

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:

24414-20-21

Child's Name:

[R.F.]

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent

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Hearing Officer:

Charles W. Jelley Esq.

Date of Decision:

06/03/2021

INTRODUCTION

This special education due process hearing concerns the educational rights of R.F. ("Student"), a student who resides in the Council Rock School District ("District").¹ The parties agree that the Student qualifies for specially-designed instruction (SDI) under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEA").² The Parent also asserts denial-of-FAPE claims under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504"). The Parties agree the Student requires an individual education program (IEP), SDI and related services to address the Student's needs related to an Autism and speech and language disability. The parties essentially agree on the timeline and relevant Student specific events from December 2018 through the present. They disagree, however, over the legal import of these events relating to the Student's past, present and proposed progress. Parents claim that the District has denied the Student a free appropriate public education (FAPE) through various actions, inactions or omissions beginning in December 2018 school year through the present and the 2020 summer ESY program.³

ISSUE

Did the District provide the Student a free appropriate public education from December 2018 through – December 2019? If no, is the Student entitled to

¹ The generic use of "Student", and avoidance of personal pronouns, are employed to protect the confidentiality of the Student and family.

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). 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1-104.61.

the compensation education?

Did the District offer the Student a free appropriate public extended school year program during the 2019-2020 school year? If no, is the Student entitled to the compensation education?

Did the District offer the Student a free appropriate public education for the 2020 -2021 school year? If no, is the Student entitled to the compensation education?

Did the District offer and provide the Student a free appropriate public extended school year education for the 2020 - 2021 school year? If no, is the Student entitled to the compensation education? (N.T. 17-18).

The Party filing the request for the hearing shoulders the burden of proof. Four virtual hearing sessions were needed to conclude the hearing.⁴ Following a thorough review of the intrinsic and extrinsic evidence presented for the reasons set forth below, the Parents' claims are Granted in part and denied in part.⁵ An appropriate Order and Notice of Appeal follows.

PROPOSED FINDINGS OF FACT

- 1.The Student is currently a pre-teen and [redacted.] (SD-1).
2. The Student is identified as a person with a disability and is eligible for IDEA, primarily as a student with Autism and a secondary disability category, Intellectual Disability and the third disability category of speech and language disability (S & L). (S-1 p.27). As part of the initial evaluation to transition to

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (SD-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. Citations to duplicative exhibits may not be to all, and references to Parents in the plural will typically be made where it appears that one was acting on behalf of both.

⁵ After carefully considering the entire testimonial record, including the non-testimonial, extrinsic evidence in the record, in its entirety, I now find that I can draw inferences, make Findings of Fact and Conclusion of Law. Consequently, I do not reference portions of the record that are not relevant to the issue(s) in dispute.

the District for school-aged services in 2015, Student's mother and pre-school teacher rated the Student's adaptive behavior in the "Extremely Low" range. The report notes the Student was unable to interact with standardized cognitive and school readiness assessments. (S-1 p.3). Subsequent administration of the Wechsler Nonverbal Scale of Ability (*W.N.V.*) in 2017 rendered a Full-Scale I.Q. ("F.S.I.Q.") of 41 and a Full-Scale I.Q. with modifications of 68, both scores represent the "Extremely Low" range of cognitive ability. S-1, p.15.

3. Given the inability to respond using a picture exchange format, another measure – the Test of Nonverbal Intelligence-Fourth Edition (TONI-4) was administered. The Student earned an Index Score of 83, at the 13th percentile rank, at the Below Average level (S-1 p.18). The examiner administered the Inventory of Early Development III- Standardized (IED-III). The IED III assesses five domains. The Student earned a Composite Score at the 1st percentile for Physical Development; a Language Development score at less than the 1st percentile, an Academic/Cognitive score at less than the 6th percentile, and an Adaptive Behavior score at the 1st percentile. (S-1 p.19). The Student's Adaptive Behavior Assessment Scale-Second Edition (ABAS-II) Parent and teacher rankings fell in the "Low" to "Extremely Low" level. (S-1 p.24-25). The evaluation team determined the Student scores fell in the significantly sub-average general intellectual functioning with onset before age 18, with concurrent deficits or impairments in present adaptive functioning. Therefore, the Student is a person with an intellectual disability. (S-1 p.26).
4. Due to limited command of verbal language, upon enrollment in the District, the Student used and continues to use an alternative augmentative communication ("A.A.C.") device to communicate during the school day. (S-1 p.26, N.T.II 291-292). The device is portable and includes software that supports the development of communication skills. (S-1).

