

*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:**

25893-21-22

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

N.P.

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

[redacted]

#### **Parents:**

[redacted]

#### **Counsel for Parent:**

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#### **Hearing Officer:**

Cheryl Cutrona, J.D.

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

April 25, 2022

## **INTRODUCTION AND PROCEDURAL HISTORY**

On December 22, 2021, the Parents of N.P. (hereinafter "Student")<sup>1</sup> filed a due process complaint claiming that the Pleasant Valley School District (hereinafter "District") denied the Student a free and appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA")<sup>2</sup>.

The case proceeded to a closed, due process hearing held in five sessions: February 10, February 14, February 17, March 7, and March 10, 2022. The sessions were convened remotely on the Zoom virtual platform due to the COVID-19 pandemic. Written closing statements were provided by the parties by April 6, 2022.

## **ISSUES**

1. Did the District fail to provide a FAPE under the Individuals with Disabilities Education Act ("IDEA")?
2. If so, is the Student entitled to compensatory relief?
3. Is the Student entitled to prospective placement at [the Private] School?

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. This Hearing Officer will use plural pronouns (i.e., they, them, their) to protect the Student's gender. All personally identifiable information, including the details on the cover page, will be redacted prior to the decision's 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> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

## **FINDINGS OF FACT**

All evidence including the exhibits admitted to the record, transcripts of the testimony, and the parties' written closing statements was considered. The only findings of fact cited in this Decision are those needed to address the issues resolved herein. All exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. The Student [redacted] resides in the District and at all times relevant to the claims and defenses in this matter, the District was the Local Education Agency for the Student.
2. The Student is identified as one in need of specially designed instruction under the primary disability category of Autism, secondary disability category of Intellectual Disability (ID), tertiary disability category of Other Health Impairment (OHI), and quaternary disability category of Speech or Language Impairment (SD-19 at 20)<sup>3</sup>.
3. The Student has a full-scale IQ of 40 (SD-2 at 9), and a General Ability Index score of 44, which is in the extremely low range (S-19 at 18).
4. The Student has significant and complex behavioral needs. The Student engages in physical aggression [redacted], self-injurious behaviors [redacted], destruction of property, task refusal, difficulty with transitioning, ritualistic stereotypy [redacted], eloping, yelling, crying, and occasional incontinence (NT at 181).

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<sup>3</sup> References to the record throughout this decision will be to the Notes of Testimony (NT) followed by the page number in the hearing transcript, School District Exhibits (S-) followed by the exhibit number, and Parent Exhibits (P-) followed by the exhibit number, where necessary.

5. The Student's size and strength render aggressive behaviors, tantrums, and self-injurious behaviors to be particularly problematic (NT at 175).
6. The Student engages in ritualistic stereotypy behaviors include chinning (NT at 56, 171, 176), [redacted] (NT at 56, 176, 566). The [behavior] has become so aggressive that it has been categorized under self-injurious behavior (NT at 176).
7. On January 9, 2020, the Student was enrolled in a non-residential, treatment facility (hereinafter TF) associated with Behavioral Health Associates, Incorporated (BHA) (S-1; S-4; NT at 416). The TF's focus is on a combination of therapeutics and academics (S-1; NT at 618-619) including a program for those dually diagnosed with Autism and Intellectual Disabilities, and a program for students who have enhanced behavioral needs (NT at 417-418).
8. There are approximately 24 students in the enhanced high school program at the TF (NT at 559). Including the Student, there are four students in their classroom (NT at 559). Each classroom in the enhanced program has a Board Certified Behavioral Analyst (BCBA) and a special education teacher (NT at 418, 465-466, 494). Each student is provided with a Registered Behavior Technician (RBT) (S-1, S-25; NT at 418, 465-466, 494, 754-755).
9. The TF uses Therapeutic Aggression Control Techniques – 2 (TACT-II), a process primarily designed to de-escalate, then physically manage students who have become unsafe either to themselves or others (NT at 447). TACT-II is described as less likely to result in injury to a student or staff member (NT 447) than other strategies. All of the TF staff are trained in TACT-II (NT at 448, 504). The TACT-II process includes trying to determine the motivation behind the behavior (NT at 448-49), verbal

de-escalation, and, if that does not work, distracting the student from what they might be obsessing over, then removing any environmental factors that could be causing the behaviors to escalate (NT at 762- 763). If de-escalation, distraction, and removal do not work, the last resort would be to restrain or utilize a TACT-II hold on a student (NT at 763). After a student is restrained, the staff models deep breathing or other de-escalation tactics to calm the student (S-27 at 65; NT at 766-768). Once the student is calm, the student is given space (NT 767-768).

