

*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:**

24769-20-21

**Child's Name:**

Z.W.

**Date of Birth:**

[redacted]

**Parent:**

[redacted]

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**Hearing Officer:**

Charles W. Jelley Esq.

**Date of Decision:**

03/18/2022

## **PROCEDURAL HISTORY**

On April 9, 2021, the Parent filed the pending Due Process Hearing Complaint alleging failures under the Individual with Disabilities Education Act ("IDEA") and Section 504 of the Rehabilitation Act (504).<sup>1</sup> The Parent requests an Order, awarding compensatory education, contending that the District failed to offer the Student a Free Appropriate Public Education ("FAPE") from April 9, 2019, through June 4, 2020. The Student graduated with a regular education high school diploma on June 4, 2020. The hearing officer will first make Findings of Fact. Next, I will provide an overview of the IDEA and 504 requirements at issue. The hearing officer will then analyze the merits of the Parties' arguments based on the factual proofs established in the record and then argued in their closing statements. Finally, the hearing officer will apply the Findings of Facts, reach Conclusions of Law and enter a Final ORDER. Accordingly, for the reasons set forth below, Parents have established, and the administrative record supports a Decision in their favor, in part, and in part for the District. A time-limited award of compensatory education is set out in the following Order.

## **FINDINGS OF FACT**

### **EARLY EDUCATIONAL HISTORY**

1. From enrollment in 9<sup>th</sup> grade through 12<sup>th</sup> grade, Student's primary disability was Emotional Disturbance. During the [2019-2020] school year after a reevaluation, the District changed the primary disability to Autism, with a secondary disability of Emotional Disturbance. (S-3 p. 7, S-11, S-9).

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

2. The Student's [2017-2018] report card grades were as follows: Computer Repair 64.25%, Science 9-12 60.4%, Math Foundations 54.9%, Personal Social Development 65.45, English 9/10 49.6%. (P-14 p.8). The Student's 4<sup>th</sup> term Grade Point Average (GPA) was 0.762 with an overall GPA of 1.429. While the record is unclear what happened during the CTC Computer Repair class, the Student was not allowed to return to the program. (P-14 p.8).
3. The Student's final [2017-2018] report card states the Student earned three (3) "Ds" and two (2) "Fs." (S-3 p.11).
4. The Student began the 2018-2019 school year in a full-time Emotional Support classroom, with an IEP, at a District high school. (S-3 p. 9).

#### **THE MULTIPLE IEP MEETINGS DURING THE [2018-2019 SCHOOL] YEAR**

5. On September 24, 2018, the Parent and the District staff met to develop an IEP for the Student's [2018-2019 school] year at the high school. The IEP states the Student needed full-time Emotional Support and was on track to graduate in June 2019. The Student's English 9-12, Math 9-12, Physical Education, Science 9-12, History 9-12, English 9/10, and Personal Social Development for the entire day took place in the full-time Emotional Support class. (S-3 p.10). As a consequence of not passing 9/10 English, the Student had two English classes. (S-3 p.10).
6. In the first making period, the Student earned the following grades: English 9-12, 45%, Math 9-12 76%, Physical Education S, English 9/10 47%, Science 9-12, 35%, History 81%, Personal Social Development 69%. (S-3 p.10).
7. The IEP includes a reading comprehension, reading fluency, multiple on-task/attention goals, and two writing goals. The Student reads on the 5<sup>th</sup>-grade level with noted inconsistencies. The IEP notes the Student needs specially-designed small group instruction in reading comprehension and fluency. (S-3 p.9).
8. Writing probes were administered to assess overall writing ability and grammar usage. The Student had a median result of 16 for correct word sequencing and 20 for total words written. These results were below the 25th percentile. (S-3 p.11).
9. The English teacher recommended that the Student continue receiving small group

instruction to improve writing fluency. The teacher also commented that the Student should continue with the writing goal until reaching the 50th percentile. The teacher used multiple accommodations like word banks, guided notes, and cloze sheets. (A cloze is a practice exercise where learners have to replace words missing from a text.<sup>2</sup> (S-3 pp.10-12).

10. In Science/Biology, the teacher reports that when the Student is not shut down or unfocused, the Student will participate in class, take notes, read from the text, and complete assignments. The Student does well when completing guided notes and can often answer questions directed at [Student] to check for understanding. The science teacher reports that the Student's biggest issue is staying on task and refraining from derailing the classroom discussion. (S-3 p.13).
11. In History, the Student was working on general Geography and Maps. The Student comprehends most general geography concepts but struggles on assessments. The teacher noted that the Student would rush through tests. When offered assistance, like reading the test/question, the Student will ignore the person trying to help and rush through the work. (S-3 p.13).
12. Personal and Social Development instruction was provided in the Full-Time Emotional Support Classroom. It was often challenging to keep the Student-focused as the class occurred at the end of the day. When redirected to the lesson, the Student could focus for short periods. The Student was constantly looking for ways to discuss different topics, often refusing to stay on topic until consequences were brought up. When consequences were provided, the Student would either shut down or listen to music. The Student was often frustrated by repeated redirection and refused to do work or accept help. When interested in the topic being taught or seeing that other students are engaged in the lesson, the Student would contribute to class discussions and complete assignments. However, if another peer was off-topic or misbehaving, the Student would engage the peer and often escalate the situation. (S-3 p.13).

<sup>2</sup> Cloze: Procedure, Technique and Definition  
<https://study.com/academy/lesson/cloze-procedure-technique-and-definition.html>

13. The Student earned a 28% on progress monitoring for the Math goal involving the application of mathematical concepts. The Math goal's expected level of achievement was 85% accuracy, in four random samples, on a 6th grade level in a marking period. The math teacher later reported that "[Redacted] is mostly a passenger in period (six) 6 foundations in math class. [Redacted] currently has a 28% for MP 1, which is actually up from a 13% at the halfway mark of MP 1. Most days, [redacted] comes in and wants to get on [redacted] computer. It isn't easy to get [redacted] to put it away, but [redacted] will eventually usually follow directions. When [redacted] is not on [redacted]computer, [redacted] still does not really want to participate. [Redacted] enjoys asking questions or making comments that has nothing to do with the content of the class. [Redacted] just does not have an interest in what we are doing. Consequently, [redacted] does not perform well on tests/quizzes, and [redacted] rarely completes any of [redacted] assignments. I do not think that [redacted] benefits from being in my class. I don't know what alternatives are out there for [redacted], but it might be worth looking into. [Redacted] not really a behavioral issue, so [redacted] is fine to continue on in this class. However, I just don't think that [redacted] wants to be here." (S-3 pp.13-14). The Student's Math baseline was 58%, the Progress monitoring data reports "inconsistent performance." (S-3 p.31).
14. The 9/10 English teacher reported the Student did not meet any reading or writing goals. The teacher recommended that the 9/10 English goals should continue into the next IEP. In English 9/10, the Student was reading 52 words per minute with 99% accuracy, at the 5th-grade level, with 63% comprehension. Overall the Student reads on the 5th grade level with inconsistencies. These results indicate that the Student needs specially designed small group instruction in reading comprehension. When the Student is focused and on task, the Student can complete assignments accurately and participate in class. The Student needs consistent prompting to stay on track with work. The Student will usually rush through assignments and not follow the directions provided in class. The Student needs to be monitored while on the computer because the Student

likes to do other things. (S-3 pp.15-17).

