student's strengths, weaknesses, and discrepant scores. The District's lack of "consideration" interfered with the review of existing data and the Parents' participation.

The District's view, if accepted, would require me to assign greater weight to the two-person staff review, proffered here, without notes or prior notice to the Parents, over the mandated team process. The testimony, the exhibits, and the team's decision conflict with applicable regulations. The scope of the differences between the reports and the District's understanding of the Student's circumstances required a deliberative, documented, and thoughtful team "consideration," which did not happen here.

Even assuming *arguendo* that the review by two is proper, once the two rejected the recommendations, the District should have issued prior written notice. The prior written notice should have explained the basis for the District's "actions" rejecting the private psychologist's specific learning disability findings. This same lack of prior written notice occurred after the speech and the OT services were cobbled onto the first IEP.²² Stated another way, without prior notice of the basis for the District's actions, the Parents cannot fully participate in the IEP process. Whether the evaluation "consideration" violation is viewed in isolation or as a whole with the other evaluation violations above, the procedural flaws substantively interfered with the evaluation process, compromised the offer of a FAPE, and substantially limited the Parents' participation.

²¹ *T.S. v. Bd. of Educ.*, 10 F.3d 87 (2d Cir. 1993)(IDEA dispute analyzing what steps a district's must undertake to "consider" IEE reports).

²² 20 U.S.C. § 1415(b)(3)(B)

The District may not avoid or delay its FAPE duties.²³ To ensure the Student does not miss another year of necessary support in all areas of educational need, the District must do what it should have done all along, "consider" the IEE reports. Accordingly, within six school days of this Decision, the District must reconvene the evaluation team and the IEP team, "consider" the IEE reports, and with an open mind, make necessary changes. Because I now find these violations are substantive, I will factor these violations into a specific award of compensatory education.

THE [2020-2021 SCHOOL YEAR] AND [2021-2022 SCHOOL YEAR] IEPS WERE FLAWED

Parent argues that the failure to identify several areas of educational need is a per se denial of a FAPE. The IDEA mandates that a student's IEP "set out measurable annual goals, including academic and functional goals, along with a 'description of how the child's progress toward meeting' those goals will be gauged." *Id.* Typically a district's failure to establish measurable annual goals constitutes a procedural violation of the IDEA. Students can recover for such violations only if the omissions "impede[] the child's right to a free appropriate public education."²⁴

Therefore, I must now decide if the evaluation failures caused a failure to include goals and specially-designed instruction in areas of unique need, (1) resulted in the loss of educational opportunity, or (2) seriously infringed on the parents' opportunity to participate in

²³ *Letter to Carroll*, 68 IDELR 279 (OSEP 2016).

²⁴ *Rodrigues v. Fort Lee Bd. of Educ.*, 458 F. App'x 124, 127 (3d Cir. 2011); see also *G.N. v. Bd. of Educ. of Twp. Of Livingston*, Civil Action No. 05-3325 (JAG), 2007 U.S. Dist. LEXIS 57081, 2007 WL 2265035, at *7-8 (D.N.J. Aug. 6, 2007) ("The failure to include goals and objectives violates IDEA").

the process." Applying this test, I now conclude the omission of goals and personalized instruction denied the Student a FAPE.

The Student is performing well below grade and age standards in Spelling, Written Expression, Reading Fluency, Mathematics, and Reading Comprehension. The Student is in [redacted] grade, cannot read, and continues learning alphabet letters on grade level. The delay in providing special education has resulted in the loss of educational opportunities to participate in regular classrooms. The failure to identify the Student in all areas of suspected disability infringed on the Parents' opportunity to participate in the child find and the IEP process. It is axiomatic that absent specially-designed instruction or measurable goals, students with WIAT percentile rankings from 0.7 percentile to the 7th percentile will continue to fall farther behind. The [2020-2021 school year] IEP, [2021-2022 school year] and [2022-2023 school year] IEPs, have done nothing to improve the Student's Spelling, Written Expression, Reading Fluency, and Reading Comprehension skills. Absent goals or specially-designed instruction, the IEP is not challenging nor reasonably calculated to provide meaningful benefit. Finally, the failure to include goals in these core skills contributed to the ongoing denial of access to the regular education setting and curriculum. Therefore, I now find that the District denied the Student a FAPE in these areas. This conclusion does not end the analysis; I will now review the content of the IEP services offered and provided to determine if the remaining content offered was a FAPE.

