

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:

26997-22-23

Child's Name:

A.P.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

Caryl Andrea Oberman, Esquire
Leona Goldshaw, Esquire
705 North Easton Road
Willow Grove, PA 19090

Local Education Agency:

Rose Tree Media School District
308 West Olive Street
Media, PA 19063

Counsel for LEA:

Gabrielle C. Sereni, Esquire
Hadley Perkins, Esquire
19 West Third Street
Media, PA 19063

Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

01/16/2023

INTRODUCTION AND PROCEDURAL HISTORY

The student, A.P. (Student),¹ is a very early school-aged student who resides in the Rose Tree Media School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² based on the Autism and Speech/Language Impairment categories.

Student has been provided early intervention services and first enrolled in the District for the start of the 2022-23 school year. The District provides half-day kindergarten programs in the morning and afternoon, and uses a random selection process for assignment to a morning session because parental preference tends to be greater for that time of day. Student was not chosen for a morning session through this process, which was the Parents' preference.

Following an evaluation, the District offered a special education program that would be provided in an afternoon session. The parties convened several meetings but were unable to resolve their differences. The Parents then filed a Due Process Complaint under the IDEA, Section 504 of the Rehabilitation Act of 1973,³ and the Americans with Disabilities Act,⁴ with the case proceeding to an efficient due process hearing.⁵ The Parents

¹ 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).

² 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).

³ 29 U.S.C. § 794.

⁴ 42 U.S.C. §§ 12101-12213.

⁵ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit

claimed that a morning program was necessary to its appropriateness for Student, whereas the District contended that this request was not based on educational need.

Following review of the record and for all of the reasons set forth below, the claims of the Parents cannot be sustained and must be denied. Specific directives for the parties will be set forth in the order.

ISSUES

1. Whether the District's proposed program and placement for Student for the 2022-23 school year was appropriate, both procedurally and substantively, based on Student's needs;
2. If the District's proposed program and placement for Student was not appropriate, whether the District must be required to provide specific services for Student; and
3. If the District denied Student a free, appropriate public education in its program proposed for the 2022-23 school year, should Student be awarded compensatory education?

FINDINGS OF FACT

1. Student is a very early elementary school-aged student residing in the District. Student has been identified as eligible for special

number, but citations to duplicative exhibits may not be exhaustive. In case it is not clear on the record, S-1 through S-35 have been admitted. References will be made to Parents in the plural where it appears that one was acting on behalf of both.

education based on Autism and a Speech/Language Impairment.
(N.T. 33-34; P-20; S-18.)

2. The District provides a half-day kindergarten program, and uses a type of lottery system in each of its elementary schools to determine which students are assigned to the morning or afternoon session. Parents are asked their preference, and the results are tabulated randomly to assign each student to a session. (166-69, 174.)
3. The morning and afternoon sessions are each 2.5 hours in length and do not differ in any respect including the curriculum that is provided. (N.T. 192-93, 267-68.)
4. Students with Individualized Education Programs (IEPs) who need either a morning or afternoon session may be transferred from the randomly assigned placement if the IEP team makes that decision. (N.T. 181, 190, 216-17, 239-40.)
5. IEPs for students with disabilities are implemented in the same manner regardless of which session a student attends. (N.T. 268.)
6. The Parents have observed that Student is calm in the mornings, but begins to tire at approximately 11:30 a.m. Typically, as of the date of the first hearing session, Student can be redirected from challenging behavior in the late morning but, sometime in the early to mid-afternoon (1:30 – 3:00 p.m.), Student has a “meltdown” that may be of long duration, and the Parents have difficulty calming Student. (N.T. 49-51.)

Early Educational History

7. Student was diagnosed with Autism at a young age and began early intervention (EI) services. (N.T 41-43; P-1; S-1.)

8. The local Intermediate Unit (IU) evaluated Student in November 2019 several months after the Autism diagnosis when Student was preparing for preschool-age services. An Evaluation Report (ER) was issued and reported that, at that time, Student was not exhibiting problematic behavior in the home except with transitioning between activities. (P-2; S-2.)
9. The ER reported skill deficits across domains, and specifically with respect to expressive language and social-emotional development. Needs identified included increased attention to tasks in addition to expressive and functional communication skills. Student was determined to be eligible for early intervention services based on developmental delay. (P-2; S-2.)
10. The IEP developed for Student by the IU in February 2020 contained goals/outcomes in the areas of visual motor, gross motor, expressive language, and functional play skills, as well as maintaining attention to tasks. Behavior specialist consultation was included due to some challenging behaviors in the classroom including elopement and task refusal. The goals/outcomes were revised periodically based on Student's functioning, with new goals addressing fine motor and pre-academic skills. (S-3.)
11. Student began remote rather than in-person EI services in April 2020, generally in the mornings. As of January 2021, as Student continued to receive remote services, Student was attending the preschool distance learning class several afternoons each week. (N.T. 50; S-3 at 12, 15-16.)
12. In July 2021, as Student prepared to return to in-person EI services, a behavior update was provided in the IEP. At the time, Student was

