

*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:**

File No. 24585-20-21

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

[C.J.]

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

[redacted]

#### **Parents:**

[redacted]

#### *Counsel for Parents:*

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

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#### *Counsel for LEA:*

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#### **Hearing Officer:**

Cathy A. Skidmore, Esquire

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

07/15/2021

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>1</sup> is a late elementary school-aged student in the Kennett Consolidated School District (District) who currently is identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.<sup>3</sup>

Student's Parents filed a Due Process Complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504, as well as the federal and state regulations implementing those statutes. In that Complaint, the Parents challenged the District's program spanning the 2017-18 through the 2020-21 school years, demanding compensatory education through November 2020 as a remedy. The District generally denied the Parents' averments and claims for relief.

Following a due process hearing at which the parties presented evidence in support of their respective positions,<sup>4</sup> and review of the record in

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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. 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> 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).

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

<sup>4</sup> The hearing convened remotely due to the existing restrictions imposed by the COVID-19 pandemic. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. The Findings of Fact and citations to the record are to those that are necessary to resolve the issues; and, citations to duplicative exhibits may not be to all. References to Parents in the plural will be made where it appears that one was acting on behalf of both.

its entirety, the claims of the Parents must be granted in part and denied in part.

## **ISSUES**

Whether any of the Parents' claims are barred by the applicable statute of limitations;

Whether the District denied Student FAPE in any respect during the applicable scope of the claims;

If the District did deprive Student of FAPE, whether Student is entitled to compensatory education?

## **FINDINGS OF FACT**

1. Student is a late elementary-school aged student in the District. Student is eligible for special education pursuant to a Specific Learning Disability and an Other Health Impairment. (N.T. 50; S-35.)
2. Student also has diagnoses of Post-Traumatic Stress Disorder (PTSD), an anxiety disorder, and several medical conditions. (N.T. 51-57; S-35.)

### **Early Educational History**

3. Student was provided early intervention services and then school-based special education services in kindergarten and first grade in a neighboring state. Student's eligibility was based on Developmental Delay and services addressed reading weaknesses and occupational therapy needs. (N.T. 57-61; S-5.)

4. Student has had behavioral health services provided by the local county since the spring of 2018 after the family moved to Pennsylvania. (N.T. 116-18, 137; S-35 at 5.)
5. The Parents have not shared any of Student's mental health records with the District. They did provide a release for the exchange of certain information between the District and a private behavioral health service agency in December 2019; that exchange did not include medical or psychiatric information, however. (N.T. 128; S-36.)

#### **2017-18 School Year**

6. Student enrolled in the District for the start of the 2017-18 school year in second grade. (N.T. 61.)
7. The District issued a Notice of Recommended Educational Placement (NOREP) in early September 2017 proposing to implement the most recent Individualized Education Program (IEP) from the other state. The Parents approved that NOREP. (S-6.)
8. The District developed an IEP in September 2017. Parent input at that time related to increased occupational therapy services and possible physical and speech/language therapy needs. They also expressed concerns with Student following directions, completing homework, and attending to task, in addition to communication skills, interpersonal relationships, transitions, and behavior. (S-7 at 9.)
9. Needs identified in the September 2017 IEP were reading decoding and fine motor skills. Annual goals (from the other state's IEP) addressed both decoding and fine motor skills. Student's program was one of itinerant learning support, participating in regular education except for learning support for reading and occupational therapy. The Parent approved the NOREP for this IEP. (P-24 at 30; P-28; S-7 at 16-24.)

10. The District conducted an evaluation in the fall of 2017 with the consent of the Parents and issued an Evaluation Report (ER) in November 2017. (S-9; S-10; S-11.)
11. Parent input into the November 2017 ER reflected problematic behavior at home including verbal and physical aggression, as well as difficulty communicating and frustration from the school day. (S-11 at 1-2.)
12. The November 2017 ER set forth medical diagnoses from earlier in the year: Separation Anxiety Disorder, Disruptive Mood Dysregulation Disorder, and Attention-Deficit/Hyperactivity Disorder (ADHD). That physician also noted a need to rule out Autism and Bipolar Disorder. (S-11 at 7-8.)
13. Assessment of Student's cognitive ability for the November 2017 ER (Kaufman Brief Intelligence Test, Second Edition) yielded an average range Verbal IQ score and a below average range Nonverbal IQ score, with a Composite Score (90) in the average range. The scores were noted to require caution in interpretation because of Student's refusal to comply with assessment directives, but the Composite Score was consistent with previous cognitive assessment in 2015. (S-11 at 2-3, 8-9.)
14. Scores from assessment of academic achievement for the November 2017 ER (Young Children's Achievement Test) were deemed to be not an accurate reflection of Student's skills due to the lack of cooperation. Student's scores were generally in the poor to below average range. (S-11 at 9-10.)
15. Teacher input into the November 2017 ER included distractibility, task refusal and noncompliance, attention-seeking behaviors, and difficulty with writing tasks. Detailed descriptions of two observations by the

school psychologist reflected ongoing noncompliance and task refusals. (S-11 at 3-6.)