THE 2017-2018 SECOND GRADE and THE 2018-2019 THIRD GRADE

SCHOOL YEARS

5. In February 2018, of Second grade, the IEP team met and revised the IEP. The team revised the Present levels, the IEP goals, short-term objectives, SDI, the related services, and the Student's participation in regular education. The team also checked the box "Yes," indicating that the Student exhibits behaviors that impede learning. (S-2 p.7). By checking the "Yes" box, the team agreed to develop a "Positive Behavior Support Plan that is based on a functional assessment of behavior... may be listed in the Present Levels section of the IEP with a clear measurable plan to address the behavior in the Goals and Specially Designed Instruction sections of the IEP or in the Positive Behavior Support Plan...". Functional Behavioral Assessment forms are available at www.pattan.net." (S-2 p.7).
6. Later in the Present Levels, the IEP provides a statement of a "Functional Behavior Assessment Update and Positive Behavior Support Plan." The summary first described "mouthing objects and "off task." While the statement did not include an objective baseline or measurable goals, it did include a working hypothesis. The statement also included a statement that "Additional strategies for [redacted] Positive Behavior Support Plan are imbedded in the Specially-Designed Instruction." (S-2 p.11).
7. The IEP includes SDI's like the specific "use of differential reinforcement" and "sensory-based activities" throughout the day. The remaining SDIs target academic learning. (S-2 pp.21-24).
8. During 3rd grade school years, a Board Certified Behavior Analyst ("BCBA") and speech therapist provided training in Applied Behavioral Analysis (ABA) techniques to the Student's educational team on a monthly and as-needed basis. (N.T. 70-71, 83). The BCBA provided, at least weekly and on as needed, basis individual consultations to identify the functions of different behaviors and increase desired behaviors. (N.T. 83-85). The Student's I.E.P program included speech therapy, occupational and physical therapy as related services. (N.T. pp.82-84). The 3rd-grade classroom autistic support teacher used a variety of

teaching techniques, including ABA programming and techniques. The teacher uses a token economy reward system of positive behavior supports with motivating reinforcers to support positive behaviors. N.T. 72-74. The Student's classroom includes five or six students, one teacher, and four teaching assistants. (N.T. 29).

9. The Student's IEP calls for the Student to participate in regular education classroom for morning meetings, art, gym, library, and music. During these classes, a one-on-one teaching assistant supports the Student's limited command of verbal language. (S-7 p.1).
10. The present levels of performance note the Student uses an iPad with Proloquo2go A.C.C. device to communicate throughout the day. (S-7 p.7).
11. In math, the Student continues to work on number identification and identification of money. (S-7 p.7).
12. In language arts, the Student continues to work on letters "f, s, and h," answering three functional questions about personal information. (S-7 p.7).
13. The IEP includes additional annual statements like completing three classroom jobs; the Student continues to work on letters, "f, s, and h," answering three functional questions about personal information. (S-7 p.7).
14. One day a week, the Student's class travels into the community to receive direct instruction targeting community signs, ordering food, making a purchase. (S-7 p.7).
15. Throughout the school day and in the community, the Student receives direct instruction on self-help skills. (S-7 p.8).
16. The IEP includes present levels targeting the following areas: (1) transition from one activity to another; (2) accepting "no" as a response; (3) unpacking and packing up; (4) bus safety; (5) community-based instruction; (6) eating snacks and lunch; (7) toileting; (8) turn-taking; (9) following directions; (10) responding to "stop" and "wait." (S-7 p.9).
17. The present levels include short plain fact-based statements from the

classroom teacher, the speech therapist, the Occupational Therapist (O.T.), Physical Therapist (P.T.). (S-7 p.10).

18. The present levels include input from the District's Board Certified Behavioral Analyst (BCBA). The BCBA input summarized his analysis of the Student's two behaviors of concern, *i.e.*, mouthing objects like tables, chairs, eating indigestible items and off-task behavior. The summary noted a working hypothesis and possible reinforcers. (S-7 p.11).