10. The TF also uses other techniques, including RIRD (response, interruption, and redirection) to address a student's automatically reinforcing behaviors (NT 569); match stimulation, explained as saying a competing stimuli when a student continues to repeat a phrase to compete for attention (NT at 569. 30); and a sensory room (NT at 785-786).
11. Between the time the Student was admitted to the TF and the time of the hearing, the number of times the Student needed to be restrained had increased. According to the TF records, between July 8, 2021 and the time of the hearing, the Student had been physically restrained 21 times (S-27; P-8, at 1; NT at 102). These restraints lasted anywhere from two minutes to 17 minutes, with an average of seven minutes per restraint. Because of the Student's size and strength, as many as five staff members were needed to effectively administer a safe restraint (S-27). Several staff members required medical care following injuries sustained while attempting to restrain the Student. On December 1, 2021, one staff member sustained broken ribs (S-27 at 178; NT at 819-822).
12. After school at the TF, the Student attended an after-school program at the [redacted] from 2:30 to 4:00 p.m. where the Student received

Applied Behavior Analysis (ABA) therapy and had 2:1 staffing (NT at 58, 59) at PAAC.

13. Several IEP revision meetings were held in early 2020 after the Student was placed at the TF. When the IEP team met on February 12, 2020, an IEP revision was made that prioritized the Student's behavioral goals over functional academic goals because the Student's largest barrier to an improved quality of life was severe aggression and self-injurious behavior. The academic goals were removed from the December 2020 IEP to the December 2021 IEP (S-4 at 1, 7; S-4 at 96; NT 500-501). Academic goals were reinstated in the December 17, 2021 IEP (S-20).
14. The first Progress Report following the Student's placement at the TF, dated February 28, 2020, indicated that they were adjusting to the new classroom albeit some difficulties with bumping into things, pacing, eloping, and falling asleep. It also reported that the Student's intense negative behaviors had declined from an average of 15 per week to 10, 9, 7 and 6 in the last updates. The Student's positive interactions with the staff were increasing (S-5 at 5).
15. The team met again on March 2, 2020 to discuss alternative placements for the Student including in-state, residential treatment facilities (RTF). The Parents secured a Supports Broker to aid in the search for an alternative placement. Many alternatives located in Pennsylvania were considered. In most situations, the Student was not accepted due to the Student's age, severe behaviors, or COVID-19 restrictions. In response to the pandemic, some schools have closed their doors to new students at this time. The Student is also on a waiting list for at least one other school (P-7 at 13; NT at 97, 354-356).
16. At the December 8, 2020 IEP meeting, the team reviewed the recommendations of various doctors and a psychiatric evaluation, and

concluded that, at that time, there was a medical necessity for Student's placement at a RTF (S-28 at 59-60; S-31; NT 514).

17. Subsequently, the team agreed to send the Student to an intensive outpatient behavioral program at an out-of-state "Institute" from February 1-19, 2021 (NT at 86) which, by all accounts, was not effective, reinforced the problem behaviors, and resulted in increased self-injurious behaviors and aggression towards staff (S-14 at 9). The IEP team met on March 1, 2021 to review and discuss the Institute's recommendations and by March 16, 2021 the TF discontinued following those recommendations (S-14 at 9) which appeared to make things far worse.
18. The TF Progress Report dated February 25, 2021, noted that following their return from the placement at the outpatient Institute, the Student was following a schedule, routine, and transitions to new locations and activities when prompted. The Student was also completing small tasks with staff assistance and frequent breaks (S-9 at 1).
19. In an attempt to medically stabilize the Student, the Parents placed the Student in an inpatient program at a special hospital in [state name] for six weeks from March 26 through May 7, 2021 (S-19 at 4; NT at 87-89, 458). Following hospitalization, the Student returned to the TF (NT at 89). By all accounts, the gains made during the hospital stay were short lived (S-14 at 9; S-28 at 89; NT at 134, 195, 200-201, 879-880).
20. There is a TF Progress Report dated April 30, 2021 which appears to be limited to Speech and Language goals, despite the fact that the Student was placed in the [out of state] hospital for part of the time period covered by the Report. The third quarter data was limited due to that absence. The Student demonstrated progress on two of three goals tracking responses to: (1) functional "how" questions by sequencing pictures with a goal of 80% accuracy; (2) to functional "when" questions with a goal of 80% accuracy; and (3) assigning adjectives to pictures