15. The IEP includes two (2) English goals and two Writing goals. The baseline data for the English reading word per minute goal was 64 word-per-minute, while the reading comprehension baseline on 5<sup>th</sup>-grade material was 49%. (S-3 pp.32-33). The first marking period data states the Student is making "minimal progress" and displays "inconsistent performance." (S-3 pp.33-34).
16. The IEP includes a goal to improve on-task attention and a goal to improve completing tasks. The baseline for on-task performance is 62%, while the completing task baseline was 65%. Both goals set the criterion for success at 85%. (S-3 pp.35-36).
17. Next, the IEP includes a goal to complete assignments by the due date, demonstrate the ability to participate in classroom discussions, and respond to written and verbal directions/redirections appropriately. The progress monitoring reports "minimal progress" on completing assignments, while the participation goal notes "no progress" on the responding to verbal directions goal. (S-3 pp.37-39).
18. The IEP included a Positive Behavior Support Plan (PBSP) targeting lack of focus and shutting down. (S-3 p.20).
19. The IEP includes 14 forms of modification, accommodations, or specially-designed instruction (SDI). The SDIs include reading aloud tests, quizzes, repeating directions to class assignments with frequent checks for understanding/focus, frequent repetition, practice, and consistent exposure to newly taught material in a variety of formats to ensure student understanding, study guides and graphic organizers to assist student learning when new concepts are introduced. (S-3 pp.42-45).
20. The IEP included "Counseling "related service for 45 minutes every other school week/group. (S-3 p.45). No progress monitoring data was provided for this service.
21. Although the Student is in an Emotion Support class, the IEP reports the Student's level of intervention is "Learning Support: Itinerant: Special education

supports and services provided by special education personnel for 20% or less of the school day." (S-3 p.49).

22. On December 17, 2018, the parties met to discuss the Student's enrollment in the Career Technical Center (CTC) Culinary Arts full-day program. As a result of the meeting, the District updated Section V, the goal statements, Section VI, the Special Education/Related Services/Supplementary Aids and Services, Section VII Educational Placement, and Section VIII PennData Reporting. The changes to Section VII reflect the IEP team's decision to move the Student from the high school full-time Emotional Support class to the CTC Culinary arts program. The CTC placement called for the Student to participate in the regular education setting, with help from the Special Population Department at CTC. The parties agreed the Student would participate in regular education English and Math class and Culinary Arts with non-disabled peers for the entire school day. (S-8 pp.33-35, S-4, S-3 p.49, N.T. p.50, p.241). Sometime in December 2018, the Student began to attend the CTC. *Id.*

### **THE FEBRUARY 2019 IEP MEETING**

23. Upon arriving in December-January, the Student and the Parent learned that the class syllabus called for the Student to complete academic coursework on the industry's history, safety, sanitation, hand tool identification, and proper usage of the slicer. (N.T. pp.128-129). To participate in the hands-on culinary skills training portion of the class, the Student was required first to complete the academic coursework. (N.T. p.55).
24. On January 4, 2019, the Director of Pupil Services for the District notified the Parent that the Student was not compliant or engaged in learning. (P-19 p.4.). The Student was sleeping in class not completing assignments. *Id.* The culinary arts teacher- the Chief- noted the Student did not want to do the bookwork. (N.T. pp.129-130).
25. To assist the Student in learning the six-plus chapters from the textbook, the District provided a tutor for eight days. (N.T. p.55). The IEP team did not decide to provide the tutor. (P-19, N.T. pp.231-233). The Student started hands-on

Culinary Arts training at the end of February. (N.T. p.129).

26. The Chief noted the reading level of the Culinary Arts textbook was on a high school level. (N.T. p.167). While the IEP team knew that the Student's reading fluency and comprehension levels, as reported in the IEP, was 5th-grade level, the Chief did not. (S-3 p. p.32, p.33). The Student struggled with consistency in arriving at school on time, completing homework, and utilizing resources available at the school. (N.T. p.131). The Student did not seek help with tests or use the option of retaking tests or having tests read. (N.T. p.165).
27. By February 22, 2019, the Chief and the instructors reported inconsistent performance. In Culinary Arts, the Student earned an overall average of 65%. (S-3 p. 8-9. N.T. p.129).

### **THE MARCH 2019 IEP MEETINGS**

28. On March 7, 2019, because the Student was doing well in the hands-on Culinary Arts program, the Parent requested, and then on March 28, 2019, the District and the CTC staff agreed the Student could repeat the program and stay for an additional [redacted] school year. (S-3, p.7, p.8, N.T. p.221, S-3, p.9, p.18, N.T. 57, pp.92-94, pp.220-221, p.226, N.T. p.57, S-11 p.3, N.T. p.109).
29. The March 28, 2019, IEP included the Positive Behavioral Support Plan ("PBSP") targeting behaviors of concern like shutting down and lack of focus which included not completing work. (S-3 p.20). The IEP included program modifications and specially designed instruction. (S-3 p.40).
30. The transition goals in the March 28, 2019, IEP focused on Student's emerging interest in the culinary arts field. (S-3 p. 23-25). The March IEP continued the math, reading fluency, reading comprehension, writing, remaining on task, completing assignments, participating in class, and responding to directives goals. (S-3 p. 31-39.) The March IEP included eighteen (18) different forms of specially designed instruction. (S-3 pp.42-45).
31. Once the Student was placed in the full-day culinary arts program at CTC, the Student stopped attending English 9/10, English 11-12, Math, Science, and History classes at the District's high school. (S-9; N.T. p.255).



32. During the 2019-2020 school year- [redacted]- placement at the CTC, the Student became somewhat independent in the hands-on Culinary Arts program, and acted as a peer mentor to the other students. (S-8 p. 6, S-11, p.6; N.T. p.144). On returning for the 2019-2020 school year, the Student did not repeat the fall academic classroom orientation. (N.T. p.141).
33. While attending the school-based CTC hands-on Culinary Arts program, the Student did not exhibit previous rates of shutting down or focusing behaviors. (S-8 p.6)
34. The September 19, 2019, IEP developed during Student's [school] year focused on transitional skills and supports necessary to assist the Student with completing the Culinary Arts program. (S-8; N.T. pp.227-228).
35. When the September 2019 IEP team changed the IEP, the team also removed the direct instruction. (S-3 p.43, N.T. p.241 vs. S-8 pp.28-31). For example, when the Student moved to the CTC, the IEP team removed the following services/supports: (1) a teacher who would provide direct, small group instruction in reading and written expression to improve the student's academic skills, (2) a teacher who would provide direct, small group instruction in reading, and written expression to improve the Student's academic skills, (3) a teacher who would provide direct, small group instruction in math to improve the Student's academic skills, (4) a teacher who would provide the student with guided notes when presented with new concepts, (5) a teacher who would provide a word bank of specialized vocabulary words when testing or quizzing the student on concepts, (6) a teacher who would provide assignment modifications to include more white space, few short answer or composition questions, multiple-choice questions, use of word bank, and use of true/false questions focusing on the "key" point of instructions. (S-8 pp.28-31). The regular education teacher and the Chief at the CTC were responsible for implementing the November 2019 IEP. *Id.*

