

*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:**

25265-21-22

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

H.G.

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

[redacted]

#### **Parents:**

[redacted]

### **Counsel for Parents**

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#### **Local Education Agency:**

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#### **Hearing Officer:**

Joy Waters Fleming, Esq.

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

February 22, 2022

## **Information and Procedural History**

The Student <sup>1</sup>is currently [redacted] years of age and last attended school in the District during the 2020-2021 school year enrolled in the first grade. In April 2021, the Parents unilaterally placed Student in a private school (Private School). Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) as a child with Autism, a Speech or Language Impairment, and as Other Health Impaired (OHI). The Parents filed a due process complaint alleging that the District failed to offer the Student a free appropriate public education (FAPE), in violation of the IDEA and Section 504 of the Rehabilitation Act as well as the federal and state regulations implementing those statutes.<sup>2</sup> The Parents seek compensatory education for the 2019-2020 and the 2020-2021 school year through April 2021 until the Student's enrollment in the Private School. The Parents also seek tuition reimbursement for Student's attendance at the Private School from April 2021 through the 2021-2022 school years, including summers. Finally, the Parents seeks reimbursement for their privately obtained evaluation and related costs.<sup>3</sup> In response, the District maintained that its implemented program, placement and evaluation were appropriate for the Student and that no remedy is owed.

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

<sup>2</sup> The Parent's IDEA claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified at 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). Federal implementing regulations of Section 504 are found at 34 C.F.R. §§104.1-104.61. See *also* 22 PA Code §§15.1-15.11 (Chapter 15).

<sup>3</sup> The Parents request for reimbursement of expert witness fees pursuant to Section 504 is denied. *Arlington Cent. District Board v. Murphy*, 548 U.S. 291 (2006)

For the reasons that follow, the Parents' claims are granted in part and denied in part.

### **ISSUES**

- 1) Did the District deny the Student a free appropriate public education during the 2019-2020, the 2020-2021, and the 2021-22 school years, inclusive of summers ?
  
- 2) If the District denied Student a FAPE, is Student entitled to compensatory education ?
  
- 3) If the District denied Student a FAPE, are the parents entitled to tuition reimbursement from April 2021 onward?
  
- 4) Was the District's reevaluation of the Student appropriate?
  
- 5) If the District's reevaluation of the Student was not appropriate, are the Parents entitled to reimbursement for an IEE?
  
- 6) Pursuant to Section 504, are Parents entitled to reimbursement of the cost of the independent evaluator's professional services, including in-person testimony during the due process hearing?

### **FINDINGS OF FACTS**<sup>4</sup>

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<sup>4</sup> The Parties stipulated to the admission of the following exhibits: P-5 through P-9, P-12 through P-17, P-20 through P-21, P-23 through P-24, P-26 through P-36, P-38 through P-40, P-42, P-46 through P-54, P-56 through P-61, P-63 through P-67, P-69, P-76 through P-85 (pp. 2-39), P-87-P-88, P-89. S-10 through S-46, S-48 through S-50, S-52 through S-54, S-57 through S-62.

## **2018-2019- Preschool**

1. In September 2018, a physician-private evaluator diagnosed the Student with an Autism Spectrum Disorder (ASD), ADHD and Anxiety. In the evaluation, the Parent reported the Student's anxiety increased during transitions to school, after breaks and when changes in service over the summer were made. The increase in anxiety occurred with regularity at home after the school day. (P-5, p. 2)
  
2. In January 2019, the Parents' private evaluator suggested goals and recommended Student attend a typical morning kindergarten followed by an afternoon autistic support session with related services. (P-8; N.T. 174-175, 225-229)
  
3. In April 2019, in preparation for transition to kindergarten, the District school psychologist evaluated the Student to determine eligibility for school-age special education programming. (S-10)
  
4. The ER included a review of records, a summary of the privately conducted evaluations, teacher and parent input, an observation of the Student at the private pre-K program, assessments of cognitive ability, academic achievement, attention regulation, social-emotional, and behavioral functioning and input from speech/language, occupational and physical therapy evaluations. (P-13)

5. On the WPPSI-IV, the Student obtained composite scores in verbal comprehension of 93 (32<sup>nd</sup> percentile), fluid reasoning of 88 (21<sup>st</sup> percentile) with a FSIQ of 87 (19<sup>th</sup> percentile). (P-13)
  
6. On the Woodcock-Johnson IV (WJ-IV), the Student demonstrated applied problems/math reasoning abilities in the 20<sup>th</sup> percentile, reading/letter-word identification skills at the 96<sup>th</sup> percentile and passage comprehension scores in the 81<sup>st</sup> percentile. (P-13)
  
7. The Parent completed the Behavior Assessment for Children-Third Edition (BASC-III), the Brown ADD and the Autism Spectrum Rating Scale (ASRS). The rating scales provided to the Student's teacher were not returned. (P-13)
  
8. BASC-III ratings were within average limits for externalizing problems (hyperactivity, aggression) and internalizing problems (anxiety, depression, somatization). On the behavioral symptoms index, atypicality was within the average range, but the Parent rated the Student as at risk for attention problems and withdrawal. On the adaptive scales, the Parent rated concerns related to adaptability and social skills as clinically significant and activities of daily living and functional communication as at risk. (P-13)
  
9. Parent ratings on the Brown ADD scales were within average limits. No significant problems were noted with the Student's ability to get started on tasks, sustain attention, mental effort, working memory skills, frustration management, emotional expression, impulse control, and self-regulation of behavior. (P-13)

10. On the ASRS, Parent ratings were consistent with the ASD diagnosis. The Parent ratings indicated that Student had difficulty using appropriate verbal and non-verbal communication, interacting with other children, emotional response, tolerating change, adapting flexibly. (P-13, p. 16)