using a rewards system for exhibiting expected behavior such as sitting in a chair and listening quietly. Student would attend the EI program five days each week for 2.5 hours in the spring of 2022. (P-35; S-3 at 9-10; S-3 at 6.)

Transition to District Programming

13. The Parents began the process to transition Student to school-age programming in early December 2021. A transition meeting with the EI provider, the Parents, and two District representatives convened in January 2022, and Student was registered with the District. (N.T. 51-52, 293, 340-41; P-5; S-5; S-13.)
14. A Reevaluation Report (RR) was issued by the IU in January 2022. At that time, the Parents reported that Student frequently exhibited “meltdowns” at home “at 11:00 a.m., 3:00 pm, and between 5:30 pm and 6:00 pm” (S-8 at 6), and sometimes in the car after preschool. They described Student’s challenging behaviors to include tantrums, noncompliance, and aggression, which were not seen in the school setting. The behavior specialist consultant recommended a fading of those services because of Student’s presentation at school. (P-6; S-8 at 6, 15.)
15. Needs identified in the January 2022 RR were for following directions, sustaining attention to activities, pre-writing skills, functional communication, articulation, cooperative play, and gross motor skills. Student’s eligibility for transition to school-age programming in the fall was also noted. (P-6; S-8.)
16. The IU developed a new IEP for Student following the January 2022 RR. The Parents continued to report that Student engaged in aggressive behavior in the home, but the IEP reflects only a mild

challenging behavior at school during activities, specifically interrupting. This IEP maintained the goals that Student had not yet mastered from the prior review. (P-9; S-9.)

17. In early March 2022, Student's pediatrician provided a written recommendation for regular school-age programming for the 2022-23 school year with a one-on-one or classroom aide. (P-12; S-14.)

The District's Reevaluation

18. In February 2022, the District sought and obtained the consent of the Parents to conduct its own reevaluation. (S-10; S-11.)
19. The District's RR was issued in May 2022, incorporating results of the IU's January 2022 RR and information from a recent IEP, as well as documentation from the Parents and related service providers. (P-20; S-18.)
20. Parent input into the District's RR included Student's "serious behavioral issues at home" (S-12 at 1), which were described to the District school psychologist as meltdowns and aggression that were not exhibited at school. (P-11; P-12; S-12; S-18 at 1-2.)
21. Input from the EI teacher for the District's RR noted various strengths including many pre-readiness skills, and weaknesses (delays in cognition, social-emotional functioning, language, and motor skills). The teacher indicated "N/A" in response to a question asking whether there were behavior issues (S-15 at 5). (S-15; S-18 at 5-6.)
22. The District conducted assessment of Student's intellectual ability for its RR. Student attained an average range Full Scale IQ and average range scores on all subtests. A measure of pre-academic skills

reflected a number of skills that Student had already acquired. (P-20; S-18 at 8-9.)

23. In the area of social/emotional/behavioral functioning, the results of the Behavior Assessment System for Children – Third Edition rating scales completed by one of the Parents and the IU teacher were vastly different. The Parents endorsed clinically significant concerns on almost all of the scales (hyperactivity, aggression, anxiety, depression, attention problems, atypicality, and activities of daily living) with the few exceptions of somatization, adaptability, and functional communication (all in the at-risk range) and no concerns regarding withdrawal and social skills. The teacher ratings reflected no areas of concern. (P-20; S-18 at 9-10.)
24. On the Adaptive Behavior Assessment System –Third Edition rating scales for the District’s RR, the Parents reported below average adaptive skills in the conceptual, social, and practical domains and on the general composite. Student’s IU teacher noted below average skills only in the conceptual area and in the average range on the general composite. (P-20; S-18 at 10-11.)
25. Evaluation of speech/language, physical, and occupational therapy skills for the District’s RR included incorporation of the IU January 2022 RR and some additional assessments. Recommendations for continuation of those related services were provided by all three therapists. (P-20; S-18 at 12-17.)
26. A Functional Behavioral Assessment (FBA) interview and direct observation for the District’s RR reflected behaviors in the home but none in the school setting. Without any behaviors of concern at

school, a formal FBA did not occur and a behavior plan was not recommended. (P-20; S-17; S-18 at 11-12.)