16. Assessment of Student's behavior for the November 2017 ER (Behavior Assessment System for Children – Third Edition (BASC-3) yielded rating scales reflecting clinically significant concerns of the Parents in nearly all areas with the exception of at-risk concerns with Social Skills, Leadership, and Resiliency. Teacher scales revealed concerns of one or both in the clinically significant range for Hyperactivity, Aggression, Anxiety, Depression, Somatization, Learning Problems, and Negative Emotionality; and at-risk concerns in the additional areas of Attention Problems, Withdrawal, Adaptability, Study Skills, and Resiliency. The scales for executive functioning ranged from Extremely Elevated (Parent) to Not Elevated (one teacher).
17. Occupational therapy evaluation for the November 2017 ER revealed deficits in visual-motor integration and other fine motor skills. Direct and consultative services were recommended. (S-11 at 15-16.)
18. Physical therapy evaluation for the November 2017 ER did not reflect any school-based needs. (S-11 at 11-12.)
19. Speech/language screening for the November 2017 ER did not reflect any articulation deficits. (S-11 at 6.)
20. A functional behavioral assessment (FBA) was conducted for the November 2017 ER. At that time, Student would fail to engage in or complete tasks or follow directives; verbally refuse to comply and at times drop to the floor instead; and engage in nonsensical self-talk instead of listening to others. Observations for the FBA were very detailed in describing each of these behaviors. The hypothesized functions of Student's noncompliant behaviors was determined to be

- escaping demands of tasks or directives, and to gain attention during whole-group instruction. (S-10; S-11 at 20-29.)
21. The November 2017 ER identified Student as eligible for special education on the basis of an Other Health Impairment. (S-11.)
  22. The District developed a Positive Behavior Support Plan (PBSP) for Student in December 2017. The goal in the PBSP addressed self-regulation, and provided antecedent strategies, replacement behaviors, and consequences. (S-13.)
  23. Student's IEP was revised in December 2017. The District provided updated present level information including benchmark reading probes reflecting that Student was exhibiting reading skills well below grade expectations; however, Student had met the decoding goals. Information from the November 2017 ER was also included. (S-14.)
  24. Needs in the December 2017 IEP were identified as reading skills, fine motor skills, independent work habits, coping strategies, and a behavior plan. (S-14 at 15.)
  25. A new reading decoding goal in the December 2017 IEP targeted decoding two-syllable words. Other goals addressed fine motor skills (writing sentences, using proper spacing and placement in written work, and cutting shapes) and improving self-regulation (as set forth in the PBSP). (S-14.)
  26. Program modifications and items of specially designed instruction in the December 2017 IEP included small group learning support for reading decoding and mathematics; writing supports; preparation for transitions; direct instruction for the PBSP goal; and class participation and assignment/test accommodations. Occupational therapy and social skills were identified as related services. Student's program remained one of itinerant learning support with regular education participation,

except during reading and mathematics instruction and support, and occupational therapy. The Parents approved the NOREP. (S-14 at 32-41; S-15.)

27. Student's IEP was revised slightly in January 2018 to include the availability of choices for Student. (S-16.)
28. Student continued to exhibit problematic behavior at school during the 2017-18 school year, including task refusal, verbal outbursts, and some physical aggression [redacted]. At other times, Student successfully de-escalated behaviors and resumed participation in the classroom. (N.T. 66-67, 70, 72, 79, 164-65, 166-68, 190-91, 194-95, 204.)
29. Student was provided small group phonics instruction with a special education teacher each day that focused on fluency. Like all second graders, Student also participated in small group reading instruction that was leveled into tiers based on each student's fluency and comprehension benchmark scores and occurred four times each week. Some students, including Student, additionally qualified for Title I reading services. (N.T. 175-77, 201-02; P-21; P-25; S-14 at 6.)
30. In March 2018, Student's problematic behavior at school increased. The team agreed to provide additional time in the learning support classroom and to take data on Student's behaviors. (S-25 at 14.)
31. The District conducted risk screenings after Student threatened a peer and a staff member in April 2018. (P-18.)
32. Also in April 2018, the IEP team met to discuss Student's escalating behaviors, and agreed to add a personal care assistant (PCA) for Student throughout the school day. Student returned to regular education participation for mathematics and all writing supports. The Parent approved the April 2018 NOREP. (P-19; S-25 at 2, 14.)