### **THE DISTRICT'S OCTOBER 2019 REEVALUATION REPORT**

36. On October 11, 2019, the District provided the Parent with a copy of the Student's Reevaluation Report. The report included an extensive summary of the

- previous school district and private evaluation reports dating back to 2008 when the Student was first identified as a person with an "Other Health Impairment" and determined to need specially-designed instruction. (S-11 p.2).
37. In 2010, a private school psychologist identified the Student as presenting with low average intelligence, high functioning Autism, Attention Deficit Disorder, Dysgraphia (difficulty with writing), Mood Disorder, and a Specific Learning Disability in Reading and Written Expression. (S-11 p.2).
  38. In December 2011, an intermediate unit psychologist report concluded the Student then qualified for IDEA services as a person with Emotional Disturbance. No information was found to indicate a diagnosis of Autism. (S-11 p.2).
  39. In 2015, when the Student was in [redacted] grade, the current District completed an evaluation. It concluded that the Student remained IDEA eligible as a student with Emotional Disturbance who needed specially-designed instruction and a positive behavior support plan. (S-11 p.2).
  40. In the fall of 2017, the Student completed a neuropsychological evaluation. The evaluator concluded that the Student met the criteria for the following diagnoses: Conduct Disorder, Childhood-Onset type, Autism Spectrum Disorder, with intellectual Impairment, Intellectual Disability - Intellectual Development Disorder, mild Attention-Deficit /Hyperactivity Disorder, Combined Presentation. (S-11).
  41. During the fall of 2019, the District psychologist observed the Student at the CTC, in the Culinary Arts class. The observation lasted 30-minutes. The observation summary states the Student appeared to be on task and responding to verbal directions. (S-11 p. 6).
  42. Although requested by the psychologist, the Chef refused to complete the Behavior Assessment System for Children, Third Edition (BASC-3). The Mother completed the BASC-3. The Mother reported clinically significant behavior for Externalizing Problems and Hyperactivity and Conduct problems. Persons with the profile can become disruptive, argumentative, defiant, threatening to others, and may engage in rule-breaking behaviors. Adaptive skills scores indicate difficulty

adapting to changing situations and taking a long time to recover from difficult situations. Expressive and receptive skills communication skills were rated poor. (S-11 p.10).

43. On September 13, 2019, as part of the reevaluation, the Student took the CareerScope Assessment as a transition assessment. Based on this single assessment, the Student's transition interest lies in the area of Plants/Animal and Accommodating. The Plants/Animal scores reflect an interest in gardening, landscaper, or animal caretaker. In contrast, the Accommodating scale demonstrates an interest in helping others. (S-11 pp.10-11).
44. Relying on a 2017 private evaluation, the psychologist identified the Student as a person with Autism and Emotional Disturbance. Although the evaluator concluded that the Student continued to need specially-designed instruction as a person with Emotional Disturbance, the evaluator listed Autism as the primary IDEA disability and Emotional Disturbance as a secondary IDEA disability. The psychologist then recommended continuing the most recent specially-designed instruction and modifications. The reevaluation team and the IEP team were not aware of the results of the District-funded IEE. The reevaluation provides that the team should, at some point, review the IEE data. The psychologist did not explain why he did not reach out to the IEE evaluator to discuss his evaluation data or the status of the IEE. (S-11 pp.16-17).

#### **THE NOVEMBER 2019 IEP**

45. On November 5, 2019, [redacted] the IEP team met to revise the IEP. After the IEP meeting, the District presented, and the Parent approved the recommendation changing the Student's placement from Learning Support to Autistic Support. (S-14).
46. At the same time, the November 2019 IEP team concluded that based on the low levels of the Student's interfering behaviors like not focusing, shutting down, and not following directions, the Student no longer required the behavioral supports. (S-16 pp.12-14).
47. The November 2019 IEP team again dropped the attention and task completion

goals. In its place, the team included a single annual goal for "responsible decision making and self-advocacy." The IEP present levels do not describe the assessment techniques or the process used to determine the need for the goal. (S#16 p.23). The reevaluation report did not assess communication, decision-making, or self-advocacy skills. (S-11).

48. The November IEP included 12 forms of modifications and specially-designed instruction. The specially-designed instruction included using an assistive technology device when writing longer than a single paragraph. The related service of counseling was discontinued. (S-16 pp.24-26). The November IEP identified Itinerant Autistic Support for 20% or less of the school day as the level of intervention. (S-16 p.29). Later on, the IEP states that the Student will participate in the regular education classes for 100% of the day. (S-16 pp.29-30). The specially-designed instruction now included Autistic Support for 60-minutes a month or 12-minutes a week. (S-16 pp.29-30).
49. In March 2020, the CTC shut down due to the pandemic and the governor's order to close all schools. Sometime in April 2020, all instruction switched to online for the remainder of the year. (N.T. p.146). The emails between the Parent and the CTC staff indicate the Student was once again shutting down and in danger of failing all CTC classes. (P-18, P-19).
50. Before the Student's graduation, the Chef worked on getting the Student a job in the culinary arts field. (N.T. p.114, p.148). Chef found a job, for the Student, in [another state], working as a line cook. (N.T. pp.114-116, pp.150-151).
51. The Student went to and then left [the other state], returning home after being fired. (NT. pp.151-154). On learning the Student was unemployed, the Chef contacted the Student to discuss other employment opportunities in the local area. (N.T. pp.116-117, p.152). Due to market conditions surrounding the pandemic, numerous restaurants were not hiring. (N.T. pp.152-153). As opportunities came up, the Chef forwarded job offers to the Student. (N.T. pp.152-153).