11. On the Scales for Identifying Gifted Students (SIGS), the Parent viewed the Student as having strengths in general intellectual ability, language arts skills, and creativity. (P-13, p. 16)

12. After a classroom observation and the administration of the Goldman Fristoe Test of Articulation and the Clinical Evaluation of Language Fundamental-Preschool, Second Edition, the District's speech-language pathologist concluded that the Student demonstrated below average expressive, receptive and pragmatic language skills. (P-13, p. 25, S-10)

13. The Occupational Therapy (OT) assessment concluded that the Student had difficulty with handwriting and needed sensory strategies to assist with task and focus. No PT needs were identified. (P-13, p. 25, S-10)

14. The ER determined the Student eligible for special education supports and services under the classifications Autism, Speech or Language Impairment and Other Health Impairment (OHI). (P-13, p. 26)

15. The ER recommended SDI that included social skills development, a daily schedule, notice of transitions, movement breaks, social stories, collection of baseline data for sensory strategies, and self-calming strategies as needed for anxious behaviors. (P-13, p. 26-27)

16. On May 14, 2019, the IEP team met to review the District's evaluation and propose kindergarten programming. Parent concerns included Student's eating, bottle use, self-regulation, sensory input needs, regression during breaks, distractibility, anxiety, touching others, language, and adult attention needed. (P-14, P-17, p. 25, S-19, p. 34)

17. The Student's needs recognized by the IEP team included improved receptive, expressive and pragmatic language skills, writing skills refinement, adaptability/flexibility, self-regulation, impulse control, and attention regulation. (P-13, p. 27, P-14, p. 30)

18. The May 2019 IEP contained annual goals with baseline data that addressed (Speech) receptive, expressive and pragmatic language and (OT) handwriting needs.<sup>5</sup> All goals indicated that measurement of progress would occur through data collection and observations with reports provided to the Parents at the end of each marking period and IEP meetings. The collection of updated information for baseline data was slated to occur within ten days of IEP implementation. (P-14, pp. 38-44; N.T. 483)

19. A speech goal expected the Student after presented with a story to answer WH (who, what, where, when, why) questions to provide an on-topic, grammatical response in 80% of trials across three consecutive sessions. (P-14)

20. A second speech goal expected the Student to recall, repeat and follow 2-3 step directions given fading cues in 80% of trials across three consecutive sessions. A third speech goal expected the Student to label

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<sup>5</sup> Updated data would be gathered within 10 days of IEP implementation.

items, name the category and provide two attributes given faded verbal cues in 80% of three consecutive trials. (P-14)

21. A fourth goal expected the Student to interact with teachers/peers by maintaining personal space boundaries using appropriate vocal volume or clarification and/or repetition when needed, scoring eight out ten on a rubric when observed across three probes. (P-14)

22. An OT goal expected the Student to copy the first name with the correct letter case using a dominant adaptive grasp, with 80% accuracy for three consecutive probes. A second OT goal expected the Student to form uppercase letters using dominant adaptive grasp with 80% accuracy for three consecutive probes. (P-14)

23. The May 2019 IEP contained modifications and SDI that included daily, direct instruction in an autistic support classroom for the development of social skills, home and school communication, adult lunch supervision, a predictable routine, transition notice, movement breaks, wait reminders, a daily schedule, pre-teaching and re-teaching of academic content, teaching of self-calming strategies, lined paper, social stories and a small environment for assessments. (P-14, pp. 45-48)

24. Related services in the May 2019 IEP included thirty minutes of weekly individual OT and Speech/Language therapy services, thirty minutes of weekly group Speech/Language therapy, special transportation, and a 1:1 aide five days a week. (P-14, p. 49, P-17, p. 55; S-15)

25. The IEP recommended that Student receive supplemental autistic support with 43% of the day spent in the regular education environment.



The program offered by the District included a full-day kindergarten program at a District elementary school. The team determined that Student's special education support and services could not be provided in the neighborhood school where only half-day kindergarten was available. The team deferred a decision regarding ESY. (P-14, pp. 52-53, S-12, p. 52, S-15; N.T. 456, 461)

26. On July 30, 2019, through a NOREP, the Parents accepted the programming offered by the District. (P-17, S-15)

### **2019-2020 School Year -Kindergarten**

27. During the 2019-2020 school year, the Student attended full-day kindergarten in the District. During the morning session, the Student was pushed into a regular education classroom of fifteen to seventeen students, with support from the special education teacher or an instructional aide. The Student spent the afternoon kindergarten session in an autistic support program. (N.T. 462)

28. During the morning session, the Student started the day with a sensory walk, followed by daily instruction in reading, writing and math. (N.T. 462, 489)

29. After the morning session, recess and lunch, the Student attended the District's autistic support afternoon kindergarten. The special education teacher provided the Student with a visual schedule on a whiteboard and social stories to assist with structure, routine and transitions and social skills instruction. The Student received pre-teaching and re-teaching to reinforce concepts from the morning session. To assist with self-calming, the special education teacher introduced lessons to address feeling nervous, anxious or upset, along with breathing techniques. The Student was accompanied by a

1:1 aide that assisted with social-emotional needs during the entire school day. (P-26; N.T. pp. 411-412-414, 424-426, 434, 457, 461-469, 477)

30. On September 26, 2019, the District updated baseline data in Student's IEP. (S-17; N.T. pp. 414, 420-421)

31. On October 10, 2019, the team held a "check-in" IEP meeting to discuss the Student's transition to kindergarten. (P-14, P-17, p. 13, S-16, S-17)