27. The District's RR identified needs for following directions, receptive vocabulary and sound production, gross motor skills, fine and visual motor skills, with academic and social skill supports. Student was determined to be eligible for special education based on Autism and Speech/Language Impairment. Recommendations for the IEP team were also provided. (P-20; S-18 at 17-18.)

Preparation for Fall 2022

28. The survey for Student's home school for the 2022-23 school year yielded more parents preferring a morning session than there were available slots. The students were randomly selected for the morning session, and a number of others were placed on a waiting list on request of parents. (N.T. 170-72.)
29. The Parents received written notice on April 13, 2022 that Student was assigned to the afternoon session for the fall. They replied immediately, stating that Student had private Applied Behavior Analysis (ABA) services in the afternoons. When offered, they did ask that Student be placed on the waiting list. (N.T. 66, 114-15, 172; P-15; S-31.)
30. The Parents were in communication the school principal about the need for a morning session due to afternoon ABA services after the notice of the afternoon assignment. At the time, however, Student was not yet receiving private ABA services. (N.T. 62-63, 84, 115-18; P-16.)

31. An IEP meeting convened in June 2022. This IEP summarized information from the District's RR including the identified needs, noting that each need would be addressed either through a goal or specially designed instruction, or both. Student did not have behaviors that impeded Student's learning or that of others. (S-20.)
32. Annual goals in the June 2022 IEP targeted the needs for following directions, early writing skills, sound production, receptive language/functional communication, and gross motor skills. Program modifications and items of specially designed instruction addressed support for attention and peer interactions, academic support, safety, family support, and related services (specifically, Occupational, Physical, and Speech/Language therapies). A plan to reconvene the IEP team in late October 2022 to assess services and progress was also included. (S-20 at 16-24.)⁶
33. The June 2022 IEP proposed full participation in general education except during therapy sessions in a program of itinerant learning support in the neighborhood school. (S-20 at 26-27.)
34. At the IEP meeting in June 2022, the Parents expressed their preference for the morning session based on scheduling, and also explained that Student tended to engage in difficult behaviors in the afternoons. The team agreed to convene another meeting in the fall if Student's behavior in the afternoon session warranted a discussion on changes to programming. (N.T. 195, 206-07, 223-24, 231-32, 298-99, 314-15.)

⁶ The final IEP at S-20 contains a few items of specially designed instruction not appearing in the draft IEP at P-21.

35. The Parents rejected the Notice of Recommended Educational Placement (NOREP) accompanying the final June 2022 IEP, and asked for an informal meeting. They referenced Student's need for a morning session and a one-on-one aide, citing to letters from Student's family physician and a developmental neurologist. (P-23; S-22 at 3.)
36. In mid-June 2022, Student's developmental neurologist wrote a note "To Whom It May Concern" (P-22 at 1), expressing the opinion that Student would fare better in morning sessions than in the afternoons, also referencing Student's difficulty with changes to routine. The Parents did not provide this note to the District until it was made an exhibit at the hearing. (N.T. 130, 135, 260; P-22.)
37. The District did not respond to the Parents' request for an informal meeting until after the Parent called to inquire about it. The meeting convened in early August 2022. (N.T. 77-78, 225-27; P-24.)
38. At the informal meeting, the team discussed morning versus afternoon sessions, and the Parents again expressed concerns with scheduling and also noted Student's tendency toward behaviors at home in the afternoon. The meeting began to grow somewhat contentious and ended abruptly at the Parents' request. (N.T. 79, 236-40, 264-65, 279-80, 341-43.)
39. After the informal meeting, the parties agreed that the Parents would provide data from the private ABA therapist about Student's behavior in the afternoons. That data was never provided. (N.T. 266-68.)
40. The day after the informal meeting, the Parents contacted the District superintendent about the disagreement over the morning or afternoon session for Student. They cited Student's behaviors at

specified times of the day (12:30, 3:30, and 6:30 p.m.), and noted Student's private ABA and other therapy in the afternoons. (P-25; S-33.)