## **THE INDEPENDENT EVALUATION ARRIVED AFTER THE STUDENT GRADUATED**

52. The private evaluator tested the Student on August 15, 2019, and December 19, 2019. (S-18 p.2).
53. The private evaluator completed a variety of assessments, including a record review, parent input, test session observations, Comprehensive Test of Nonverbal Intelligence, 2<sup>nd</sup> Edition (CTONI-2), Woodcock-Johnson IV Test of Cognitive Abilities (WJ IV Cog), Subtests of the Wide Range Assessment of Memory and Learning (WRAML-2), Beery-Buktenica Developmental Test of Visual-Motor Integration (Beery VMI), and the Woodcock-Johnson IV Test of Achievement (WJ IV ACH). (S-18).
54. On the first day of testing, the Student did not engage in discussions with the examiner, relying upon the Mother to answer many questions. (S-18 p.2).
55. Also, during the first day of testing, the examiner was able to conduct testing during half of the evaluation session. (The Student avoided testing, instead requesting or needing breaks, showing reluctance to answer questions, like closing eyes, and sitting on the couch. (S-18 p.3, N.T. pp.323-324).
56. Despite the level of engagement, the examiner commented that the Student gave "adequate performance for the *majority* of the tests." (S-18 p. 3; N.T. p.325).
57. On the second day of testing, December 19, 2019, the Student came to the testing session angry and frustrated and did not want to participate. S-18 p. 3; N.T. 325-326. The examiner attempted to engage the Student in conversation, but Student refused. (S-18 p. 3). Examiner had to negotiate with the Student to get any testing completed by agreeing not to force the Student to complete all of the achievement subtests. (S-18 p. 3; N.T. p.326).
58. The private examiner stated the very low scores derived from the Student's General Intelligence Ability (GIA) should be interpreted with caution. (S-18 p. 20).
59. Despite coordination with the District psychologist, neither examiner completed adaptive behavior rating scales (S-18 p. 22, N.T. pp.279-281, pp.303-304). The examiner did not complete an in-school observation or parent/teacher adaptive

- behavior rating scales at the direction of the District. Absent measures of adaptive behavior, the private evaluator could not conclusively diagnose an Intellectual Disability. (S-18 p. 22).
60. Based on the multiple assessments, the private evaluator concluded the Student has limited "core academic skills across all areas." (S-18 p. 22).
  61. The private examiner recommended that the Student needed ongoing reading, math, and writing instruction to promote independence. *Id.*, (N.T. p.304).
  62. A review of the testing establishes the student's cognitive functioning continued to be in the very low range. *Id.*
  63. On the CTONI-2, which factors out language skills, the Student earned a full-scale intelligence quotient - FS IQ of 62- in the low range. (S-18 p.4, N.T. pp.281-283).
  64. On the WJ-IV-Cog, the student's standard score on the General Intellectual Ability (GAI) was 53. (S-18 p. 6, N.T. p.286). A score of 53 is considered "Low." A 30 point decline in scoring indicates the Student now has limited overall processing and reduced ability. (N.T. 287).
  65. On the WRAML-2, the Student scored in the impaired range, which indicates the Student's brief directed attention is significantly impaired when compared to same-age peers. (N.T. p.292).
  66. The Beery VMI indicates that the Student's visual-motor integration skills are limited when compared to peers. (S-18 p. p.15). This measure relates to the student's eye-hand coordination and establishes the Student's ability to copy designs is impaired. (S-18 pp.14-15, N.T. p.294).
  67. Based upon a comparison between the Student's scores on the WJ-IV-COG and the WJ-IV-ACH, the examiner concluded the Student scored low in all areas of academics. At the same time, the examiner concluded that the Student did not have a learning disability. (S-18 p.22, N.T. p.295). Comparing the WJ-Gf-Gc composite scores to the WJ-IV-ACH scores, the examiner confirmed previous testing documenting weakness in Math. *Id.*, (N.T. p.302). The Gf-Gc composite also revealed a big difference between intelligence and processing. (N.T. p.302). This testing profile means the Student struggles to retain information has limited

- immediate awareness or working memory. This profile indicates that the Student's ability to learn and remember information in real time is limited in the classroom. (N.T. p.302).
68. The private evaluator reviewed the September, March, and November IEPs at issue. (N.T. pp.305-306). The examiner opined that the Math concept goal was not appropriate in light of the Student's test scores. (S-3 p.31, N.T. p.307).
  69. Based on the Student's current cognitive potential, the examiner opined that the IEP Reading goals were not appropriate; and suggested that the Student is not capable of achieving the goals. (S-3 p.32, p.33; N.T pp.307-308).
  70. While not "bad," the examiner noted that the writing goal did not specify whether the words were written correctly and did not address proper spelling. (S-3 p. 34; N.T. p.308). The examiner then expressed concern that the baseline of 20 words does not delineate whether it is a coherent sentence or simply 20 words. *Id.* Finally, based on a record review, the examiner concluded that the goal statement was not appropriate as proposed. (N.T. 308-309).
  71. The examiner commented that the time on task goal was inappropriate as written. (N.T. pp.309-310, pp.333-334).
  72. The examiner stated that based on the Student's attention skills, the goal's 85% success rate is not realistic. (N.T. p.310). The examiner opined that the goal was a great "long-term goal" but recommended that the IEP should include short-term objectives to increase attention and increase the percentage incrementally with reinforcement or intervention. (N.T. pp.309-310).
  73. The IEE examiner commented that the student needed specially-designed instruction in English, Math, and Writing goals based on the overall testing data. *Id.*
  74. The IEE examiner opined the IEP team needed to balance vocational skills development and academic instruction. *Id.* The student appears to be seven to nine years below age and grade-level norms based on the private testing. (N.T. p.336).
  75. The private examiner recommended that future IEPs include Reading, Math, and Writing instruction, short-term instructional objectives, targeting spelling, applied

- problems, math calculation, writing, and reading skills. (N.T. pp.312-313).
76. When the IEE report was completed, the private evaluator was unaware the Student intended to graduate in June 2020. After reviewing the existing data, the examiner testified that the Student was unprepared to graduate. (N.T. p.314, p.328, p.338). The examiner recommended continued intervention in core academics, functional skills, adaptive skills to address job readiness/vocational skills. (N.T. pp.315-316).
77. The private examiner and the District psychologist agree that the Student needs a classroom where the teacher uses a hands-on component, with verbal and visual modalities. (N.T. p.320, N.T. pp.319-320).
78. The IEE examiner was unaware of what grade level materials were used in Student's CTC academic classes or the Culinary Arts program. (N.T. 329). The examiner was also unaware that the Student was doing well in the culinary arts hands-on program. (N.T. 342-34).

### **STATEMENT OF THE ISSUE**

Did the District offer and provide the Student with a free appropriate public education from April 2019 to June 2020? If not, is compensatory education appropriate relief?