19. The IEP includes Parental concerns about decreasing eating, licking or swallowing non-edible objects. (S-7 p.12).

20. The IEP notes the Student needs to increase: (1) receptive language skills; (2) increase expressive language skills;(3) increase direction following during group activities; (4) increase math skills;(5) increase reading skills; (6) improve pre-writing/typing skills;(7) address sensory regulations; and, (8) increase gross motor planning and sequencing skills. (S-7 p.12).

21. The IEP includes 14 annual goal statements, along with short-term objectives. Each goal includes a statement of how and when progress monitoring data would be shared with the Parents. (S-7 p.16-23).

THE MARCH 2020 INDIVIDUAL EDUCATION PROGRAM AND MEETING

22. One month before the COVID-19 mandatory school closure, the Parties participated in an IEP conference. The District issued and the Parents approved the Notice of Recommended Educational Placement (N.O.R.E.P.) without objection. (S-11 pp.2, 35, 38-40).

23. The March 2020 IEP included 17 SDIs and the following goal statements targeting: (1) learn to tell digital time; (2) be able to identify numbers to 30; (3) increase functional communication skills; (4) will ask an adult for help to perform a task; (5) independently check through the day; (6) identify sound associated with 10 different letters; (7) read 10-functional and community sight words; (8) type in 5 preferred websites when copying from card; (9) skip count by 10s, 5s and 2s; (10) identify all coins and amounts; (11) given direct instruction on gross

motor activities to complete 4 step gross motor activities; (12) when participating in physical education with peers, Student will achieve 14/16 on rubric; (14) the Student will write first name; and, (15) Student will demonstrate 1:1 correspondence. (S-7).

24. The IEP also called for classroom-based individual and/or group-based O.T., P.T., speech therapy, and curb-to-curb transportation to and from school. (S-7 p.29-30). Finally, the IEP included weekly consultative supports for personnel like O.T. speech, P.T. and BCBA *id.*
25. After reviewing the seven extended school year (ESY) eligibility factors, the IEP [team] determined the Student should receive four (4) weeks of ESY services. The ESY program targeted 10 goal areas. (S-18). The ESY program included speech therapy, P.T., O.T., and transportation services. (S-2 pp.32-34).
26. The IEP included 20 different forms of SDI. To ensure the Parents and the school were in constant contact, the SDI's included daily written home and school and monthly meetings between staff and Parents. (N.T. p.50, p.85). The goal statements included conditions supporting skill generalization to ensure learned skills were used outside of the school day. (N.T. pp.78-92). Repetition of information, use of differential reinforcement, wait for time to account for processing speed, a least to most prompt hierarchy, and sensory-based supports. (S-7 pp.27-28).
27. After reviewing the seven extended school year (ESY) eligibility factors, the IEP determined the Student should receive four (4) weeks of ESY services. The ESY program targeted 10 goal areas. (S-7). The ESY program included speech therapy, P.T., O.T., and transportation services. (S-2 pp.32-34).
28. As per the IEP, the District provided the Parents quarterly progress reports. Each quarterly progress report described incremental gains made on each measurable school year or ESY goal or objective. (P-4, P-18, S-6 pp.9-13). The progress reports explained how throughout the school year, the Student mastered certain goals. For example, the November 2018 and the February progress reports

informed the Parents the Student mastered the walk and danger signs. In February 2018, the Student mastered the number goals. (S-6 pp.12-13).

29. The Student's toileting skills improved. (N.T. 88). The Student's ability to focus and to attend to instruction improved. (N.T. 92). The Student's chewing on non-food items decreased. *Id.* The Student's continued use of the A.A.C. device, and verbalizing answers to some questions improved. N.T. 93-94. The progress monitoring data indicates the Student began to use the A.A.C. device in different ways. N.T. 94.