33. In May and June 2018, the IEP team met to review the behavioral data. Over the spring, Student's behavior had escalated such that the classroom had to be evacuated on a number of occasions. Parents did not initially approve the NOREP proposing learning and emotional support in a different elementary school building. (S-19; S-25 at 8-13.)
34. Progress reporting in June 2018 reflected that Student had nearly met the decoding goal; and was making inconsistent progress on the self-regulation goal, as well as on the occupational therapy goals (due to behaviors). (S-20; S-25 at 36-45.)
35. Student's behavior improved with the addition of the PCA. (N.T. 204.)
36. The Parents were in regular communication with Student's teachers over the course of the 2017-18 school year. (N.T. 69, 160-61, 172-73, 192-93, 199.)
37. Student's report card for the 2017-18 school year reflected that Student was performing below grade level expectations in many skills across the areas of reading/language arts and mathematics. (S-47 at 5.)
38. Student was not eligible for extended school year (ESY) services in the summer of 2018 but attended a private ESY program. (N.T. 80, 85; S-22; S-23.)

### **2018-19 School Year**

39. Student transitioned to a different District elementary school for the 2018-19 school year (third grade) due to the location of the identified emotional support services in the District. (N.T. 82; S-25 at 60.)
40. Student's IEP was revised in September 2018, at which time the team agreed to add emotional support (particularly for mathematics support and as needed throughout the school day) along with the PCA throughout the school day. Student would gradually return to the regular education environment except during reading instruction,

emotional support check-ins twice each day, social skills, and occupational therapy. Other additions related to some new writing supports, sensory breaks, and an assistive technology evaluation. At that time, Student's program was one of supplemental emotional support. The Parents approved the NOREP. (S-25; S-33; N.T. 220-23, 227.)

41. Student's behavior during the 2018-19 school year was significantly improved over that in second grade, with only occasional incidents of task refusal that were quickly overcome. (N.T. 83, 217.)
42. A new IEP was developed in December 2018. The present level section included scores on benchmark probes revealing that Student was performing well below grade expectations in reading. By that time, Student was participating in the regular education setting for the entire day except for reading instruction, check-ins twice a day, breaks as needed, and social skills group. (S-32.)
43. Parent input into the December 2018 IEP included difficulty with homework, following directions, maintaining attention to tasks, communication, interpersonal relationships, transitions, and some academic skills. (S-32 at 20-21.)
44. Identified needs in the December 2018 IEP were for reading weaknesses, fine motor skill deficits, behavioral support, coping strategies, and working independently. (S-32 at 21-22.)
45. A reading fluency goal in the December 2018 IEP specified oral reading fluency at a second grade level. Other goals addressed fine motor skills (building core strength, improving visual-motor perception, use of a keyboard and assistive technology for writing tasks, using proper spacing and placement in written work, and cutting shapes from

- baseline performance); improving self-regulation; and social skills relating to self-regulation. The PBSP was retained. (S-32 at 30-44.)
46. Program modifications and items of specially designed instruction in the December 2018 IEP included small group learning support for reading decoding; small group emotional support for mathematics and other needed support; writing supports; access to a PCA throughout the school day for academic and behavioral success; preparation for transitions; direct instruction for the PBSP goals; and class participation and assignment/test accommodations. Occupational therapy, social skills, and the PCA were identified as related services. Student was eligible for ESY services. Student's program was one of supplemental emotional support with regular education participation except during reading instruction, emotional support check-ins, social skills, and occupational therapy. The Parents approved the NOREP. (S-32 at 45-58.)
47. Progress reporting for the 2018-19 school year reflected mastery of the reading fluency goal. Student also made significant progress on the occupational therapy, self-regulation, and social skills goals. (S-31.);
48. Student's report card for the 2018-29 school year reflected all grades in the A+ to B range. However, Student was performing below grade level expectations in many skills across the areas of reading/language arts and mathematics. (S-47 at 3.)
49. The District offered but the Parents declined ESY services in the District in 2019. Student attended a private program. (P-10.)

#### **2019-20 School Year**

50. At the start of the 2019-20 school year, the District proposed, and the Parents consented to, a reevaluation of Student. (S-34.)

51. A meeting convened in October 2019 to review the SETT<sup>5</sup> plan for assistive technology that began in April 2019. (P-11; S-38 at 18.)
52. The District issued a reevaluation report (RR) in November 2019. (S-35.)
53. Parent input into the November 2019 RR included their concerns with Student's lack of peer relationships and social skills, need for coping strategies, difficulty regulating emotions, homework completion, and poor communication skills. (S-35 at 4-5.)
54. Teacher input into the November 2019 RR revealed concerns with Student's handwriting legibility and ability to maintain attention to tasks in the regular classroom. Student's behavior was reportedly not a significant concern at that time; discontinuation of the PBSP was recommended. (S-35 at 14-17.)
55. Assessment of academic achievement for the November 2019 RR (Wechsler Individual Achievement Test, Third Edition) yielded scores in the below average range on the Total Reading Composite (with below average scores on the Word Reading, Pseudoword Decoding and Oral Reading Fluency subtests); in the average range on the Written Expression composite; and in the above average range on the Mathematics composite. The scores were judged to provide valid and reliable estimate based on Student's effort. Assessment of phonological awareness also revealed areas of weakness. (S-35 at 23-25.)
56. Occupational therapy evaluation for the November 2019 RR reflected growth since the 2017 ER, but a continuation of services was recommended to address weaknesses in fine motor, visual motor, and visual motor integration skills. (S-35 at 19-23.)