### **October 2019 IEP Revision**

32. At the October meeting, the Parents expressed concerns that Student showed signs of stress and regression and displayed new inappropriate behaviors. The Parents sought a stronger sensory diet to help relieve anxiety and improve behaviors in the home and social stories for routine changes. The kindergarten teacher had no concerns and regarded Student as adjusted, happy and participatory in school. (P -17, p. 13, P-85, p. 9, S-17, S-19, p.33-34; N.T. pp. 414-415, 417, 422, 427, 453, 486)

33. To address the family's concerns, the team amended the IEP with a school-based sensory diet. The sensory diet was shared with Student's teachers and kept on a clipboard by the 1:1. Throughout the school day, the Student took sensory walks, used the squeeze machine, was brushed and took movement breaks. The sensory diet was implemented in the morning regular education kindergarten and the afternoon autistic support classroom. (S-17; p.8, 55, S-21, p. 15; N.T. 435-436, 485)

### **January 2020 IEP Revision**

34. On January 31, 2020, the IEP team met to discuss the Student's progress, Parents' concerns of peer instigated physical aggression and increased time in regular education. (S-19; N.T. 428-430)

35. At the meeting, the District reported that Student participated in classroom activities, engaged socially and met or made progress toward IEP goals. ( P-21, p. 12, S-19, pp. 10, 30-33, 44-49, 102-04; N.T. 430)

36. On February 10, 2020, the District issued a NOREP that proposed Student receive four hours of daily autistic support, OT and speech services from June 23, 2020, through July 30, 2020, during ESY. (P-20; N.T. 66)

37. Term 1 and Term 2 progress, the Student made academic and social progress and had excellent attendance. In school, the Student appeared happy, enjoyed school, made friends, was compliant and was a good listener. (S-21, S-59; N.T. 466, 487, 490, 494-495)

## **COVID-Remote Instruction**

### **March 2020-June 2020**

38. On March 12, 2020, the COVID-19 pandemic forced the closure of the District. After instruction resumed, the District offered education through a flexible implementation plan with remote instruction that reduced the special education services available to the Student. (P-29, pp. 17-18; N.T. 438)

39. During the COVID closure, the District offered the Student instruction through Blackboard, zoom lessons from both regular and special education

teachers, individual check-ins, twice weekly, social skills instruction for 15 minutes, daily pre-teaching and re-teaching for 45 minutes, daily social and emotional individualized coping skills instruction for 30 minutes session, daily one-on-one check-ins for 15 minutes (or longer if needed), and consult with parents. (P-21)

40. During the COVID closure, the District offered the Student, once a week group speech therapy for 30 minutes, once a week, individual speech therapy for 30 minutes, and once a week individual OT for 30 minutes. (P-21)

41. From the March COVID closure until the end of the school year, the Student, when logged on for remote instruction, received social skills instruction a few times a week, did not attend any of the offered Zoom rooms, although open for two hours each day, and sometimes met with the virtual 1:1. When logged on and with a Parent, the Student played with toys in the background or was off-camera. <sup>6</sup>(P-56, p. 5; N.T. 439-446, 635-637)

## **June 2020 IEP**

42. In June of 2020, the IEP team met to discuss Student's programming for the 2020-2021 school year. Parents' concerns included the Student's transition to a new elementary school building, social skills, and a sensory diet to help with anxiety in the school and home. (P- 21, S-59; N.T. 447)

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<sup>6</sup> The Parents requested the logs completed by the 1:1 during remote instruction from March 2020 through ESY 2020. The records have not been produced and cannot be located. The District has represented that it turned over all the available records.

43. The June 2020 IEP offered goals to address Student's Speech, OT and anxiety needs. A new anxiety goal expected the Student, when anxious, upset, or frustrated, to use specific self-regulation /coping strategies to avoid engagement in unexpected behaviors, with one reminder, on four out of five opportunities, as measured by observations and documentation. Baseline data for the goal would be determined in the fall of the 2020-2021 school year. (P-29, S-59)

44. The June 2020 WH question goal expected the Student to respond to WH (who, what, where, when, why) questions with 80% accuracy, over three consecutive monthly probes, with a baseline to be determined at the beginning of the 2020-2021 school year. (P-21, p. 11, S-59, p. 11, 23-24)

45. The June 2020 following directions goal expected the Student to repeat and follow complex directions containing target concepts on 80% of opportunities over three consecutive probes (baseline: temporal 40%, locative 50%, conditional 30%). (P-21, p. 11, S-59, p. 11)

46. The June 2020 speech goal expected the Student to independently gain a partner's attention, ask a question, think about the response and extend the conversation for five turns by asking a question or making a comment with a peer scoring 8/10 on a rubric. (Baseline: 8/10 on three consecutive monthly probes). (P-12, p. 11, S-59, p. 11, 28)

47. During the 2019-2020 school year, the Student mastered both OT goals. The team proposed two new goals for inclusion in the June 2020 IEP. (P-21, S-59, p. 12)

48. The June 2020 IEP offered a twice a week social skills group, sensory breaks, a transition meeting, self-calming strategies, pre-teaching, social stories, prompting, one to one support, planned sensory diet, and daily social skills instruction, OT, Speech, a school day 1:1 and special transportation. The team determined that ESY was necessary to maintain skills over a prolonged break. (P-21, p. 37-40, S-59)

49. The June 2020 IEP recommended itinerant Autistic and Speech-Language support, at Student's neighborhood school, with 92% of the day spent in the regular education environment. <sup>7</sup> Through the June 2020 IEP, the Student would move from half-day of regular education kindergarten to a full day in the first grade. (P-21, p. 43; N.T. 450, 462)

50. During the 2019-2020 school year, the Student made progress toward some IEP goals. (P-21, S-59)

51. During ESY 2020, while assisted by a Parent, the Student received remote Speech and OT services on June 26, July 10, July 17, and July 24. (P-20, P-27)