being shown with a goal of 80% accuracy. The Report indicated that from the first quarter to the third quarter, the Student progressed on two of the three goals. The Student (1) sequenced three steps correctly with 10% accuracy in the first quarter to 50% in the third quarter; (2) gave two correct answers from 53% accuracy in the first quarter to 50% in the third quarter; and (3) gave one adjective per picture with 20% accuracy in the first quarter to 70% in the third quarter.

21. At the Parent's request, the [out of state] doctor was hired to conduct an evaluation of the Student. The Evaluation Report (ER) concluded that "[i]t appears that even after having been hospitalized six weeks, that particular goal of stabilization was not reached" (S-13 at 2). The [out of state] doctor opined that a partial hospitalization program was not an intensive enough environment for Student (S-13 at 2) and that it was necessary for the Student's medical issues to be stable before looking for a long-term placement (S-13; S-19 at 3; NT at 131, 883). The doctor listed the necessary elements of a placement for Student to be 1:1 support 24 hours a day and respite for the Parents. The doctor recommended that the Student's medication be reassessed and, once the Student's behaviors were stabilized, that the Student return to the TF or partial hospitalization (S-13 at 3-4).
22. The County MH/IDD was responsible for providing home support staff for which the Student is entitled. However, staffing has been inconsistent due to staff shortages related to the pandemic (N.T. 59, 362-363, 378). Staffing issues have also adversely affected the provision of RBTs in the home (NT at 58, 378).
23. The Student's behavioral, academic and speech goals progress during the 2020-2021 school year was reported in 40-day review documents (S-11), most of which are undated. The Conference dates listed are October 2020; January 19, 2021; March 18, 2021; and May 25, 2021. The data



on behavioral and academic goals are erratic, but the Student's strengths (e.g., attending morning meetings; attending group therapy; identifying feelings; and expressing needs) and needs (e.g., coping skills; emotional regulation; self-help with toileting and other life skills; and following directions and completing tasks without inappropriate behavior) were consistent throughout the period covered in the reports. In general, the academic and speech goals show more progress than the behavioral goals (S-11).

24. The Student's current IEP dated December 17, 2021 (S-20) includes goals that involve Essentials for Living (i.e., making requests; waiting; task completion; accepting "no;" following and tolerating directions related to health and safety; accepting transitions; taking turns; sharing; completing daily living skills; and reducing problem behaviors) (S-20 at 8-9). The Parents reported that, following high school, the Student will likely be placed in Adult Day Services and live in a group home (S-20 at 14). The current IEP includes functional academic goals (e.g., grammar; writing practice; adapted reading program; and functional math) and goal-specific Program Modifications and Specially Designed Instruction (SDI), Occupational Therapy, Speech and Language Therapy, Special Transportation, and Extended School Year (ESY) (S-20).
25. Due to COVID-19, [the Student] did not receive programming from the middle of March 2020 until the 2021-2022 school year (NT at 74-75). As a result, the Student applied for and will receive the Department of Education's offer of an additional year of education, until age 22 (NT at 150; 884).
26. The Parents have requested prospective placement of the Student at [Private School], (P-5) a private "residential school and a day school" (NT at 284). [The Private School] works with students on the autism spectrum that also have co-occurring conditions including intellectual