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<sup>5</sup> This process provides a framework for assistive technology considerations and involves the Student, Environment, Task, and Tools.

57. The November 2019 RR reported on Student's progress toward IEP goals, reflecting mastery of the reading fluency and behavioral goals, and near mastery of the social skills/self-regulation goals. Student was making progress on occupational therapy goals. (S-35 at 13-14.)
58. The conclusion in the November 2019 RR was that Student was eligible for special education based on a Specific Learning Disability (basic reading skills and reading fluency) with a secondary eligibility category of Other Health Impairment. (S-35 at 26-28.)
59. The District held a meeting to review the November 2019 RR. (N.T. 302-03.)
60. A new IEP was developed in December 2019 that included substantial content from the November 2019 RR. Identified needs were for reading weaknesses (phonological awareness, decoding, sight words, and fluency), fine motor skill deficits, and generalization of social skill/self-regulation skills. (S-38 at 23.)
61. Annual goals in the December 2019 IEP addressed reading fluency at a second grade level; reading decoding of two-syllable words; phonological awareness skills; fine and visual motor skills (cutting, keyboarding); and social skills/self-regulation. (S-38 at 30-40.)
62. Program modifications and items of specially designed instruction in the December 2019 IEP included small group learning support for reading decoding; writing supports; fading of the PCA; behavioral strategies including positive reinforcement; preparation for transitions; and class participation and assignment/test accommodations. Occupational therapy and the PCA were identified as related services. Student's program was one of itinerant learning and emotional support with regular education participation except during reading instruction,

- emotional support check-ins, and occupational therapy. The Parents approved the NOREP. (S-37; S-38 at 41-56.)
63. Student's IEP was revised in February of the 2019-20 school year to plan for fading the PCA and to confirm ESY eligibility in 2020. The IEP also reflects that Student no longer needed the check-ins for emotional support. (S-38 at 2, 4, 7, 52-54.)
  64. Student exhibited some behavior difficulties at home over the 2019-20 school year (fourth grade) including resistance to attending school and completing homework. (N.T. 88-89, 92.)
  65. Student's dedicated PCA left the District in approximately the middle of the 2019-20 school year. The District developed a schedule of other aides to provide that support for Student. (N.T. 89-90; P-33.)
  66. Progress reporting through the second trimester of the 2019-20 school year reflected some progress on the occupational therapy goals. Data was not taken after the second trimester due to the COVID-19 pandemic and resulting school closures in March 2020. (S-46.)
  67. After schools were closed in March 2020, Student had significant difficulty accessing and engaging in the instruction and completing assignment packets. Student was resistant to the virtual learning environment. (N.T. 92-93.)
  68. The District offered to provide Student with a remote PCA after the start of the pandemic. (N.T. 94-95.)
  69. Student's report card for the first two trimesters of the 2019-20 school year reflected below grade level expectations in reading, and some varied performance in other subjects. All grades were in the A to B- range. (S-47 at 2.)

70. The District proposed ESY services in the summer of 2020 that were virtual. Student attended that sixty-hour program, but not successfully. (N.T. 93-94; P-3.)

### **2020-21 School Year**

71. Student was in fifth grade for the 2020-21 school year. (N.T. 235-36.)
72. Student began the 2020-21 school year with virtual instruction. Student had a scheduled time to meet with the regular education teacher each day but did not often log in for those sessions. (N.T. 236.)
73. Student's IEP was revised in September 2020 to make revisions based on a continuation of virtual instruction for Student, and the Parents' concern about Student's access to a PCA. The team determined that Student would have access to a PCA for specific subjects for four hours each school day. The Parents did not approve the NOREP. (P-1; P-2; S-38 at 2, 6-7, 41-49; S-39; S-40.)
74. During the period that Student was attending school through virtual instruction, the District was following local guidance indicating that in-person support was not safe in light of the then-existing COVID-19 circumstances, leading to a gradual return to such services beginning with those students having the most intense needs. (N.T. 373-74.)
75. Progress reporting for the first trimester of the 2020-21 school year revealed that some skills were maintained from the spring; however, Student exhibited regression with cutting skills and self-regulation, and performed inconsistently on probes for the reading fluency goal. (S-46.)
76. Student returned to in-person instruction five days per week in mid-November 2020, with the Parents approving the NOREP for that change that also noted a lack of progress during remote instruction. Student typically had regular education classes in the mornings and special