## **2020-2021 School Year- First Grade**

52. The Student began the 2020-2021 school year on September 8, 2020, and received virtual instruction. On October 5, 2020, the District's students attended school in person, a half-day, four days a week. Half the students attended in the morning; the other half attended in the afternoon. (S-54; N.T. pp. 110-111, 159, 518-519, 553-54, 741, 744-45)

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<sup>7</sup> Because the District's kindergarten program was half-day, Student's participation in morning regular education was for 100% of the day. The transition to first grade which was full day encompassed that change. (N.T. 76)

53. During virtual education sessions, the Student briefly participated in morning meetings, joined the regular education breakout room three times, briefly connected with the 1:1, and attended one out of four scheduled social skills sessions. Although accompanied by a Parent, the Student played with toys, was periodically off-camera, had difficulty following directions and transitioning to the computer, was unable to complete assessments. ( P-29, p. 14, P-33, p. 19; N.T. pp. 519, 522, 524-525)

### **September 2020 IEP Revision**

54. On September 24, 2020, the IEP team met to address Parents' concerns about the impact of virtual learning, the 1:1, a return to five full days of education, observations of dysregulation and anxiety, and future school closures. (P-29)

55. By September 24, 2020, the Student had attended three out of four speech teletherapy sessions and was offered one OT session but did not attend. (P-29, p. 14)

56. Because of concerns regarding virtual education, the District offered the Student in-person instruction with a start date of October 5, 2020. (P-30, P-33 p. 19, P-69; N.T. 527)

57. In preparation for the return to in-person instruction, the autistic support teacher created a social story and Student and a Parent met school staff and toured the elementary school. To assist with Student's transition to in-person instruction and first grade, the kindergarten special education teacher met with the first-grade team and the Parents to discuss support during kindergarten. (P-30, S-28, p. 9, S-52; N.T. 119-120, 448, 519)

58. After returning to in-person instruction, the Student's morning regular education teacher implemented the IEP. In the afternoon, along with two other students, the Student reported to the autistic support classroom for the remainder of the day, where related services and additional instruction were provided. (P-56, p. 5, S-31, S-33; N.T. pp. 747-750)

59. After the return to in-person instruction, the Student's special education teacher implemented the Student's IEP by creating social stories, social skills instruction with a specialized curriculum, and the teaching of self-calming strategies. (S-23, p.36; S-52; S-53; N.T. pp. 558-569).

60. Throughout the day, the Student was accompanied by a 1:1 aide who completed a daily log shared with the Parents. (S-30; N.T. pp. 570, 749).

### **November 2020 IEP Revision**

61. On November 5, 2020, the IEP team met in response to the Parents' concerns of Student's stomach and eating issues, after-school fatigue, anxiety and dysregulation. The Parents requested assistance with the Student's fine motor skills and more special education support. At the meeting, Student's progress toward IEP goals was reported. (P-33, S-28, p. 8, S-41)

62. The District's November 2020 progress reporting on the anxiety/self-regulation goal indicated that the Student had not displayed frustration, anxiety, or engaged in unexpected behaviors throughout the school day. (P-33, p. 14, S-41, p. 11)



63. The team revised Student's full-day instructional schedule so that Student would receive additional time in autistic support through three daily, fifteen-minute check-ins, thirty minutes of daily pre and re-teaching, strategies for using utensils while eating and cups for drinking; breaks upon request; and strategies to support virtual learning in the event of further COVID closures. (P-33, S-27; N.T. 528-531)

64. The District's December 2020 progress reporting on the anxiety/self-regulation goal indicated that the Student had not displayed frustration, anxiety, or engaged in unexpected behaviors throughout the school day. (S-41, p. 11)

65. December 2020 progress reporting on Speech and OT goals indicated the Student made inconsistent progress since the beginning of the 2020-2021 school year. (S-41, pp. 12-13)

66. In January 2021, the Parent expressed concern that the Student was anxious, had difficulty adjusting to hybrid instruction, and reaction to the discipline received after a recess incident. (P-35, P-36)

### **March 2021 IEP Revision**

67. On March 3, 2021, the District offered ESY to the Student based on concerns of social skill regression. (P-40; N.T. 538)

68. On March 12, 2021, the second trimester ended. Second-trimester progress reporting indicated that the Student made progress toward IEP goals during the 2020-2021 school year. The March 2021 progress reported toward the anxiety/self-regulation goal indicated that during the first and

second trimesters, the Student was not observed to engage in unexpected behaviors at school because of feeling anxious, upset or frustrated. (P-47, p. 11, 38-49, S-41, p. 11)

69. From March 23-25, 2021, during and after school, the Student exhibited behavioral and emotional changes (school refusal, asking if awake or asleep, fears of harm, pacing, heavy breathing, overall distress). The Student did not return to school in the District after March 25, 2021. (P-42, P-47, p. 8, S-41, p. 27)

70. The District closed for Spring Break from March 29 through April 2, 2021. On April 6, 2021, the Parents applied for admission to the Private School. (P-8, S-39, S-40; N.T. 685-687)

### **April 2021 IEP Revision**

71. On April 8, 2021, the IEP team met to discuss the Parents' concerns of Student's school and home dysregulation, anxiety and refusal and fear of attending school. (P-47, p. 8)

72. At the April meeting, the District proposed a reevaluation of the Student that included an FBA with observations in the home and school, a referral to an IU program to address school avoidance and refusal, and a transition plan to reacclimate Student back to the elementary school. The transition plan included visits to the school with trusted adults to meet outside the building, moving to inside as tolerated, consideration of a truncated schedule with increased time at school, allowing Student to remain in the support room with trusted school personnel with gradual participation in regular education classroom. (S-41, pp.50-55; N.T. 127-28, 591-92)