THE PARENTS' INDEPENDENT EDUCATIONAL EVALUATION

30. On January 16, 2019, the Parent's independent evaluator completed an in-school observation of the Student. The evaluator noted, the Student needed hand-over-hand assistance to navigate the A.C.C. device. (S-4, p.7, N.T. 576). The evaluator also noted that when the Student became frustrated, the Student would "tap on [redacted] chin with [redacted] hand with moderate force." S-4, 7. During recess, the evaluator noted that the Student spent much of the time in the sensory room. The evaluator reported that the Student was not observed to socialize. (N.T. 577). Following the recess, when back in the classroom, the Student required hand over hand assistance to trace letters and required direction to navigate the device to locate categories. (S- 4, p.8). The evaluator next concluded that the Student's behavior was inconsistent across settings and situations. (S-4, p.9).
31. The evaluator administered four standardized tests, all of which concluded, across the board, Student performed at the "Very Low" to "Well Below" level when compared to same-age peers in ability, academics, social, emotional, behavioral and language skills. (S-4, p.9). After reviewing the Student's profile, the evaluator concluded the Student was a person with Autism. The evaluator ruled out Attention Deficit Hyperactivity Disorder (A.D.H.D.) and did not note the presence of any other disabilities. The evaluator's report made 14 recommendations. The first recommendation suggested the Student should be

placed in a school that is "designed specifically to educate students with autism spectrum disorder, cognitive delay and related, language, academic, behavioral, social, safety and adaptive living deficits." The evaluator also recommended that the Student enroll in "a highly structured program based in the strict principles of Applied Behavior Analysis (ABA) . . . with" a ratio of 1 staff to every 2 students is recommended." (S-4 p.9).

32. The Parent's expert is not a certified school psychologist, has never worked for a public school district, and has never been responsible for writing an IEP (N.T. pp.569-570).
33. The private evaluator has never qualified as an expert in any capacity to provide testimony before the Office of Dispute Resolution or any other administrative body, court, or tribunal until this Due Process Hearing. (N.T. p.).
34. In reaching her expert opinion, the evaluator did not review all of the Student's educational records – including kindergarten, first and second-grade education records or the District's 2017 Reevaluation Report (R.R.). (N.T. pp.616-617, p.623). The private evaluator did not consult with Student's speech therapist, observe the C.B.I., and was unaware that the IEP team, including the Parent, identified the Student as a person with an intellectual disability. (N.T. p.458, N.T. p.619).
35. After receiving and reviewing the independent education evaluation (I.E.E.) the District offered, the Parents agreed to reevaluate the Student's functional education needs and disability status. (S-4).

THE MARCH 2020 REEVALUATION REPORT AND THE IEE

36. On March 1, 2020, the District provided the Parents with a copy of the R.R. The R.R. includes Parent input, teacher input, the results of previous ability testing, language assessments, O.T. assessments, P.T. assessments, rankings from social and emotional checklists, and IEP progress monitoring data from 2018. The R.R. included a list of strengths, needs, along with 14 recommendations from the

teacher. After reviewing the I.E.E. and the then-current data, the team concluded that the Student was a person with Autism and an intellectual disability. (S-9).

Fourth Grade -2019-2020 School Year

37. The Student's 4th-grade autistic support classroom included a total of five (5) to six (6) students staffed by a special education teacher and five (5) teaching assistants. (N.T. p. 186). The 4th-grade teacher implemented ABA techniques in the classroom. (N.T. p.136, pp.183-184). The District BCBA also advised the teacher to collect progress monitoring data and increase skill generalization (N.T. p.184).
38. The 4th grade teacher, the BCBA and the related service providers collaborated to ensure fidelity of applied behavioral analysis (ABA) instructional techniques and consult on behavior-related issues. (N.T. p.185, p.187-188).
39. The daily classroom morning routine included working on unpacking and breakfast routine; interacting with the regular education peers in morning meeting; working 1:1 with the teacher on individual IEP goals; participation in a preferred activity; opportunity for sensory breaks; small-group morning activity with peers; functional skills work such as hygiene; recess and lunch with regular education peers; quiet time; opportunity to participate in any one of four "centers"; adapted specials; snack; whole group activity targeting S & L, motor and life skills; group afternoon meeting; and, computer lab or an additional recess. (N.T. pp.155-157, 189.) Once a week, the Student participated in C.B.I. and generalization skills goal activities. *Id.*
40. From February 2020 until the school closure in mid-March of 2020, to decrease the Student's pica behavior or self-injurious behavior, the BCBA and the O.T. collaborated with the teacher to provide alternative sensory outlets. The District's progress monitoring data indicates the frequency of the pica decreased. (N.T. pp.159-161, N.T. pp.168-169, P-58).
41. In February of 2020, the IEP team determined the Student mastered the following goals: copying websites and other words from a card without assistance;

answering three pieces of personal information about; identifying the numbers 1-18; identifying seven (7) functional and community sight words; and receptively identifying the letters A through G. (S-11 pp.7-8, N.T.pp.205-206).