disability, behavioral challenges, speech, and language impairments, medical or psychiatric concerns (P-5 at 1; P-6 at 1; NT at 238-39, 283). The Student was accepted to the [Private School] (P-6 at 3; NT at 103, 288, 355) [redacted] Program, which has a 4-1-4 ratio: four students, one classroom teacher, and four paraprofessionals, each paraprofessional working one-to-one with each student. The [redacted] Program focuses on engagement and regulation, helping students to regulate their sensory systems through sensory regulation activities and integration activities (NT at 288-289). There is a Family Nurse Practitioner on duty 24 hours every day (P-5 at 4; NT at 296). The mental health team, made up of school psychologists, clinical psychologists, mental health clinicians, and BCBA's, works with the educational staff (NT at 297-99, 311). The program includes adapted physical education, functional communication and social skills (NT at 299-302). There is no cap on clinical services at [Private School] (NT at 301). Not all of the teachers at [the Private School] are certified in special education (NT at 325). Not all of the paraprofessionals are certified BCBA's or RBT's (NT at 327-328). [The Private School] is not accredited by the State [redacted]; although the school is accredited by [another state.] (NT at 328; 869; 879). A representative of [the Private School] presented information about the school to the IEP team on November 23, 2021 and again on December 17, 2021 (S-23 at 6; NT 240-241; 841-842).

## **Parents' Claims**

The Parents claim that the District has denied FAPE to the Student. As a result, the Student has not made meaningful educational progress, has continued to demonstrate significant deficits in communication and all academic areas, and the severe and pervasive behaviors that have greatly impacted the Student's ability to derive meaningful educational benefit have not improved.

The Parents maintain that a prospective placement in [the Private School] is the only means for the District to provide FAPE to the Student. The Parents contend that [the Private School] is the closest school that can offer the Student the intensive services specifically targeted to manage the Student's educational, communication and behavioral needs and that also has availability (NT at 115, 240) and is willing to accept the Student.

Due to District's denial of FAPE, the Parents allege that the Student is entitled to compensatory education from November 2019 until such time as the Student receives FAPE, through being prospectively placed at [the Private School].

### **District's Claims**

The District maintains that it has provided the Student with FAPE offering IEPs that were reasonably calculated to provide meaningful educational benefit, and that the Student has made meaningful educational progress based upon the Student's particular circumstances. Now that the Student has consistently attended the TF since Fall of 2021, the Student's problematic behaviors have decreased and the Student has made progress in many IEP goals. Therefore, the Student is not eligible for compensatory education.

The District contends that the Parents have failed to prove that [the Private] School is an appropriate placement for the Student, not only because [the Private School] is not licensed, but because not all of the teachers are certified in special education (NT 325); the Student will not receive one-to-one support from a BCBA (Board Certified Behavioral Analyst) or an RBT (NT at 327-328) at [the Private School]; and there is no doctor on staff to stabilize the Student's medications (NT at 321). The District argues that the equities weigh against an award of prospective placement at [the Private School].

The District argues that the TF is able to program for the Student and that [the Private School] is not an appropriate placement. Therefore, the District should not be required to fund placement at [the Private School] and the Parent's claims should be denied.

## **DISCUSSION AND APPLICATION OF LAW**

### **General Legal Principles: Burden of Proof**

In general, the burden of proof essentially consists of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

The burden of persuasion must be established by a preponderance of the evidence. *Jaffess v. Council Rock School District*, 2006 EL 3097939 (E.D. Pa. October 26, 2006). A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in *Schaffer* called "equipoise." When the evidence is in "equipoise," the party seeking relief and challenging the program and placement must prove their case by a preponderance of the evidence in order to prevail. See *Schaffer* above; see also *Ridley S.D. v. M.R.*, 680 F.3d 260 (3d Cir. 2012); *L.E. v. Ramsey Board of Education*, 435 F.3d 384 (3d Cir. 2006).

On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See *Schaffer*, above.

In the present matter, based upon the above, the burden of proof rests upon the Parents, who filed the complaint initiating the due process hearing.

### **General Legal Principles: Credibility Determinations**

It is the responsibility of the hearing officer, as factfinder, to determine the credibility and reliability of the witnesses' testimony. 22 Pa. Code §14.162 (requiring findings of fact); See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution*, 88 A.3d 256, 266 (Pa. Commw. 2014) (it is within the province of the hearing officer to make credibility determinations and weigh the evidence to make the required findings).