41. The District issued a second NOREP after the informal meeting, adding the morning session request as one of the options considered but rejected by the District. The Parents rejected the NOREP, citing to inappropriateness of the afternoon session and the level of support in the classroom. (P-26; S-23.)
42. In approximately mid-August 2022, Student began private ABA services for approximately two hours four days each week in the afternoons by a Board Certified Behavior Analyst (BCBA). (N.T. 122-24; P-28.)
43. The District agreed to provide a one-on-one support person for Student regardless of which session Student would attend. (N.T. 256-57; HO-2 at 7 n.2.)
44. The District has discretion to admit students to kindergarten after the start of the school year. (N.T. 201.)
45. In late August 2022, Student's private BCBA made a recommendation for a structured daily routine for Student and noted having observed behavioral challenges in the home. She made no recommendation for the time of day Student should attend school. (N.T. 255-56; P-29.)

DISCUSSION AND APPLICATION 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. 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). Accordingly, the burden of persuasion in this case must rest with the Parents who filed for this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, in the role of fact-finders, are also charged with 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 credible as to the facts as they recalled them. As for the instances that there were contradictions among witness accounts, those are attributed to lapse in memory or recall, or to differing perspectives, rather than on any intention to mislead. The weight accorded the evidence, however, was not equally placed. In particular, the Parents’ advocate, despite her years of experience in the field, described the applicable standards for a free, appropriate education as expecting “the very best” (N.T. 316-18); she also relied on notes she made at various meetings but conceded that they were not wholly accurate (N.T. 309, 311-12). Credibility is discussed further below as necessary.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, 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 each of 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. Some 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 states, through local educational agencies (LEAs), meet the obligation of providing FAPE to an eligible student 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 confirmed, 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*, 580 U.S. 386, 400, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

Individualization is, thus, the central focus for purposes of assessing programming decisions under 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). Additionally, 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).

"The IEP *must aim* to enable the child to make progress." *Dunn v. Downingtown Area School District*, 904 F.3d 248, 255 (3d Cir. 2018)(emphasis in original). IEP development, of course, must follow and be based on an evaluation as monitored and updated by changes in the interim. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320-300.324.

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family including parents have "a significant role in the IEP process." *Schaffer, supra*, at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b). 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); *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 565 (3d Cir. 2010).

The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program. Among other things, IDEA requires the IEP Team, which includes the parents as members, to take into account any "concerns" parents have "for enhancing the education of their child" when it formulates the IEP.

Winkelman v. Parma City School District, 550 U.S. 516, 530 (2007).

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). Further, the substantive standards for evaluating claims under Section 504 and the ADA are essentially identical. *See, e.g., Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those two statutes, particularly when considered together with claims under the IDEA. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

Intentional discrimination under Section 504 requires a showing of deliberate indifference, which may be met by establishing “both (1) knowledge that a federally protected right is substantially likely to be violated ... and (2) failure to act despite that knowledge.” *S.H. v. Lower Merion School District*, 729 F.3d 248, 265 (3d Cir. 2013). However, “deliberate choice, rather than negligence or bureaucratic inaction” is necessary to support such a claim. *Id.* at 263.

The Parents’ Claims

Before turning to the merits of the issues presented, it is important to emphasize that this case is not about the District’s process for assigning children to particular kindergarten sessions. Rather, the Parents contend that the District’s proposal for an afternoon session fails to offer Student FAPE based on Student’s individual disability-related needs.⁷ They do not,

⁷ It merits mention that the District’s Motion to Dismiss the Complaint was denied twice. (HO-1; HO-2.)

however, challenge the content of the IEP or the proposed itinerant learning support with related services.

In support of their claims, the Parents point to a variety of evidence that unquestionably establishes that Student engages in problematic behaviors in the home that tend to occur more in the afternoon. However, as the one District administrator who is also a BCBA persuasively and cogently testified, the time of day and the setting when and where behaviors occur are both important elements to consider (N.T. 357).

Turning to what the District knew in June 2022 when the IEP was proposed, the District was aware that Student reportedly had private ABA services in the afternoons; and that Student also exhibited behaviors at various times, generally in the afternoons when Student was not at school. This same discussion occurred at the informal meeting in August 2022. While the meeting participants do have differing recollections of the extent to which Student's behaviors in the home were emphasized as a major reason for Student's need for a morning session, the record does establish that the behavioral routines described by the Parents were not consistent over time, such as the first occurrence ranging from 11:00 a.m. to 12:30 p.m. Student's private BCBA did not make a specific recommendation other than a structured daily routine; and, the June 2022 letter from Student's developmental neurologist had not been provided to the District. Even if it had, however, that letter does little more than opine that morning sessions would be better for Student. Moreover, and critically, the testimony of another District administrator was convincing, and quite logical in this field, that if and when Student exhibited challenging behaviors in the school setting, the team would work to identify means to address them, which would also help Student be prepared for full-day school-age programming (N.T. 271, 347). The record as a whole simply does not

support a conclusion that the District denied Student FAPE, or acted with deliberate indifference under Section 504.