THE PRESENT LEVELS ARE INCOMPLETE AND INADEQUATE

The IDEA provides that an IEP shall include "a statement of the child's present levels of educational performance, including ... how the child's

disability affects the child's involvement and progress in the general curriculum." 20 U.S.C. § 1414(d)(1)(A)(i). In general, the content of this statement is committed to the discretion of the participants in the IEP meeting.²⁵ Nevertheless, the regulations suggest that the IEP "accurately describes the effect of the child's disability on the child's performance in any area of education that is affected" and avoid simple labels. *Id.* Moreover, when "test scores are appropriately included, [] they should be self-explanatory or accompanied by an explanation." *Id.* The present levels here are not self-explanatory. The WIAT and WISC scores require the Parents and the teachers to refer to a manual to understand what they mean. Even after reading the manual, the scores do not provide "How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) 34 CFR §300.320 (a)(1).

Education needs must be written in the IEP so that everyone working with the child knows the level at which the child functions. The present levels here do not meet this requirement and are flawed. The WIAT and WICS present-level statements do not establish a baseline for creating goals and monitoring progress or allow informed parental participation in the IEP process. Stated another way, the present levels did not express what the Student can do in objective and measurable terms in the regular education curriculum.²⁶

THE IEP IS MISSING SPECIALLY DESIGNED INSTRUCTION

²⁵ *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 702 (10th Cir. 1998).

²⁶ *Chase v. Mesa County Valley Sch. Dist. No. 51*, 53 IDELR 72 (D. Colo. 2009)(test scores must be accompanied by some type of self-explanatory and individual analysis). See also, *Pocatello Sch. Dist. #25*, 18 IDELR 83 (SEA ID 1991) (noting that the parents could not fully understand the proposed educational program and participate when numeric test scores are neither explained nor self-explanatory).

Special education" requires districts to provide specially designed instruction, provided at no cost to the parents, that is intended to meet the unique needs of a child. 34 CFR §300.39 (a)(1). Specially-designed instruction requires District to design instructional content that "change methodology, or delivery of instruction" so as "(1) to address the child's unique needs resulting from the disability; and (2) ensuring the child's access to the general curriculum so that the child can meet the educational standards that apply to all children within the jurisdiction of the public agency." 34 CFR §300.39 (b)(3). The first IEP included one form of specially-designed instruction calling for "Modified assignments and assessments in the regular education classroom." (P-7 p.23). The October 29, 2021, IEP revision added "Preferential seating in regular education settings. The November 2021 IEP incorporated the use of multisensory-based techniques and strategies to be monitored by the occupational therapist to the others." (P-25, pp.38-39). The February 2, 2022, IEP removed the multisensory-based techniques and continued the "In the Regular Education setting: 1. Modified assignments and assessments 2. Preferential seating." The suggested specially-designed instruction does not describe how the "instructional content, methodology, or delivery of instruction" are changed. The phrase "changes in assignments" does not identify what will occur. For example, are the teachers reducing the number of problems, modifying grades, assignment due dates, or the length of the assignment? Are the staff reducing the number of problems, test items, changing the grading scale, or the time limits for taking tests? Furthermore, the IEP does not identify who will make the changes, i.e., regular or special education. Finally, the statement "modified assessments" does not tell the reader what changes the teachers should make when giving assessments.

The October 29, 2021, IEP use of "Preferential seating in regular education settings" is a physical modification, not a change in design, instruction, or delivery of instruction.

The November 2021 addition of multisensory techniques provided on an "as-needed basis" is vague and misleading. An informed reader cannot tell who, when, where, and what will trigger the "as-needed basis. A stranger would not know "what the teacher will do, what the Student will receive, and how the "technique" will be assessed. Simply put, the statement, as written, is not specially-designed instruction. These procedural violations are inextricably intertwined and form the basis of a substantive FAPE denial.

Absent specially-designed instruction, the IEP lacks an essential ingredient needed to provide personalized instruction that is reasonably calculated to provide a benefit. The lack of specially-designed instruction prevented the Parents from understanding how the Student was to learn. The above violations denied the Student a FAPE and excluded the Parents from meaningful participation.