73. At the meeting, the Parents, advised of their intention to enroll the Student at the Private School and seek reimbursement from the District. On April 8, 2021, the Parent signed an enrollment contract for Student's attendance at the Private School for the remainder of the 2021-2022 school year. (P-48, S-38, S-40, S-54; N.T. 124, 649-650)

74. On April 16, 2021, the District denied the Parents' request for tuition reimbursement and provided the Parent with a revised IEP, a NOREP, a covid compensatory services NOREP, and a permission to reevaluate the Student (PTR). (S-42, S-44)

75. An evaluation was proposed to address concerns reported by the Parents regarding school avoidance and development of a plan to assist with the Student's return to the District elementary school. The PTR proposed cognitive and academic testing, speech and language and occupational therapy evaluations, and ATTEND evaluation consisting of psychological and FBA evaluations completed by the IU to include a review of records, parent interview, student interview, behavior rating scales, school and home observations. (P-52)

76. The April revised IEP included goals to address Student's speech-language, writing, peer interaction and self-regulation needs; SDI offered included direct instruction in social skills; sensory breaks; check-ins; use of a daily written and visual schedule; predictable routine; frequent movement breaks; use of social stories, modeling and cueing; prompting, repetition, redirection; advance notice of changes to schedule/routine; 1:1 adult support; use of planned sensory diet; strategies to support virtual learning should the need arise and the transition plan to reacclimate the Student back to school. (S-41)

77. Related services offered in the April 2021 IEP included speech and language therapy, occupational therapy, special transportation and a 1:1 aide. (S-41, p.55)

78. On May 24, 2021, after consultation with Student's medical provider, the Parents consented only to a review of records for purposes of the proposed reevaluation. (P-52, P-56, p. 7, 25, S-46)

### **June 2021 RR/IEP**

79. On June 10, 2021, the District issued its RR. The RR contained a records review that included summaries from the April 2019 ER, progress toward IEP goals, Speech/Language, OT, and Physical Therapy updates, present education levels, and input from the Student's former and current teachers. (P-56, S-58)

80. The RR determined the Student eligible under the classifications Autism, Speech or Language Impairment, and Other Health Impairment (anxiety and ADHD). The RR determined Student needed to improve receptive, expressive and pragmatic language skills; refine writing skills, improve peer interaction, adaptability and self-regulation in regard to impulse control and attention regulation. (P-56)

81. The June 2021 IEP offered responsive goals and SDI that included instruction in ELA and Math for 1.5 hours per day, three daily individual fifteen-minute check-ins, increased time in the autistic support classroom, a formal behavioral observation by a BCBA, and additional sensory/coping strategy support if excessive repetitive behaviors or increased dysregulation

occurred, related services and a transition plan to reacclimate the Student back to the elementary school. (S-49, pp.56-57, 62; N.T. pp. 134-137)

82. On July 2, 2021, the Student received an independent educational consultation. (P-59)

83. On August 5, 2021, the Parents requested a due process hearing. (P-87)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **General Legal Principles**

In general, the burden of proof may be viewed as consisting of two elements: the burden of production and the burden of persuasion. It is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Thus, the burden of persuasion, in this case, must rest with the Parents. Application of this principle, however, determines which party prevails only in those rare cases where the evidence is evenly balanced or in " equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, in the role of factfinders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *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). This hearing officer found most of

the witnesses who testified to be credible as to the facts. Witness testimony was quite consistent overall, and there was no indication of an intent to deceive. However, the District's inability to produce the records ostensibly kept by the 1:1 while providing remote assistance to the Student during some of the COVID closures proved problematic. Additionally, neither party introduced testimony from the 1:1. Without testimony or records, the Parent's testimony was more persuasive and afforded more weight as to this issue.

## **Substantive FAPE**

The IDEA requires that states 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. 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 comply with the procedural obligations in the Act. The state, through its local educational agencies (LEAs), meet 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.'" "Meaningful benefit" means that a student's program affords the student the opportunity for significant learning in light of his or her individual needs, not simply de minimis or minimal education progress. *Andrew F. ex rel. Joseph F. v. Douglas County School District*, 580 U.S. 137 12 S. Ct. 988, 197 L. Ed. 2d 335, (2017) "A focus on the particular child is at the core of the IDEA." *Id.*, \_\_\_ U.S. at \_\_\_, 137 S. Ct. at 999, 197 L.Ed.2d at 349-50 (2017) (citing *Rowley* at 206- 09)

(other citations omitted). Individualization is the central consideration for purposes of the IDEA. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). A proper assessment of whether a proposed IEP meets the above standards must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *see also, Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993). At a minimum, an IEP must include, in part, a statement of the child’s present levels of academic and functional performance, a statement of measurable annual goals designed to meet the child’s needs to enable him or her to be involved in and make progress in the general education curriculum, a statement of how progress on the goals will be measured, and a statement of the special education and related services and supplementary aids and services, based upon peer reviewed research, to be provided to the child. 34 C.F.R. §300.320.

## **Evaluation Requirements**

Substantively, 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[.]” Page 13 of 20 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 appropriately examined.

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

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining— (i) whether the child is a child with a disability; and (ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

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

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



with an LEA's educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b).

## **Least Restrictive Environment**

Moreover, also very crucial is the IDEA obligation for eligible students to be educated in the "least restrictive environment" (LRE) that permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993). All LEAs are required to make available a "continuum of alternative placements" to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa. Code 14.145.