- education supports and related services in the afternoons. (N.T. 96, 237-38, 377-78; S-41.)
77. A new IEP was developed in November 2020. Identified needs were for reading weaknesses (phonological awareness, decoding, sight words, and fluency), fine motor skill deficits, and generalization of social skill/self-regulation skills. (S-44.)
78. Annual goals in the November 2020 IEP addressed reading fluency at a second grade level; decoding; phonological awareness skills; fine and visual motor skills (copying patterns and sentences/paragraphs); and social skills/self-regulation. (S-44 at 32-37.)
79. Program modifications and items of specially designed instruction in the November 2020 IEP included small group learning support for reading decoding; writing supports; fading of the PCA; behavioral strategies including positive reinforcement; preparation for transitions; and class participation and assignment/test accommodations. Occupational therapy and the PCA were identified as related services. Student's program was one of itinerant learning support with regular education participation except during reading instruction, emotional support check-ins, and occupational therapy. (S-44 at 38-47.)
80. The Parents approved the NOREP accompanying the November 2020 IEP. (S-43.)
81. Student was provided learning support for reading as well as one period each day with a reading specialist over the 2020-21 school year. Emotional support also resumed in the spring of 2021. (N.T. 243, 246, 248, 261-63.)
82. Progress reporting at the end of the second trimester of the 2020-21 school reflected mastery of the decoding goal; and steady and significant progress toward the occupational therapy goals. Student's

- performance was inconsistent with respect to the self-regulation and phonological awareness goals, and relatively stagnant on the reading fluency and goal. (S-50.)
83. Student was eligible for ESY services in 2021, and the District also recommended COVD Compensatory Services (CCS) over that summer. (N.T. 379-81, 391-92.)
84. The District offered an extended period of ESY services for Student in 2021 that would also include CCS. The Parents declined those services in part because they were to be provided in a new school building and they did not approve the NOREP. (N.T. 145-47; P-35.)
85. The District will revisit the need for additional CCS for students, including Student, over the next two school years. (N.T. 379-81, 387-88, 399-400.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **General Legal Principles**

The burden of proof is generally viewed as comprising two elements: the burden of production and the burden of persuasion. In cases such as this, 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, here, the burden of persuasion rests with the Parents who filed the Complaint and requested this administrative hearing. Application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise," however. *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, who assume a role as a fact-finder, bear the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley School District*, 2014 U.S.

Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be generally credible as to the facts as they recalled them. In the relatively few instances where witness accounts varied, those are attributed more to lack of specific recollection and differing perspectives, rather than any intention to mislead. The weight accorded the evidence, however, was not equal. The testimony of the District professionals with first-hand knowledge of Student's performance at school was credited over that of others lacking such direct involvement. The documentary evidence was quite persuasive particularly where there were understandable memory lapses.

In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

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

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

The state, through its local educational agencies (LEAs), meets the obligation of providing FAPE to eligible students through development and implementation of an IEP which is "reasonably calculated" to enable the

child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court has observed, an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

Individualization is clearly the central consideration for purposes of the IDEA. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child’s parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands services are reasonable and appropriate in light of a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Endrew F.*, *supra*; *Ridley*, *supra*; see also *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); see also *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same).

## **Substantive FAPE: Child Find**

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); see also 22 Pa. Code §§ 14.121-14.125. The statute itself sets forth two purposes of the required evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1)(C)(i).

The obligation to identify students suspected as having a disability is commonly referred to as “child find.” LEAs are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). More specifically, LEAs are required to consider evaluation for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to identify a disability “at the earliest possible moment.” *Id.* (citation omitted).

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

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

## **General Section 504 Principles**

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). Thus, in this case, the coextensive Section 504 claims that

challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

## **IDEA Statute of Limitations**

The IDEA expressly provides that a party "must request an impartial due process hearing on their due process complaint within two years of the date the parent or public agency knew or should have known about the alleged action which forms the basis of the complaint." 20 U.S.C. § 1415(f)(3)(c); see also 34 C.F.R. § 300.511(e).<sup>6</sup> In other words, "[t]he IDEA statute of limitations is triggered when the [filing party] knew or should have known about the action that forms the basis of the complaint." *J.L. v. Ambridge Area School District*, 2008 U.S. Dist. LEXIS 54904, \*28-29, 2008 WL 2798306, \*10 (W.D. Pa. July 18, 2008). The IDEA also expressly provides for two specific exceptions to the two-year limitation period, permitting claims beyond that timeframe to a parent who was prevented from requesting the hearing as a result of:

- (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
- (ii) the local education agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

20 U.S.C. § 1415(f)(3)(D); see also 34 C.F.R. § 300.511(f).

Hearing officers must "make determinations, on a case by case basis, of factors affecting whether the parent 'knew or should have known' about the action that is the basis of the complaint." *J.L. v. Ambridge Area School*

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<sup>6</sup> The IDEA statute of limitations also applies to Section 504 claims such as those raised here. *P.P. ex rel. Michael P. v. West Chester Area School District*, 585 F.3d 727, 737 (3d Cir. 2009).