This Hearing Officer found each of the witnesses to be candid, credible and convincing, testifying to the best of their ability and recollection concerning the facts necessary to resolve the issues presented.

### **General IDEA Principles: FAPE**

The IDEA requires the provision of 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. Decades ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to assist a child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and

“meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

To be eligible for special education services under the IDEA, the student must (1) meet the requirements of one or more of the disability categories identified in the regulation and (2) require specially designed instruction to benefit from that instruction.

In this case, the Student’s eligibility for special education services and specially designed instruction is uncontested. The Student has been diagnosed with four of the 13 exceptionalities listed in IDEA: Autism, ID, OHI and Speech or Language Impairment.

### **Autism**

The IDEA defines Autism as a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (ii) Autism does not apply if a child’s educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section. (iii) A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (c)(1)(i) of this section are satisfied. 34 C.F.R. §300.8(c)(4). The Student’s Autism diagnosis includes Attention Deficit Hyperactivity Disorder (ADHD), and Disruptive Mood Dysregulation Disorder (DMDD).

### **Intellectual Disability**

The IDEA defines Intellectual Disability (ID) as a “significantly subaverage general intellectual functioning, existing concurrently with

deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance." 34 C.F.R. §300.8(c)(6). The last time the Student was assessed, [Student's] full-scale IQ was 40.

### **Other Health Impaired**

IDEA defines Other Health Impaired (OHI) as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment. An OHI is "due to chronic or acute health problems" and it "adversely affects a child's educational performance." 34 C.F.R. §300.8(c)(9).

### **Speech or Language Impairment**

The IDEA defines Speech or Language Impairment (SLI) 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 C.F.R. §300.8(c)(11).

## **General IDEA Principles: The IEP**

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency ("LEA") representative and the child's parents. An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic

achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." Id. § 1414(d)(1)(A)(i).

A FAPE, as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." Id. § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. Id. §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D).

Although the IEP must provide the student with a "basic floor of opportunity," it does not have to provide "the optimal level of services," or incorporate every program requested by the child's parents. *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 557 (3d Cir. 2010). It has been established that an eligible student is not entitled to the *best possible program*, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). The statute guarantees an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

The question in this case is whether or not the District's IEPs dated December 19, 2019, December 18, 2020, and December 17, 2021, as modified, were reasonably calculated to enable Student to make progress. The IEPs include present levels, individualized measurable goals, program modifications, SDI, transition services, and related services reasonably calculated to meet the unique needs of the Student as required to assist a child to benefit from that instruction.



The IEP team has convened numerous times to ensure that everyone's concerns are taken into consideration; tweaking and adjusting treatment plans, methods of responding to problematic behavior, goals, program modifications, SDI, and transitions.

The Student is a complex individual with unique and challenging needs who displays severe and pervasive behaviors that have greatly impacted [Student's] ability to derive meaningful benefit from [Student's] education. At the time of the hearing, the Student was not considered to be medically stable and [Student's] problematic behaviors tended to cycle. The [redacted] doctor described the behaviors as having "waxed and waned" (S-13). One of the Student's teachers describes the Student's behaviors as "consistently inconsistent" (S-20 at 7). The TF Clinical Director, who has worked with the Student since 2018, described the Student as "by far one of the most complex kids [he has] ever worked with" (NT at 518).

The District has provided progress reports and interim 40-day meeting reports outlining the Student's academic, speech, and behavioral needs that correlate with the witnesses' descriptions and the experts' reports of the cyclical and pervasive nature of the Student's behavioral needs. Documented academic progress has demonstrated sporadic gains, while the behavioral progress has been erratic.

The Parents are dedicated, loving, and attentive. They have built a strong support system for their child. They have been willing to try the IEP team's suggestions (N.T. 197, 243, 365-366) and have done their best to find an appropriate placement and services to stabilize their child to improve the Student's capacity to benefit educationally.

Educational programming for the Student has been challenging. The Student needs substantial support, particularly when the behaviors become explosive. The testimony provided by those involved with the Student demonstrate that the parties have worked tirelessly to provide the best

education and support services to meet this Student's unique and substantial needs. The importance of stabilizing the Student's behavior and medication needs are crucial to the Student's success.