## **Procedural FAPE**

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

## **Tuition Reimbursement**

Parents who believe that an LEA is not providing or offering FAPE to their child may unilaterally place him or her in a private school and thereafter seek reimbursement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). Tuition reimbursement is an available remedy for parents to

receive the costs associated with their child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 242 (3d Cir. 2009). Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009) (explaining that a tuition reimbursement award may be reduced on an equitable basis such as where parents fail to provide the requisite notice under 20 U.S.C. § 1412 (a)(10)(C)(iii)); *see also, C.H. v. Cape Henlopen School District*, 606 F.3d 59 (3d Cir. 2010); *Carter, supra*. A private placement need not satisfy all the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

## **Section 504**

The provisions of Section 504 of the Rehabilitation Act bar a school district from discriminating against a student on the basis of disability. 29 U.S.C. § 794.

In order to establish a violation of § 504 of the Rehabilitation Act, the filing party must prove that:

1. [Student] is "disabled" as defined by the Act;
2. [Student] is "otherwise qualified" to participate in school activities;
3. The school or the board of education receives federal financial assistance; and
4. [Student] was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. By contrast, intentional discrimination under Section 504 requires a showing of deliberate

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

### **Parents’ Claims**

The Student entered kindergarten at the beginning of the 2019-2020 school year. Unfortunately, this first public school experience was interrupted by the COVID-19 pandemic, and in March 2020, a transition from in-person to remote instruction occurred. When school resumed for the 2020-2021 school year, the Student received instruction remotely transitioned back to in-person; but in March 2021, was unilaterally placed in the Private School by the Parents.

In their Complaint, the Parents allege that the District failed to adequately evaluate the Student and offer or provide appropriate special education programming during the 2019-2020, 2020-2021, and 2021-2022 school years, including ESY resulting in a denial of FAPE. The Parents seek compensatory education for the entirety of Student’s enrollment in the District, tuition reimbursement for the Private School attended from April 2021 through the 2021-2022 school year, and reimbursement for their privately obtained July 2021 evaluation. The Parents have established by a preponderance of evidence that Student was denied FAPE from March 2020 until the end of the 2019-2020 school year, including ESY. All other claims are denied.

The Parents challenge the appropriateness of both evaluations conducted by the District. The April 2019 ER, conducted in preparation for Student's transition to kindergarten, was comprehensive and legally compliant with IDEA expectations. The District's April 2019 ER utilized various assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student, all relating to areas of suspected disability. Specifically, the District's evaluation process summarized available data, incorporated results of previous evaluations, included parental input and obtained and reported information from teachers of the Student. The District school psychologist conducted a classroom observation of the Student during preschool that, in addition to the testing observations, provided valuable information about Student when presented with directives and task demands. Furthermore, the ER included cognitive and achievement testing, occupational, physical, and speech-language evaluations, and assessments to evaluate Student's social, emotional and behavioral functioning. The District's evaluation report summarized and reviewed all data and available information that was gathered and determined Student's eligibility for special education. The ER resulted in several programming recommendations to address Student's identified needs. The evidence presented supports the conclusion that the District's ER was sufficiently comprehensive to identify Student's special education and related service needs in all areas related to suspected disability for purposes of informing the IEP team. In sum, the District's evaluative process met all IDEA criteria.

Next, the Parents contend that during kindergarten, the District failed to provide appropriate programming to address Student's significant anxiety, remote instruction was not appropriate, and that meaningful educational progress was not made. Student's kindergarten year was disrupted by the

COVID-19 pandemic, which gave rise to different issues related to the delivery of programming, which will be addressed later in this decision. The following discussion relates to Student's programming from the commencement of the 2019-2020 school year until the COVID school closure in March 2020. The Parents have not established by a preponderance of the evidence that the District failed to provide the Student with a FAPE from the beginning of the 2019-2020 school year until the March 2020 COVID closure.

The Student started the 2019-2020 school year attending full-day kindergarten, with the morning spent in regular education and the afternoon spent in a specialized autistic support setting. Although this program was not at the Student's neighborhood school, the full-day kindergarten setting provided critical opportunities for both regular education and intensive autistic support consistent with recommendations made by both the private and District evaluations. During the District's morning kindergarten program, the Student received academic instruction through a regular education curriculum. After lunch with peers, the Student attended the afternoon kindergarten session with pre-teaching and re-teaching of concepts from the morning sessions. Although the Parents expressed concern to the team that the Student struggled with episodic anxiety in the home, the most recent evaluative data, gathered months before the kindergarten transition, resulted in individualized recommendations that were implemented and satisfactorily addressed that concern. That data included rating scales completed by the Parent that did not indicate Student's anxiety rose to a level that merited intervention beyond what the District offered and implemented. The private evaluation, obtained by the Parents and referenced in the District's documentation, characterized Student's anxiety as occurring primarily in the home and triggered by transitions and school breaks. However, to address the possibility that anxiety might interfere with

the Student's kindergarten functioning, the kindergarten IEP included a litany of appropriate, responsive SDI that included self-calming strategies and a full-time, school-day, 1:1 tasked with providing dedicated assistance only to the Student. When the Parents reported an increase in home-based behaviors related to Student's anxiety and dysregulation, the District reacted with sensory-based strategies embedded throughout the school day. The IEP offered and implemented during the Student's kindergarten year was drafted, agreed to and then revised numerous times to reflect the changing needs of the Student. Any needs that arose related to the Student's anxiety were adequately met by the District. Hearing testimony from the kindergarten special education teacher and supportive evidence indicated that the Student had great attendance, was happy, engaged, participated, made friends, and overall appeared to have a successful transition to kindergarten. Although not all IEP goals were met, documented progress occurred from the beginning of kindergarten until the March 2020 COVID closure. The District's programming and supports offered were appropriate as to this time frame.