### **APPLICABLE LEGAL PRINCIPLES AT ISSUE IDEA AND SECTION 504 FAPE**

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. § 1412. Local education agencies (LEA) – districts- meet the obligation of providing a FAPE to eligible students through the development and implementation of IEPs, which must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential."<sup>3</sup> Substantively, the IEP must respond to the child's individual educational needs. 20 U.S.C. § 1414(d), 34 C.F.R. § 300.324.<sup>4</sup>

<sup>3</sup> *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

<sup>44</sup> Parents' Section 504 claims here repackage the IDEA evaluation and FAPE claims as violations of § 504; therefore, for all the same reason, the disposition of the IDEA claims resolved the Student's



In *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U. S. 176, 102 (1982), the court established the contours of actionable procedural or substantive violations of FAPE. A finding of a procedural violation requires preponderant evidence the district violated IDEA and parallel state law procedural requirements. If the violation is purely procedural, the question then becomes did the violation(s) result in a loss of educational benefits to the student. Or did the violation significantly impede the parents' opportunity for participation in the IEP process?<sup>5</sup> As for the substantive component, the *Rowley* court held the evidence must establish "the [IEP] developed through the Act's procedures [was] reasonably calculated to enable the child to receive educational benefits. Later, in *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) relying on *Rowley*, the court held when the student is in an integrated setting, the determinative question is whether the IEP is reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

The Third Circuit has interpreted *Rowley* and then *Andrew* to mean that the "benefits" provided to the child must be meaningful. Meaningfulness of the educational benefit is relative to the child's potential.<sup>6</sup> Taken as a whole, the benefit should provide "significant learning." *Id.* At the same time, the district is not required to maximize a child's potential.<sup>7</sup> The meaningful benefit standard requires LEAs to provide more than "trivial" or "de minimis" benefit.<sup>8</sup> It is well-established that an eligible student is not entitled to the best possible program, or the type of program preferred by a parent, or to a guaranteed specific level of achievement.<sup>9</sup> Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving

Section 504 FAPE claims. *K.D. by Theresa Dunn and Jonathan Dunn v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 256 (3d Cir. 2018) (Section 504 claims were a repackaging of those allegations underlying the IDEA claim).

<sup>5</sup> 20 U.S.C. § 1415(f)(3)(E)(ii), 20 U.S.C. § 1415(f)(3)(E)(iii)).

<sup>6</sup> See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003).

<sup>7</sup> See, *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), cert. denied, 488 U.S. 925 (1988).

<sup>8</sup> See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), cert. denied 488 U.S. 1030 (1989).

See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995)

<sup>9</sup> See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011).

parents." *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

## **FAPE REQUIREMENTS AND GRADUATION**

Graduating from high school with a regular high school diploma constitutes a change in placement, triggering procedural safeguards and prior written notice. *Centennial Sch. Dist.*, 114 LRP 45848 (SEA PA 09/12/14), 34 CFR 300.102 (a)(3)(iii), *Letter to Richards*, 17 IDELR 288 (OSERS 1990). A "regular high school diploma" means the standard high school diploma awarded to the other students that is fully aligned with state standards, except that a regular high school diploma shall not be aligned to the alternate academic achievement standards of 20 USC 6311 (b)(1)(E). Students with disabilities who have not graduated with a regular high school diploma are still entitled to FAPE until they reach the age at which eligibility ceases under the age requirements within the state. 34 CFR 300.102 (a). When a student's IDEA eligibility terminates due to age or graduation with a regular diploma, the district must provide the student with a summary of academic achievement and functional performance. The summary must include recommendations on how to assist the student in meeting postsecondary goals. 34 CFR § 300.305(e)(3). OSEP advises that to ensure graduation requirements are met and that the goals and objectives in the IEP are completed, IEP teams should review the child's IEP sometime before a student receives a diploma. *Letter to Richards*, 17 IDELR 288 (OSERS 1990). While the review may not require another face-to-face IEP meeting, the results of the review should be included with the final prior written notice. Finally, awarding a high school student a diploma does not necessarily moot a student's claim for compensatory education. *Pennsbury Sch. Dist.*, 48 IDELR 262 (SEA PA 2007) (finding that a recent high school graduate was entitled to compensatory education because the 12th-grade IEP failed to address identified needs).

## **IDEA EVALUATIONS AND ASSESSMENTS**

The IDEA sets forth three broad criteria that districts must meet when evaluating

or reevaluating a child's IDEA eligibility. Evaluators must "use a variety of assessment tools and strategies" to determine "whether the child is a child with a disability." The district "[may] not use any single measure or assessment as the sole criterion" for determining whether the child is a child with a disability or the child's educational needs. 20 USC § 1414(b)(2)(B). And finally, the District must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors and physical or developmental factors." 20 USC § 1414(b)(2)(C).<sup>10</sup> These intertwined subparts of the IDEA regulations impose additional criteria school officials must meet when evaluating a child.

Once the District completes a full comprehensive reevaluation, provided the evaluation team determines the Student is IDEA eligible, the focus then shifts to creating an IEP that includes: a statement of the student's present levels of academic achievement and functional performance 34 C.F.R. § 300.320(a); establishes measurable annual goals designed to meet the student's needs resulting from the student's disability; that enables students to make progress in the general education curriculum 34 C.F.R. § 300.320(a)(2)(i); provides for the use of appropriate special-designed instructional services 34 C.F.R. 300.320(a)(4); and, schedule of continuous progress monitoring.<sup>11</sup> Annually, or as needed, after reviewing the student's continuous progress monitoring data, districts must adjust, modify and revise the IEP goals and specially-designed instruction to meet the student's then-current needs/circumstances. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320, 324.

### **APPROPRIATE RELIEF**

In this instance, both Parties seek appropriate relief within the meaning of the IDEA. *Sch. Dist. of Phila. v. Post.*, 262 F. Supp. 3d 178, 197 (E.D. Pa. 2017)

<sup>10</sup> An IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Andrew F. v. Douglas County School District RE-1*, U.S. \_\_\_\_, 137 S. Ct. 988, 999 (2017).

<sup>11</sup> The Supreme Court has stated that the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (*Andrew F.*, 137 S. Ct. at 1000).

(citing 20 U.S.C. § 1415(i)(2)(C)(iii)). OSEP guidance states that a student's right to compensatory education is independent of any current right to FAPE. This means that a student's graduation does not automatically relieve the district's responsibility to provide compensatory education and related services for previous FAPE violations. *Letter to Riffel*, 33 IDELR 188 (OSEP 2000), and *Letter to Riffel*, 34 IDELR 292 (OSEP 2000), *Moynihan v. West Chester Area Sch. Dist.*, 77 IDELR 2 (3d Cir. 2020, unpublished), *Ferren C. v. School Dist. of Philadelphia*, 54 IDELR 274 (3d Cir. 2010). Here the Parent seeks appropriate relief in the form of compensatory education *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) (comparing the make-whole versus the hour-for-hour approach). At the same time, the District desires a declaratory finding that its program and offer of FAPE was appropriate.

### **WITNESS CREDIBILITY**

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses."<sup>12</sup> Explicit credibility determinations give courts the information that they need in the event of a judicial review.<sup>13</sup> All witnesses testified credibly and candidly shared their recollection of facts and their lay opinions. I did not discern any efforts to withhold information, misstate the facts or deceive me. To the extent that witnesses recall events differently or draw different conclusions from the same information, genuine differences in recollection or opinion explain the difference. Before I discuss the substance of each IEP, I must discuss how much persuasive weight I will give to the testimony of certain witnesses on specific topics in dispute. In this instance, the District psychologist went to the CTC to obtain firsthand

<sup>12</sup> *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003).

<sup>13</sup> See, *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

knowledge about the Student's then-current educational services. The psychologist collected observational data and completed a review of the testing. Therefore, based on his credentials and experience, I will give the testimony medium to high weight provided that testing comports with the expected data collection, testing, and observation requirements otherwise expected in a reevaluation report. 22 Pa Code Chapter §§ 14.124, 14.131, 14.132, and 34 CFR §300.320.