The District and its providers have accommodated the Parents requests prior to the current request to prospectively place the Student at [the Private School]. All of the parties have worked relentlessly to find an ideal placement for the Student during unusual times. Even during normal times, the Student's age and problematic behaviors would make it difficult to identify a residential placement that would admit the Student.

In conclusion, the Parents have not demonstrated by a preponderance of the evidence that the District denied a FAPE to the Student. At all times, the District has provided IEPs that were reasonably calculated to meet the unique and substantial needs of the Student required to assist them in benefitting from their instruction.

### **General Principles of Law: Compensatory Relief**

Compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE under the terms of the IDEA. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *Big Beaver Falls Area School District v. Jackson*, 615 A.2d 910 (Pa. Commw. Ct. 1992). Compensatory education may be an appropriate form of relief where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996).

In this situation, there has been no finding of a denial of FAPE, so there can be no compensatory education remedy awarded.

## **General Principles of Law: Prospective Placement**

Prospective placements are permissible under Third Circuit precedent. *D.S. v. Bayonne Bd. Of Educ.*, 602 F.3d 553 (3d Cir. 2010). Hearing officers have relied upon the three-prong *Burlington-Carter* test when determining whether to affirm a request for a prospective placement. *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 370 (1985); *Florence County School District v. Carter*, 510 U.S. 7 (1993).

Long-standing case law and the IDEA provide the potential for private school placement with tuition if a school district has failed in its obligation to provide FAPE to a child with a disability (*Florence County District Four v. Carter*, 510 U.S. 7 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); see also 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)).

The Parents must establish all three prongs of the Burlington–Carter Test to prove their case: (1) the District’s proposed IEP is inappropriate for the child; (2) the placement chosen by the Parents for the child is appropriate; and (3) the equities weigh on the side of the Parents for full tuition. *Lauren v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). Only if it is determined that the district failed to offer FAPE, does the hearing officer need to decide whether the private school placement is appropriate for the child. And then, only if the first two prongs are met, is an examination of the equitable considerations required.

Step one requires the hearing officer to examine the educational program offered by the District. Here, as discussed above, the District offered IEPs that appropriately conform with the FAPE requirements. The District complied with the IDEA by developing IEPs that were reasonably calculated to enable the Student to receive *meaningful* educational benefit based on the their unique needs.

Based on the conclusions above, there is no need to further address the remaining two prongs of the Burlington-Carter test, and Parents' claim for prospective placement at [the Private School] is denied.

## **CONCLUSIONS OF LAW**

1. The Parents did not prove by a preponderance of the evidence that the District failed to provide the Student with FAPE under the Individuals with Disabilities Education Act ("IDEA"). The District complied with its obligations to Student under the IDEA over the entirety of the 2019-2020, 2020-2021, and the Fall semester of the 2021-2022 school years.
2. The Student is not entitled to compensatory relief from December 2019 until a prospective placement is provided.
3. The Parents failed to meet the requirements for prospective placement as described in the Burlington-Carter test because the District at all times provided FAPE to the Student.

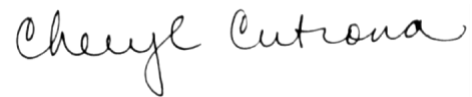
## **ORDER**

AND NOW, this 25th day of April, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's December 19, 2019 IEP, as written, and as later modified on January 6, 2020; February 12, 2020; and March 2, 2020, was appropriate for the Student.
2. The District's December 18, 2020 IEP, as written, and as later modified on March 1, 2021; March 22, 2021; May 26, 2021; June 9, 2021; July 28, 2021; October 1, 2021; October 15, 2021, was appropriate for the Student.
3. And, the District's December 17, 2021 IEP, as written, was appropriate for the Student.

4. The Parents' claim for compensatory education is denied and dismissed.
5. The Parents' claim for prospective placement at [the Private School] is denied and dismissed.

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



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**Cheryl Cutrona, J.D.**  
**Special Education Hearing Officer**  
**April 25, 2022**  
**ODR 25893-21-22**