In March 2020, everything changed. The COVID-19 pandemic forced an unnatural transition for this Student when a shift from in-person to remote instruction occurred. The Parents contend that during remote instruction, without IEP mandated 1:1 support; the Student was unable to consistently access the District's online educational programming and teletherapy sessions. That is partially true. However, this issue is further complicated by unavailable District records ostensibly kept by the assigned 1:1 tasked with providing virtual support to this Student.<sup>8</sup> Although the

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<sup>8</sup>Prehearing, the Parents requested the District one-to-one logs from March 2020 through ESY 2020. These records have not been produced. The District has represented it turned over all the available records.

Student received some educational programming when assisted by a Parent, without the documentation substantiating the District's provision of mandated 1:1 services, the evidence was preponderant that Student's ability to access education was inconsistent. The credible testimony from the Parents and the District on this point left no doubt that the Student, even when logged in, played with toys, left camera view, and lacked engagement. The 1:1 assistance, although virtual and in place to facilitate access to educational programming, was not used with regularity, but without the District's missing records, the Student's efforts could not be substantiated. During ESY 2020, the evidence merits a similar result. Although the Student did access the virtual platform and received Speech and OT services, without the missing records, the offered 1:1 virtual assistance could not be substantiated. During this time, the Student was left without vital services, as well as an inability to access the curriculum reliably.

The District's failure to provide this support was contrary to the Pennsylvania Department of Education (PDE) guidance. PDE, in reliance on direction from the US Department of Education, issued guidance that during the COVID-19 pandemic, a District's obligation to provide FAPE was not altered, waived, or excused.<sup>9</sup> Although this District was forced to adjust to the realities of the COVID-19 pandemic, there was no suspension or other alteration of IDEA obligations: "no matter what primary instructional delivery approach is chosen, [State Educational Agencies (SEAs)], LEAs, and individualized education program (IEP) teams remain

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<sup>9</sup> <https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/AddInfoCOVID19.aspx> (last visited February 2, 2022)

responsible for ensuring that a free appropriate public education (FAPE) is provided to all children with disabilities.”<sup>10</sup>

The Parents have established by a preponderance of the evidence that the Student was denied FAPE during the COVID closure in March 2020 until the end of the 2019-2020 school year and during ESY. For purposes of determining an appropriate compensatory education remedy, this Hearing Officer is mindful that this Student was entitled to a continuation of educational opportunity even during the COVID closures. Still, consideration must also be given to the District’s need to develop a plan for remote instruction for all its students and take the necessary steps to implement that plan within a reasonable time. An appropriate remedy will be Ordered.

The Parents have not met their burden of proof that the District denied Student a FAPE during the 2021-2022 school year. The IEP in place developed in June 2020 in anticipation of Student’s transition to the first grade had the requisite supports designed to offer meaningful benefit to the Student. Because of ongoing concerns related to COVID-19, the Student started the first grade with remote instruction. As remote instruction continued, the Student again struggled to participate, but now documentation existed regarding the special education programming offered and accessed. During virtual regular education sessions, the Student occasionally participated during morning meetings, joined the regular education breakout room three times and attended one out of four of the scheduled social skills sessions. Although offered opportunities to work with the virtual 1:1, the Student inconsistently did so. The Student attended most

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<sup>10</sup> U.S. Department of Education, Question and Answer document, September 28, 2020, at 2, addressing Implementation of IDEA services, available at <https://www.ed.gov/coronavirus/program-information#speced> (last visited February 2, 2022).



offered speech teletherapy sessions but missed the sole proposed OT session. During this period of remote instruction, the District did provide appropriate special education programming and commensurate services. Although the 1:1 remained virtual, the Parents have not established that the District's delivery of special education programming during this limited-time denied the Student a FAPE.

After a September meeting with the Parents, the District agreed to return the Student to in-person instruction. The implemented June 2020 IEP retained goals from the previous year's programming and commensurate supports to address the Student's speech, social and OT needs; but now included a goal to address anxiety, coping and self-regulation. The new goal along with SDI, was appropriate, implemented and provided benefit to the Student. The anxiety goal in tandem with the social stories, predictive routines, sensory breaks, and the school day 1:1, were appropriate for the Student's known emotional needs and responsive to the Parents' request for preemptive measures. The District's testimony and corroborative documentary evidence were persuasive that in school, the Student appeared well-adjusted, engaged, and did not display frustration, anxiety or engage in unexpected behaviors at school. This is not to say that the Parents' testimony was disingenuous. They also provided believable testimony that after the school day ended, the Student, on occasion, became dysregulated. However, when these concerns were brought to the District's attention, Student's IEP was revised with responsive interventions put into place.

In March 2021, the Student's emotional functioning decompensated and manifested in a refusal to attend school. The District and Parents conferred during these days and an IEP meeting promptly occurred. At the meeting, the District proposed revisions to the IEP and other measures to

support Student's return to the first grade. However, the Parents conveyed their decision that Student would attend a Private School. Ultimately, the Parents also refused the District's request to conduct a comprehensive reevaluation, consenting only to a records review.

The Parents now seek tuition reimbursement for Student's enrollment in the Private School from April 2021 through the 2021-2022 school year. Consideration of this remedy first requires an analysis of whether the proposed program offered by the District offered Student a FAPE. The hearing record in this matter has established that the District's offer of FAPE was appropriate.

In support of their claim for tuition reimbursement, the Parents' contend that the April 2021 IEP developed in response to Student's March emotional crisis was untimely, deficient and should constitute the last offer of FAPE for purposes of this review.<sup>11</sup> The April 2021 IEP offered essential autistic support, a full-time 1:1 and continuation of speech and OT services, all of which were appropriate supports considering this child's needs. However, to address the immediate and new school refusal issue, a transition plan to gradually reacclimate the Student back to the elementary school and provide needed emotional support was suggested. In addition to the transition plan, a referral to an IU program to address school avoidance were proposed. All suggestions were rejected by the family, who had already decided that the Student would attend a private school. The District's efforts to obtain updated information through a reevaluation for

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<sup>11</sup> Although in April 2021, the Parents indicated their intention to seek reimbursement for tuition at the Private School, they did not file a request for a due process until August 2021. During this time, the Parents continued to express a degree of cooperation and communication with the District. The District appropriately developed programming in June 2021 in anticipation of Student's return for the 2021-2022 school year.

purposes of developing individualized and responsive programming were also refused, with consent provided only for a records review.