*District*, 622 F.Supp.2d 257, 266 (W.D. Pa. 2008) (quoting 71 Fed. Reg. § 46540-01 at 46706 (August 14, 2006)). This is a “highly factual inquiry.” *Id.* The Third Circuit reaffirmed the importance of the knew or should have known date in *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 606 n. 4 (3d Cir. 2015). Generally speaking, the fact-finder must determine whether the actions or inaction by an LEA “are sufficient to alert a reasonable parent that the child would not be appropriately accommodated.” *Brady P. v. Central York School District*, 2018 U.S. Dist. LEXIS 43230 at \*19, 2018 WL 1367325 at \*7 (M.D. Pa. 2018).

The Third Circuit also cogently explained in *G.L.* that there is obvious tension between the obligation to timely pursue a claim against an LEA as a diligent plaintiff and the need for participation in the parent/LEA collaboration process that is inherent in the IDEA:

On the one hand, although a child's right to special education under the IDEA does not turn on parental vigilance, *M.C. [v. Central Regional School District]*, 81 F.3d [389,] 397 [3d Cir. 1996], parental vigilance is vital to the preservation and enforcement of that right. ... Parents are often in a position to be forceful advocates for their children and through their vigilance and perseverance to help fulfill the IDEA's promise of a free appropriate public education. That “cooperative process . . . between parents and schools” that results from a parent's action, after all, is at the very “core of the statute” itself. *Schaffer*, 546 U.S. at 53.

*G.L.*, 802 F.3d at 625. And, where a Due Process Complaint is not timely filed with respect to all claims, “all but the most recent two years before the filing of the complaint will be time-barred.” *Id.* at 620.

**The Parent's Claims**  
**Statute of Limitations**

The Parents' offer of proof on the scope of the claim asserted that they did not know, or have reason to know, of the District's alleged denial of FAPE until its November 2019 RR when it concluded that Student had a Specific Learning Disability in reading. They suggest that their knowledge was limited by the November 2017 ER that did not identify a Specific Learning Disability and that they had to rely on the District's documentation. The District counters that the Parents were armed with all relevant facts throughout the time period of Student's enrollment, and that claims prior to February 2019 are time-barred.<sup>7</sup>

The record does not support a conclusion that the District's November 2017 ER and November 2019 RR solely form the basis of assessing the Parents' knowledge in this case. They were aware since Student's enrollment in a different state that Student had weaknesses in areas of reading, and that the District maintained the identical IEP goals upon Student's transition. The District conducted the November 2017 ER and advised caution in interpreting assessment results that, in any event, reflected performance below expectations in reading skills. Student's IEPs were revised over the 2017-18 and 2018-19 school years and, at all times, reflected Student's reading and language skill deficits and the special education programming to address them. All of that information, together with the progress reports, plainly establish that the Parents were fully aware of the District's actions as they occurred, not some time later. The law does not demand that a parent be able to point to a specific disability category in order to possess necessary knowledge about the child's needs and exercise requisite parental vigilance. Moreover, the Parents actively participated in programming decisions for and communications about Student throughout

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<sup>7</sup> The original Complaint was filed on February 12, 2021; and an Amended Complaint was deemed filed as of February 23, 2021 following a sufficiency challenge. Parties may file an amended complaint if the hearing officer grants permission, 34 C.F.R. § 507(c)(3), which was granted in this case despite the lack of agreement by the District.

Student's enrollment. Here, the evidence simply does not support a conclusion that the Parents lacked knowledge of the District's special education programming for Student such that the scope of their denial of FAPE claims may be expanded beyond the two-year period immediately preceding their Complaint. Accordingly, the discussion below relates solely to the time period of February 2019 through November 2020.<sup>8</sup>

*FAPE Denial*

Three different school years are encompassed by the above permissible scope of the Parents' claims. They shall be addressed in chronological order.

During the 2018-19 school year, Student was provided a program of learning and emotional support to address social/behavioral/emotional needs, occupational therapy weaknesses, and reading skill deficits, in addition to additional writing supports. Student was provided individualized special education reading services and intensive regular education services targeting known deficits. PCA support was provided throughout the school day. Student made progress on all of the annual IEP goals by the end of that school year, six months after IEP development, including mastery of the reading fluency goal, which this hearing officer concludes is meaningful in light of Student's circumstances. There was no evidence presented from which one could conclude that the District should have taken steps to reevaluate Student, or that Student's program was inappropriate in any respect, during the second half of the 2018-19 school year.