For all the reasons that follow, as noted below, I sometimes found particular testimony from one or more witnesses either persuasive or more substantive than others when they could cogently describe the Student's needs, circumstances, interests, and overall progress. Although the IEE data arrived after graduation, I find the results and the testimony credible and reliable. Accordingly, I will give the IEE report persuasive weight, so far as it corroborates the existing data profile.

### **THE BURDEN OF PROOF**

Generally, the burden of proof consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief.<sup>14</sup> The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise.<sup>15</sup> In this case, the Parents are the party seeking relief and must bear the burden of persuasion.

### **DISCUSSION, ANALYSIS, AND CONCLUSIONS OF LAW**

First, I will provide background and historical information that led up to the Student's September 2018 to December 2018 [redacted] IEP. Then I will review the December 2018 move to the CTC. Next, I will study the Student's January to February adjustment at the CTC and the March 2019 IEP revisions. Then, I will review the September 2019 [redacted] IEP revisions tracking the beginning of the [school] year, the October 2019 reevaluation report, and the November 2019 IEP revisions. Finally, I will review the IEP implementation changes following the March

<sup>14</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

<sup>15</sup> See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).

2020 shutdown, the Student's graduation, and the accord persuasive value of the late-arriving IEE.

### **THE MOVE TO THE CTC CULINARY ARTS PROGRAM**

Faced with another year of failing grades, in December 2019, the Parent asked, and the District agreed to place the Student at the CTC in the Culinary Arts program. The move from full-time Emotional Support class to full-time regular education was a significant change; yet, the District did not initiate a reevaluation or issue procedural safeguards or a NOREP. 34 CFR §300.502, 34 CFR §104.35(a). Neither the testimony nor the exhibits cogently explain what, if any, data the District relied on suggesting the full-day CTC regular education placement and curriculum. Furthermore, the District witnesses' testimony did not address how the Student's previously agreed on Reading, Math, Writing, Attention, and Personal Social Development goals would be provided at the CTC. Teacher comments in the IEP contradict the District's action to discontinue the special education teacher's involvement. The present levels in the September 2018-2019 IEP state the Student "should continue to work" on all academic, on-task, and behavioral goals. Yet, the revised IEP changed the type of intervention and decreased the Student's time in the special education classroom.

The record testimony does not explain, and the exhibits do not corroborate, how the IEP team concluded that implementing the IEP was reasonably calculated to provide meaningful benefit. For example, the testimony from the District staff did not cogently describe how after - failing 9<sup>th</sup>/10<sup>th</sup> grade English, twice, along with failing 11<sup>th</sup>-12<sup>th</sup> grade English – a regular education English class, without specially-designed instruction, at the CTC was appropriate. The Student's Math IEP goals place the Student five to six years below grade level, yet the team placed the Student in regular education CTC Math.

The entire IEP decision-making process violates 34 CFR §300.503 notice requirements. Finally, this ongoing series of substantive IEP violations contradicts *Rowley* and *Andrew F.*'s FAPE requirements. FAPE violations that occurred outside the statute of limitations will not be considered in calculating the appropriate relief.

## **THE MARCH 2019 MEETINGS LEADING TO THE STUDENT'S [2019-2020 SCHOOL] YEAR**

Before starting the hands-on culinary skills instruction, the Student was required to complete prerequisite academic Culinary Arts course work. Faced with the course requirement of completing four (4) chapter tests in a short amount of time, the Student reverted to the earlier off-task and refusal to work behaviors. When the District learned in January 2019 that the Student began to shut down, sleep in class, and refuse to do the work, an administrator unilaterally decided to provide the Student with a one-on-one tutor for eight days. Contrary to the IDEA, the decision to offer one-on-one support was made by a single administrator and not the IEP team. While the Student completed the chapter tests and then moved on to hands-on culinary skills training, the unilateral decision to provide one-on-one services interfered with the Parent's participation in the IEP process.

Although by March 2019, the Parties agreed that the Student would return for [another] year, they did so without a reevaluation. The March 2019 to June 2019 progress monitoring data reflects little to no meaningful growth above baseline. The report corroborates the need "The data indicates that these are still areas that need a monitored goal" (S-8 p.8). Yet the CTC moved in the opposite direction. In March 2019, the Chef reported the Student's Culinary Arts grades ranged from 63%, in early March, to 75% at the end of March. The record does not include the end-of-year report card grades for Culinary Arts, regular education Math, English, or quarterly progress monitoring for the remaining IEP goal statements. No one from the District or the CTC testified that they implemented the remaining IEP goal statements, the SDIs, or the behavior plan to improve attention. The failure to provide quarterly progress monitoring, the SDIs, and the behavior plan caused a twofold substantive violation. First, the violation denied the Parent meaningful participation in the IEP process. Second, the violations denied the Student meaningful progress. 20 USC §1414 (d)(4)(A) through 20 USC §1414 (d)(4)(B). As the IEP was fundamentally flawed when offered and revised, the District failed to provide a FAPE; therefore, the scope of relief is limited to April 2019 to June 2019. An appropriate Order awarding relief follows.

To the extent, the District argues *K.D. v. Downingtown Area Sch. Dist.*, 72 IDELR 261 (3d Cir. 2018) is controlling; I disagree. In *Downingtown*, the record reflected the student made slow progress, as evidenced by the changes in her baseline performance. The quarterly baseline data changes reflect stagnant to little or no gains in this instance. The undated progress monitoring data, scattered in the present levels, made it difficult to track or understand who provided what service, when it was delivered, and the Student outcomes. Equally troubling is the fact that while the Student had failing grades in Math, English, and Writing, and an overall low GPA of 1.429, the Student was promoted each year to the next grade. The rolling procedural flaws prevented the Parent's meaningful involvement in the IEP process. Accordingly, applying the snapshot review of what the team knew in April 2019, I now find the IEP did not meet the Student's known needs associated with the child's disability. See, 34 CFR §300.320 (a)(2)(i), *Questions and Answers on Andrew F. v. Douglas County School District RE-1*, 69 IDELR 174 (U.S. 2017), 71 IDELR 68 (2017)

### **THE [2019-2020] SCHOOL YEAR, THE SHUTDOWN AND GRADUATION**

The Student began the [school] year as a full-day Student at the CTC. Rather than repeat the academic chapter tests, the Chief encourage the Student to act as a peer mentor. In September 2019, without a cogent justification, the September 2019 IEP team deleted the Math, Reading Fluency, and Total Words Written and Correct Words Sequencing goals. Without explanation, the team instead decided to continue the on-task goal, the completing assignment goal, the participation in classroom instruction goal, and the response to the verbal direction goal. The September 2019 IEP continued to include the positive behavior strategies. Even though the IEP dropped the academic goals and kept the attention-related Emotional Support goals, the team changed the intervention to Learning Support. As the Student continued to participate in CTC English and Math class. (S-12 vs. S-3 vs. S-8).