COMPENSATORY EDUCATION IS APPROPRIATE RELIEF.

Applying *GL* and *MC*, once the denial of FAPE is established, the hearing officer must determine when the District either knew or should have known of the denial of a FAPE. After reviewing the record, the testimony, and the exhibits, against the loss of a FAPE, I now find that the District either knew or should have known of the FAPE denial in January 2020 when they completed the evaluation. I also find the District either knew or should have known again in February 2021, when they offered the first IEP without specially-designed instruction.

I now find the errors in creating the initial evaluation placed the District on notice of any follow-along denial of FAPE violations. I must now determine

how the Parents suggested quantitative analysis will make the Student whole. I now find a modified quantitative hour-for-hour approach will create an equitable bank of compensatory education time that will make the Student whole. Therefore, I will not award day-for-day, hour-for-hour relief demanded. Instead, I will now **ORDER** four (4) hours a day for each school day the District was in session.

The records note the Student is expected to attend school for 6.5 hours a week. Based on the circumstances, including the scope and the magnitude of the loss of a chance to make meaningful academic, social, and behavioral progress, the Student is now awarded four (4) hours a day for each day of school beginning with the date of the evaluation report through the end of that school year.

The award of compensatory education then begins again for each day of the 2021-2022 school year, including all days in the ESY program. The relief continues into the 2022-2023 school year, ending when the District revises the IEP and issues a new NOREP.

To calculate the total award of compensatory education for each year, the Parties should multiply the number of days the District was in session by four hours. Typically the award is equitably reduced by the number of days the Student was absent; therefore, the Parties should subtract those school days from any final compensatory education calculation.

I now find two hours of compensatory education will remedy the lack of the omitted IEP goals targeting the Student's unidentified specific learning disability. The remaining two hours will address the loss of a chance to learn in the Learning Support class without specially-designed instruction.

SELECTION AND PAYMENT FOR COMPENSATORY SERVICES

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

The Parent can select the compensatory education service provider at their sole discretion. The District should reimburse the Parent selected compensatory education provider at the rate regularly charged for each service by each provider. To the extent the Student or the Parent incurs travel costs to and from the provider, the District should reimburse the Parent or the Student for all mileage or transportation expenses at the District's rate for travel reimbursement. In January, the District should report unused hours to the Student and the Parent each year. Any unused compensatory hours remaining after age 23 will revert to the District and are otherwise forfeited.

FINAL ORDER

AND NOW, this January 31, 2022, the District is now **ORDERED** as follows:

1. The Parent's IDEA child finds a claim for the 2019-2020 school year is **DENIED**.
2. The Parent's claim that the District failed to provide either IDEA or Section 504 free appropriate public education for the 2019-2020 school year is **DENIED**.
3. The Parent's claim the District failed to provide a free appropriate public education for the 2020-2021, 2021-2022, and for a portion of the 2022-2023 school years is **GRANTED** in full. The relief for these violations is described above.

4. The IDEA equitable relief **ORDERED** above makes the Student whole for any Section 504 FAPE violations.
5. The relief for failing to provide ESY services for the 2021-2022 school year is included above. No other ESY relief is **ORDERED**.
6. To remedy the FAPE violation, the District is now **ORDERED** to fund a bank of compensatory education as described above. The Parties are directed to calculate the amount of compensatory education as directed above.
7. The District is **ORDERED** to pay the total costs for all billed compensatory education services at the rate charged by the service provider selected by the Parent, at the rate charged for each service(s). All compensatory education services or travel invoices should be paid within 45 days of receipt.
8. The Parent can select the individual(s) or the provider for all make-whole compensatory education services. All other claims for appropriate relief, causes of action, or affirmative defenses not argued for in the Parents' or the District's closing statement are now dismissed with prejudice.
9. The District is directed to schedule a meeting with Parents to consider the IEE evaluations, after which the team must decide how the IEP should be revised. The IEP team must consider the types of specially-designed instruction needed to implement each goal statement.

s/ Charles W. Jelley, Esq. LL.M.
Special Education Hearing Officer

ODR FILE #26289-21-22 [

January 31, 2023