The parties agreed to a reevaluation in the fall of 2019 and continued exploring assistive technology options. At that time, Student was no longer in need of the PBSP and by December, the team agreed that PCA support

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<sup>8</sup> It is unclear from the Parents' Closing Statement whether concede that there are periods of time within that span that should be excluded. This decision will not omit any time period from February 2019 through November 2020.

was to be faded. The resulting RR yielded useful information about Student's strengths and needs and guided the IEP team in reaching a different conclusion about Student's eligibility category in order to address defined deficits requiring specially designed instruction. Through the March 2020 school closures, the evidence does not establish a denial of FAPE during the 2019-20 school year.

Although the Parents contend that the District's provision of different PCAs throughout the school day in the second semester was problematic and inappropriate, that concern must be balanced against the decision to fade that particular support and allow a reasonable period of time for implementation after that decision was made. The second semester through March 2020 when schools closed provides that reasonable period of time.

All Pennsylvania schools were closed in March 2020. Instruction in the District for Student remained virtual through November 2020. Throughout that period of time, Student did not have access to an in-person PCA whose support was part of Student's IEP and clearly became necessary in the remote learning environment. Consequently, Student accessed very minimal special education and related services. Progress monitoring was not conducted in the spring of 2020, and assessments in November 2020 reflected maintenance of some skills and regression in others (reading fluency, fine motor skills, and self-regulation).

The COVID-19 pandemic did not and has not resulted in the 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 responsible for ensuring that a free appropriate public education (FAPE) is

provided to all children with disabilities.”<sup>9</sup> The Pennsylvania Department of Education (PDE) provided guidance on the obligations of LEAs to comply with those obligations, including the provision of PCA support for students during the school closures:<sup>10</sup>

**If an Individualized Education Plan (IEP) includes a Personal Care Assistant (PCA) as a related service and a Local Education Agency (LEA) is utilizing a remote/blended learning model during the 2020-21 school year, must the LEA provide that service in the home?**

An LEA must provide all related services as documented in the IEP to ensure each child's provision of free and appropriate public education (FAPE) during the COVID-19 pandemic. If an IEP team determines a PCA is no longer appropriate because the needs of the student have changed, the IEP should be revised. If the IEP team determines a student needs a PCA as a related service, the LEA should ensure necessary safety and hygiene protocols are in place prior to providing in-home support. If in-home supports cannot be provided due to health and safety concerns, this should be considered as part of the Compensatory Services determination.

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<sup>9</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 July 14, 2021).

<sup>10</sup> Pennsylvania Department of Education, Pennsylvania Department of Education, Bureau of Special Education, Answers to FAQs Regarding the COVID-19 Pandemic (August 31, 2020), available at <https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/AddInfoCOVID19.aspx> (last visited July 14, 2021).

PDE also issued guidance for determining how in-home services could be safely implemented during the pandemic.<sup>11</sup> Here, however, the District was attempting to heed local health and safety guidance based on current conditions in the area, such that CCS would be appropriate. Regardless of how the deprivation is characterized, however, the record supports a conclusion that Student was not provided with FAPE from the school closures in March 2020 through the date of the November 2020 IEP, including ESY services for the summer, on this basis.

### **Remedy: Compensatory Education**

Compensatory education may be an appropriate form of relief following a due process hearing where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has also endorsed an alternate approach, sometimes described as a "make whole" remedy, where the award of compensatory education is crafted "to restore the child to the educational path he or she would have traveled" absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

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<sup>11</sup> Pennsylvania Department of Education, COVID-19 Answers to Common Questions, *Staying Safe While Providing In-Home Services*, available at <https://www.education.pa.gov/Schools/safeschools/emergencyplanning/COVID-19/20-21FAQs/Pages/default.aspx> (last visited July 14, 2021).

Before turning to a discussion of compensatory education, it is instructive in this hearing officer's view to also refer to other PDE guidance, namely that regarding a process for LEAs to determine appropriate COVID-19 Compensatory Services or CCS for its students. Pursuant to the most recent PDE guidance, CCS means "services as determined by an [Individualized Education Program (IEP)] team needed to remedy a student's skill and/or behavior loss and/or lack of progress that resulted from [a Local Education Agency's (LEA's)] inability to provide Free Appropriate Public Education (FAPE) while using alternative instructional models due to the COVID-19 pandemic." Importantly, again according to the same guidance, "CCS should be considered only after the student receives services as set forth in their IEP for a period of time ('recoupment period')." A multi-step process to begin after resumption of the 2020-21 school year is intended to "give the student an opportunity to recoup the lost skills or behavior or to make progress to the level(s) determined appropriate prior to the extended school closure." In essence, CCS may be made available by LEAs to children who need those services because the LEA was *unable* to provide FAPE due to the pandemic. The additional guidance by PDE regarding PCAs maintains the position on CCS to remedy any deprivation.