Based on the following procedural and substantive violations, I now find the IEP did not offer the Student a FAPE in all areas of need. Absent mandated information, like grades and progress monitoring, the Parent cannot fully participate in the IEP



process. Absent specially-designed instruction in all areas of unique need, the Student cannot learn. This combination of procedural violations caused a denial of FAPE for part of the school day. At the same time, based on the record, the Student did benefit from participation in the Culinary Arts program; therefore, an appropriate Order granting limited hours of appropriate relief follows.

**THE OCTOBER 2019 REEVALUATION REPORT WAS INCOMPLETE, AND THE DISTRICT FUNDED IEE WAS LATE**

Believing the other evaluator was administering certain assessments, neither the District psychologist nor the IEE psychologist administered a full battery of assessments in all areas of suspected disability. This is a problem. While the District's reevaluation included an in-depth summary of all of the Student's private and school evaluations, it lacked updated objective norm reference assessment data. While the reevaluation did include the Mother's checklist scores on the BASC-3. Yet, for some unexplained reason, the Chief refused to administer the BASC-3. Therefore, the validity of the Mother's single BASC-3 score is limited. I also find the single measure of the Student's transition interests insufficient and problematic. Furthermore, without the benefit of a complete autism spectrum evaluation, the District psychologist accepted the stale 2017 private Autism diagnosis as a proxy for the IDEA eligibility criteria. Applying the IDEA's two-pronged eligibility requirements, the Autism identification is legally incorrect.

First, the District did not "use a variety of assessment tools and strategies" to determine whether the Student is a child with Autism. Second, the district used a "single measure or assessment as the sole criterion" the BASC-3 to determine if the Student is a person with a disability and the SafeCourse as a proxy for a comprehensive transition assessment. Third, the reevaluation failed to include any data supporting the conclusion that the Autism disability adversely affected the Student's education. 20 USC §1414(b)(2)(B). And finally, the District failed to "use technically sound instruments" to assess the relative contribution of the Student's cognitive limitations, attention, and behavioral deficits. 20 USC §1414(b)(2)(C). Overall, the reevaluation report lacks objective measures of Autism related areas of speech, language, frequency of stereotypical behaviors, reduced interests, or

impaired social skills. Finally, when the psychologist was asked to comment on the 30 point decrease in the Student's IQ, the psychologist, relying on select statements in the outside report, attributed the decrease in IQ to the Student's hostility towards the examiner. This far-reaching subjective opinion, was proffered without a discussion with the outside evaluator, is not otherwise credible or supported by the Student's overall assessment profile. Accordingly, I now find the reevaluation is incomplete, insufficient, and otherwise inappropriate.

### **THE DISTRICT FUNDED IEE ARRIVED AFTER GRADUATION**

While the IEE has flaws, it is useful. The IEE evaluator's testimony about the Student's ability, achievement, circumstances, and goal statements are persuasive. Although the District paid for the IEE, which granted the Student a substantive right, I find it troubling that it failed to ensure the report was promptly completed. This omission interfered with the Student's right to participate and benefit from the IEE assessment.

Unlike the reevaluation report, the IEE examiner administered a variety of recognized standardized assessments. The multiple assessments included a nationally recognized measure of intelligence, a nonverbal IQ measure of intelligence, and a comprehensive battery of achievement testing. Taken as a whole, the data explained the Student's learning profile, weaknesses, and needs. The testing battery also explained how the Student's disabilities adversely affected the Student's education. The evaluators' compare and contrast explanation of the Student's IQ and achievement sub scores helped this hearing officer understand the Student's educational profile, weaknesses, and circumstances. Therefore, even though the IEE was late, I now find the examiner's testimony and report persuasive.

Furthermore, the examiner candidly recognized the limitations in his assessment. For example, the evaluator admitted that the failure to administer a measure of adaptive behavior and the missing observation left certain eligibility questions regarding an Intellectual Disability unanswered. Rather than attribute the 30 decrease in IQ score to test hostility, the IEE examiner persuasively explained why

a further assessment was needed to rule out a preexisting unidentified Intellectual Disability. The examiner's testimony also explained why the goals statements found in the Student's [2018-2019 school year] and [2019-2020 school] year IEPs were inappropriate. When the Student's progress was contrasted with the achievement scores, the IEE examiner cogently explained why the Student did not make meaningful progress. I now find the evaluator's testimony that the goals were not aligned with the Student's existing potential persuasive. The District's psychologist did not offer any substantive testimony that reduced the weight of the IEE examiner's comparisons or conclusions. While the summary of the previous testing, in the reevaluation, was informative, the testimony and the reevaluation taken as a whole were not robust or persuasive. Although the IEE examiner did not observe the Student or talk to the staff, I now find the IEE report, despite its weaknesses, coupled with the associated testimony, useful in understanding the Student's circumstances, needs, and the overall fit of the IEP goal statements. I will now turn to the November 2019 IEP.

### **THE NOVEMBER 2019 IEP**

First, the November IEP team accepted the District's psychologist recommendation that the Student was a person with Autism; therefore, based on the fundamental flaws in reevaluation, the starting point for the IEP was fundamentally flawed. Second, relying on the November reevaluation, the IEP team's erred when they dropped the goal statements targeting attention, task completion, and personal and social development. The replacement goal concentrating on self-advocacy lacks an objective starting point connected to an educational need. Third, the IEP, like the reevaluation, did not include reliable, objective baseline measures identifying a need for communication or advocacy skills training. Therefore, the goal statement failed *Rowley* and *Endrew F.*'s challenging objectives, ambitious goals, reasonably calculated benefit test. Fourth, the IEP team, for the third time in less than a year, without explanation, changed the level of intervention from Learning Support to 60-minutes a month, or 15-minutes a week, of Autistic Support. Even assuming the goal is appropriate, the record does not support a finding that 15-minutes will confer meaningful benefit or significant learning. The District's testimony is not

rooted in objective data in either the reevaluation or the present levels. An Order granting appropriate relief follows.

### **THE SHUTDOWN AND THE CHANGE TO ONLINE EDUCATION**

While the change to online education was beyond the District's control, the services provided in response to the situation were lacking. It is axiomatic if the November IEP was inappropriate when offered; the reduction in CTC services caused by the school closing compounded the existing harm. The record is preponderant that the Student began to shut down and refused to work when faced with online bookwork. Since the team deleted the positive behavior support plan, the staff and the Student were left without a clear strategy to prevent learning loss. The email contacts between the CTC teachers and the mother document the Student's lack of progress in the Culinary Arts and CTC English. Rather than revise the IEP, the CTC staff and the District pushed forward with graduation. While the Mother and the Student wanted the Student to graduate, the District was obligated to hold an IEP meeting, review the circumstances and offer a revised IEP - FAPE. Recognizing that everyday life was in flux, at a minimum, the District was required to issue prior written notice and a NOREP describing the action why the Student should graduate. After the graduation, the District failed to issue the mandated summary of performance.<sup>16</sup> The record is clear the District did not do either. Therefore, I now find this continuous series of procedural and substantive violations denied the Student a FAPE. The same abuses prevented the Parent and the Student from effectively participating in the IEP process.<sup>17</sup> Accordingly, I will now issue an appropriate Order granting appropriate relief.