The Parents contend that the June 2021 reevaluation report and subsequent IEP should be disregarded because they were developed after the Student enrolled in the private school. However, the Parents simultaneously seek reimbursement for their private educational evaluation obtained in July 2021. For whatever reasons they felt were legitimate, the Parents provided consent for the District to conduct only a review of records and refused other evaluative measures that might have proven illuminating to understand this Student's needs. Without that information, the District was hampered in its ability to conduct a comprehensive, fully IDEA compliant reevaluation. As such, any disagreement the Parents evinced, and the theory now advanced as the basis for their private evaluation reimbursement is denied.

The June 2021 IEP, although premised upon an incomplete RR, was responsive to Student's known needs and was appropriate. The RR determined the Student eligible under the classifications Autism, Speech or Language Impairment, and Other Health Impairment (anxiety and ADHD). The RR determined Student needed to improve receptive, expressive and pragmatic language skills; refine writing skills, and improve peer interaction, adaptability and self-regulation regarding impulse control and attention regulation. In response, the June IEP offered responsive goals and SDI that included instruction in ELA and Math for 1.5 hours per day, three daily individual fifteen-minute check-ins, increased time in the autistic support classroom, a formal behavioral observation by BCBA, sensory/coping strategy support, related services and a transition plan to reacclimate the Student back to the elementary school. The proposed programming was

individualized and reasonably calculated to provide Student with meaningful educational benefit given Student's unique circumstances.

Finally, the Parents contend that during first grade, the Student endured numerous, unnecessary transitions, without appropriate supports. These allegations are unsupported by the record in this matter. A great deal of uncertainty with concomitant optimism surrounded the return of children to in-person instruction in the Fall of 2020 while in the middle of a pandemic. Undoubtedly, the District wanted all the children to return in person; but at the time, this was impracticable given the public health precautions in place. The Student returned to in-person instruction after the Parents and the District recognized that Student had difficulty adjusting to the demands of remote education. Like the progression from kindergarten to first grade, the return to in-person instruction was a natural transition that was expected to occur for all students. Both transitions occurred with individualized and informed supports for the Student. Other transitions the Parents used as examples were related to COVID closures because of outbreaks or the return of children to the building. Again, when these changes occurred, the Student's IEP had numerous supports in place that were available and implemented.

The District's implemented and offered programming during the school years in question, exclusive of the period addressed above, was reasonably calculated to yield meaningful educational benefit to Student in light of Student's unique circumstances and appropriate. This hearing officer is compelled to conclude that the District's proposed programming met the standards for FAPE for this Student under the IDEA. As such, there is no need to discuss whether the Private School was appropriate or any equitable considerations. Additionally, the Parents' claim for relief under Section 504 is

denied. A student who claims discrimination in violation of the obligations of Section 504 must show deliberate indifference on the part of the school district in its purported acts/omissions. Here, the record does not support a determination that the District acted with deliberate indifference toward this student. Accordingly, the District has not discriminated against the student based on disability status.

## **Compensatory Education**

Where a school district has denied FAPE to a student under the terms of IDEA, compensatory education is an equitable remedy that is available to a student. (*Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *Big Beaver Falls Area Sch. Dist. v. Jackson*, 615 A.2d 910 (Pa. Commw. 1992)). In this case, the District denied the student FAPE through the inappropriate implementation of the IEP in the online learning environment from April 4, 2020, through the last school day of the 2019-2020 school year, including during ESY during the summer of 2020.<sup>12</sup> Under guidance from both the federal and Commonwealth Departments of Education, even if the District's failure to provide a FAPE were entirely attributable to COVID-19, the Student's rights are the same, so are the remedies for violating those rights. An award of compensatory education is appropriate. Considering the record and the equitable nature of compensatory education, this Student is awarded 3.75 hours of compensatory education for each day the Student logged into the online learning environment, from April 4, 2020, until the last day of the school year. The Student is awarded 1.0 hours of compensatory education for each day the Student logged on to access ESY 2020.

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<sup>12</sup> This date represents an equitable adjustment for the reasonable rectification period, including the time necessary for the District to convert from a face-to-face to online model of educational instruction.

## **CONCLUSION**

The Parents in this matter want to do all possible to maximize their child's opportunity to succeed. That desire is admirable. As noted above, however, a school district is not required to provide the "best" program, but one that is 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) (observing that the law demands "provision of an education that is 'appropriate,' not one that provides everything that might be thought desirable by "loving parents."") (Citations omitted.)

## **ORDER**

AND NOW, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED

The Student is awarded 3.75 hours of compensatory education for each day the Student logged into the District's online learning environment from April 4, 2020, through the last day of the 2019-2020 school year.

The Student is awarded 1.0 hours of compensatory education for each day the student logged into the District's online learning environment during the summer of 2020 for ESY.

The Parents may decide in their sole discretion how the hours should be spent so long as those hours take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the student's identified educational needs. These hours must be in addition to any current compensatory education hours currently in place. Nothing in this paragraph, however, should be read to limit the parties' ability to agree in

writing mutually and otherwise as to the use of the compensatory education hours.

It is FURTHER ORDERED that any claims not specifically addressed by this decision and Order are DENIED and DISMISSED. Jurisdiction is relinquished.

Joy Waters Fleming, Esq.

Joy Waters Fleming, Esq.  
Special Education Hearing Officer

February 22, 2022