It is important here to also note that the parties have reached a resolution of claims after November 20, 2020, and have been working collaboratively on Student's programming since that time. This hearing officer recognizes the importance of not impeding the parties' positive relationship going forward and decisions that they may make together. The District in this case has already determined that Student is in need of CCS, and anticipates that decision to be revisited on an ongoing basis over the next two years. In this case, and in light of the remedy below, the District cannot be required to provide both CCS and compensatory education for the

same FAPE deprivations that occurred during the 2020 school closures. Accordingly, and again as a matter of equity, the District may receive an hour-for-hour credit for certain CCS provided to Student through the end of the 2022-23 school year. The parties may agree to consider the compensatory education award to serve as a substitute for CCS for Student.

As to the amount of the award, the Parents suggest that full days of compensatory education are warranted, which is appropriate in some cases. *See, e.g., Keystone Central School District v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education, affirming an award of full days). The remedy must be equitable under the circumstances and, here, must relate to Student's disability-related needs which clearly did pervade the school day during remote learning. Prior to the school closures, however, Student was not exhibiting a need for a PCA throughout the entire day, and consideration of a remedy must account for the District's knowledge at the time. In addition, the District must be granted a period of reasonable rectification for purposes of the compensatory education calculation.

This hearing officer concludes that five hours of compensatory education for each day that school was in session<sup>12</sup> from May 1, 2020 through the end of the 2019-20 school year, and from the start of the 2020-21 school year through the date Student could return to in-person instruction, in addition to sixty hours for ESY in 2020, provides an appropriate remedy. The reasonable rectification period through May 1, 2020 accounts for a number of factors: the initial brief school closures; the

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<sup>12</sup> Students at the elementary school level are entitled to 900 hours of instruction per school year over 180 school days, equating to 5 hours per day. 22 Pa. Code §§ 11.1, 11.3. This figure provides a rational basis for the award despite any governmental suspension of those requirements for the 2019-20 school year due to the COVID-19 pandemic.

need for the District like all other LEAs to make rational decisions regarding, and begin to implement, alternative programming for its students in light of the sudden and eventual long-term closures; and the District's lack of access to Student's mental health records that would have provided important information to its professionals regarding Student's needs during remote instruction after the difficulties surfaced.<sup>13</sup> This award in total is intended to provide the necessary complete remedy for Student's educational service deprivation to compensate for both academic and behavioral needs that were unaddressed during the period of school closure and remote instruction.

It is unclear in this case whether the District may have already provided CCS to Student. In any event, the District must be permitted in this case to receive credit against this compensatory education award for a portion of CCS hours that it has determined, and may in the future determine, are necessary for and are provided to Student. For the 2019-20 school year and ESY in 2020, the credit for CCS may be applied to the total number of hours awarded in the attached order. Any CCS hours for which the District is not credited shall be provided through the traditional remedy of compensatory education.

The award of compensatory education is subject to the following conditions and limitations. Student's Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers Student's educational and related services needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation.

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<sup>13</sup> The District's inability to gain access from Student's medical providers, including mental health services, may impede a collaborative IEP process. See, e.g., *Oconee County School District*, 2015 U.S. Dist. LEXIS 85226, 2015 WL 4041297 (M.D. Ga. 2015).

The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age sixteen (16). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory education may be limited to the average market rate for private providers of those services in the county where the District is located.

## **CONCLUSIONS OF LAW**

1. The Parents' claims prior to February 2019 are barred by the applicable limitations period;
2. Student was deprived of FAPE at the end of the 2019-20 school year and the start of the 2020-21 school year due to pandemic-related school closures; and
3. Student is entitled to compensatory education.

## **ORDER**

AND NOW, this 15<sup>th</sup> day of July, 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Student was deprived of FAPE during the 2019-20 school year from the date of the March school closures through the end of the school year, over ESY in 2020, and from the start of the 2020-21 school year through the date Student was eligible to return to in person instruction.
2. Student is awarded five (5) hours of compensatory education for each day that school was in session from May 1, 2020 through the end of the 2019-20 school year, and for each day that school was in session and Student was not eligible for in person instruction at the start of the 2020-21 school year, as well as sixty (60) hours for the 2020 ESY services, in order remedy the deprivation of FAPE. All of the conditions and limitations on that award set forth above are expressly made a part hereof as though set forth at length.
3. The District may elect to receive credit against the compensatory education award for the total number of CCS hours provided to Student through the end of the 2022-23 school year, up to a maximum of the total compensatory education hours awarded for the 2019-20 school year and 2020 ESY.
4. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire  
HEARING OFFICER  
ODR File No. 24585-20-21