<sup>16</sup> When a student's IDEA eligibility terminates due to age or graduation with a regular diploma, the district must provide the student with a summary of his academic achievement and functional performance. This summary must include recommendations on how to assist the student in meeting his postsecondary goals. 34 CFR 300.305 (e)(3).

<sup>17</sup> *Letter to Richards*, 17 IDELR 288 (OSERS 1990) *Montgomery County Pub. Sch.*, 22 IDELR 754 (SEA MD 1995); and *Waukesha Sch. Dist.*, 114 LRP 53687 (SEA WI 10/24/14) *Black River Falls Sch. Dist.*, 40 IDELR 163 (SEA WI 2004). Districts should convene IEP meetings prior to the graduation and the termination of services of a student with a disability. The IEP team should conduct a review of the child's IEP to ensure that the graduation requirements, as well as the goals and achievements of the IEP, are met.

## **COMPENSATORY EDUCATION IS APPROPRIATE RELIEF.**

The calculation of appropriate relief is a multi-step process. First, applying the case law once the denial of FAPE is established, the hearing officer must determine the date when the district either knew or should have known of the denial of a FAPE. Second, the hearing officer must determine whether a qualitative or quantitative analysis will make the Student whole. In this instance, I now find the quantitative hour-for-hour approach will create an equitable bank of compensatory education time that will make the Student whole. Third, the hearing officer must then calculate the reasonable rectification period. Fourth, once the reasonable rectification period is set, the hearing officer must then equitably reduce the total award of the compensatory education by the value of the reasonable rectification period. In crafting the relief, the hearing officer must follow the guiding principle that "appropriate relief" must make the student "whole."

As the District provided a FAPE for part of the CTC school day, I will vary the amount of relief as described below. As stated above, I now find fundamental flaws in each IEP were evident on the face of the document when offered. Therefore, the record is preponderant that the District either knew or should have known on April 9, 2019, that the Student was denied a FAPE. Accordingly, the overall award covers the entire time from April 9, 2019, and continues through graduation in June 2020.

From April 9, 2019, to June 4, 2019, I will now award three and a half (3.5) hours a day. The procedural violations during this time, like the lack of meaningful instruction, the lack of progress monitoring, and the substantive goals statement violations described above, favor partial relief for each school day.

The denial of a FAPE continued into the [2019-2020 school] year. Once the Student began the hands-on instruction in the Culinary Arts program, the CTC experience did confer benefit; therefore, I now find three and a half (3.5) hours a day as appropriate relief from August 2019 through March 13, 2020, the day the CTC closed.

I will, however, award six and a half (6.5) hours a day of compensatory education from April 1, 2020, to June 4, 2020, graduation date. It is axiomatic, and the record is preponderant that the November IEP was inappropriate; therefore, the reduction of services and move to online services was insufficient, inadequate, and otherwise inappropriate.

Although the District did not provide evidence describing the reasonable rectification period, I believe the equities now require me to reduce the overall award as follows. First, I will reduce the award by ten (10) full school days, reflecting the initial downtime from March 13, 2020, to April 1, 2020, caused by the closing of the CTC. Therefore, the total award of compensatory relief is reduced by 65 hours.

Second, as the shutdown extended to the end of the school year, the record is preponderant that the staff made a concerted effort to minimize the continuing disruption in services. Therefore, considering the equitable purposes behind the reasonable rectification period, I will decrease the award from April 1, 2020, to June 4, 2020, by one (1) hour per day. This downward reduction acknowledges that while the response to the disruption in learning, at times, was beyond the District's control. However, the failure to provide prior written notice, procedural safeguards, a NOREP, and a summary of performance were under their control and have not gone unnoticed. Therefore, applying the reduction, the District is Ordered to provide five and one half (5.5) hours of compensatory education from April 1, 2020, to June 4, 2020.

As the record does not include a school calendar, I cannot calculate the exact total amount of the compensatory education award. Therefore, the District is Ordered to calculate the total number of school days the Student should have attended school, minus sick days, from April 9, 2019, to June 4, 2020. Next, based on the time allocations above, the District should calculate the number of compensatory education hours for each phase described above. Once the day and hour calculations are finalized, the District should deduct 65 hours from the working total. Once calculated, the District should transmit the final number of compensatory education hours to the Parent. After that, the Student may use the bank of time for special education, specially-designed instruction, related services,

or transition services described in the IDEA or Section 504. Annually, the District should report any unused hours to the Student and the Parent.

The Student and the Parent, in their sole discretion, can select the compensatory education service provider.

The District is now Ordered to reimburse the selected provider at the rate charged by the provider. To the extent the Student or the Parent incurs travel costs to and from the provider, the District is Ordered to reimburse the Parent or the Student for mileage expenses, at the District's rate for travel reimbursement. Any unused hours by the time the Student reaches age 26 will revert to the District and are otherwise forfeited.

### **FINAL ORDER**

**And Now**, this March 18, 2022, the District is hereby **ORDERED** as follows:

1. The District denied the Student a FAPE from April 9, 2019, to June 4, 2020. To remedy the District is now Ordered to provide the following relief.
2. The District is Ordered to pay the total costs for all compensatory education services at the rate charged by the service provider selected by the Parent or Student at the rate charged for those services.
3. The Parent or Student is authorized to select the individual(s) to provide any, and all make whole compensatory education services.
4. The compensatory education hours described here may take the form of any developmental, corrective, remedial, or specially-designed instruction, including related services, transportation services to and from the service provider, transition services, supplemental or auxiliary aids, as these terms are defined in the current or future regulations implementing the IDEA or Section 504.
5. The Parent is also permitted to self-fund and then obtain immediate reimbursement, within 30-days, for all costs associated with providing the compensatory education services described herein.
6. The District is directed to pay all invoices at the rate charged by the provider where the service is delivered within 30-days of receipt of the invoice.

7. The District is Ordered to calculate the number of school days the Student should have attended school, minus sick days, from April 9, 2019, to June 4, 2020. Next, based on the time allocations set forth above for each phase, the District should calculate the number of compensatory education hours for each period. [April 2019 to June 2019, September 2019 to March 2020, April 2020 to June 2020].
8. The District should then, after reducing the calculation by 65 hours, provide the calculation to the Parents. After that, the Student and Parent may use the bank of time for any special education forms, specially-designed instruction, related services, or transition services described in the IDEA or Section 504.
9. Annually, the District should report the number of unused hours to the Parent and the Student to the Student.
10. Any unused compensatory education hours remaining after the Student reaches age 27 will revert to the District and are otherwise forfeited.
11. All other claims for appropriate relief or affirmative defenses are dismissed with prejudice.

s/ Charles W. Jelley, Esq. LL.M.  
Special Education Hearing Officer  
**ODR FILE #24769-20-21**  
March 18, 2022