The Parents raise several arguments in support of their position that warrant discussion. First, they contend that the District predetermined Student's assignment through the lottery system rather than as part of the IEP development process. The District's process for assigning all kindergarten students to morning or afternoon sessions is random rather than individualized. Nonetheless, the Parents were full participants at the June 2022 IEP meeting, by which time the District was had merely been made aware of scheduling concerns for the family. Student was not exhibiting challenging behavior in the school setting, and it was only then that Parents' descriptions of Student's afternoon behaviors outside of school were brought to the District's attention. As noted, the parties had disparate recollections of the IEP team discussions of the Parents' request for a morning session, but the documentary evidence supports the District witnesses' testimony that scheduling was the primary reason. Thus, Student's unique circumstances as known at the time of the June 2022 meeting did not suggest that a team decision regarding when the IEP would be implemented should be fully explored. It is possible that the District could have provided a more elaborate explanation of these processes to the Parents, but the record here does not establish predetermination.

The Parents also contend that the District's failure to promptly respond to their request for an informal meeting amounts to a procedural violation. Their perception of a delay is amply supported by the record. However, a procedural denial of FAPE may be found when there has been significant impediment to meaningful decision-making by parents, or a substantive deprivation. The delay in convening the informal meeting was not impacted by any change in the information that the District had available and, indeed, the discussions at that meeting were very similar to those in June before

they abruptly ended. To the extent that this argument posits a substantive denial of FAPE, particularly in light of the District's concerns with Student lacking the skills of peers at this point in the school year, the attached order provides a means for the IEP team to ascertain what skills Student should have acquired in the first half of the year of school-age programming and work to remediate any deficit.

It is very evident that the Parents firmly believe that Student's behavioral challenges in late morning and especially in the afternoons would negatively impact Student's success at school. Nonetheless, the District specified in the June 2022 IEP that the team would meet within the first eight weeks of the school year to gauge Student's functioning and consider any necessary revisions. Even if a meeting were not planned by a particular date that allowed Student time to make the transition and become familiar with the new routine and environment, the District was and is obligated under the law to continually monitor Student's special education program and respond as necessary. There is no reason to suspect that the District would fail to meet those obligations to Student.

In sum, the Parents have not met their burden of establishing that the District violated the IDEA, Section 504, or the ADA. The attached order will nonetheless provide specific directives to the parties.

CONCLUSIONS OF LAW

The District did not fail to offer FAPE to Student in its June 2022 proposed program and placement.

The District did not engage in deliberate indifference to Student or otherwise discriminate against Student based on disability.

ORDER

AND NOW, this 16th day of January, 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's proposed program and placement for Student in June 2022 were appropriate for Student.
2. The District did not discriminate against Student or act with deliberate indifference.
3. Within ten calendar days of the date of this decision, the District shall convene an IEP team meeting by which time the Parents shall advise the District of their intention to enroll Student in school for an afternoon session in the District for the remainder of the 2022-23 school year, or to have Student remain in EI programming.
4. If the Parents provide notice of their intention to enroll Student in school for an afternoon session in the District for the remainder of the 2022-23 school year, the District shall within 10 calendar days conduct any screening or similar assessments to gauge Student's current skills in light of those expected for its kindergarten students at this point in the school year to inform the IEP team.
5. If the process in ¶ 4 occurs, the District shall permit Student's attendance in an afternoon session within two school days of that meeting. Following completion of the assessments, the team shall meet again within ten calendar days of their completion to review the typical mid-kindergarten year skills that Student may not yet have. The team shall discuss and decide on any additional

services Student needs to acquire those identified skills to be provided by District personnel by the end of the 2022-23 school year.

6. If Student is enrolled in school in the District for the afternoon session through the end of the 2022-23 school year, the team shall schedule another meeting of the IEP team within thirty calendar days of Student's first day of attendance to assess services and progress, and identify any need for revision and/or additional services described in ¶ 5. The need for and timing of additional scheduled meetings shall be discussed by the IEP team at each subsequent meeting through the end of the 2022-23 school year.
7. Nothing in this decision and order should be read to preclude the parties from mutually agreeing to alter any of its terms provided that such agreement is in writing.

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. 26997-22-23