COVID-19 MANDATED SCHOOL CLOSURES

42. On March 11, 2020, the World Health Organization characterized the spread of the COVID-19 Coronavirus as a pandemic, and on March 13, 2020, Governor Wolf issued an Executive Order closing all Pennsylvania schools.
43. On March 27, 2020, Governor Wolf signed into law SB 751, now known as Act 13, which modified multiple provisions of the Public School Code.
44. On March 30, 2020, the District sent the Parents written notice about the school closure. The District's letter to the Parents did not describe the specifics of the proposed changes to the I.E.P, other "actions" or a copy of the procedural safeguards. (H.O. Exhibit # 3).
45. The District's March 30, 2020 letter provided the Student would receive one-on-one synchronous⁶ instruction sessions with the special education teacher two days per week targeting teacher selected IEP goals. (N.T. pp.786-788).
46. Weekly asynchronous assignments were posted to Student's virtual classroom platform, and [the] teacher posted videos modeling instruction for Parents (N.T. pp.786-788). The speech therapist met with the Student virtually one to two times per week, for 20 to 25 minutes, offered weekly meetings with Parents, sent weekly emails to Parents with communication strategies, tips and posted Speech and language-based activities on the virtual classroom platform. (N.T. pp.476-477).

⁶ Synchronous Learning: What's the Difference? While asynchronous learning allows students to access materials, ask questions, and practice their skills at any time that works for them, synchronous learning requires simultaneous attendance at scheduled meetings or lectures. <https://www.powerschool.com/resources/blog/the-basics-of-k-12-asynchronous-learning-definition-benefits-and-activities>.

47. From May 5, 2020, until the last day of the school year, the Student received two thirty-minute weekly synchronous sessions with the long-term substitute. (N.T. p.176). Asynchronous assignments continued to be posted. (N.T. p.788). Speech and language continued once per week, and occupational therapy continued with weekly, fifteen-minute phone calls. Physical therapy sessions in the IEP were not provided. Fridays were "fun" days. (N.T. p.175).

THE STUDENT'S 2020 EXTENDED SCHOOL YEAR SUMMER PROGRAM

48. At the end of 4th grade, the Student qualified for ESY for the summer of 2020. S-11 pp.444-447. ESY included virtual Speech and occupational therapies and 1:1 sessions with the special education teacher three times per week. (N.T. pp. 789-790).
49. The Student participated in virtual instruction from home from March 2020 through ESY and then through October 2020. The Student then attended school in person Monday through Friday, each Wednesday, while all other regular education peers attended virtually. The Wednesday CBI instruction was discontinued due to safety reasons. (N.T. p. S-12, 14, 16).
50. The ESY IEP called for the Student to receive Autistic Support four days a week. Student received ESY services three times a week of individual synchronous instruction from the long-term substitute. Five group speech and language sessions offered five individual speech and language sessions (Student was absent from one.) P-38, 1. No occupational therapy or physical therapy was provided, according to the summary report. (P-38, 1. P-37). ESY was virtual. (N.T. p.178).

THE 2020-2021 SCHOOL YEAR AND THE RETURN TO CLASSROOM INSTRUCTION

51. On July 23, 2020, the District's Board of Directors approved its Phased School Reopening Health and Safety Plan, resuming in-person schooling set for August 31, 2020. (Hearing Officer Exhibit #3).
52. Student attended school virtually until October of 2020. After returning to school, the IEP team, over the Parents, objection, determined the Student was ineligible for COVID-19 Compensatory Services ("C.C.S."). (N.T. pp.290-291).
53. The Student's current autistic support classroom has a 1:1 ratio of students to adults, consisting of six (6) students. The teacher trained all five (5) trained teaching assistants. (N.T. p.277). Classroom staff and related service providers integrate ABA practices and positive reinforcement, use visuals to support language, a token economy system, analysis of functional behavioral data, errorless learning strategies, differential reinforcement of other behavior, and targeted skill generalization across environments in the community. (N.T. pp.281-282, 293-296, 302, 373).
54. A different District BCBA, this school year, provides weekly consultations to the teacher, the Student and works with staff to develop strategies to manage prompt dependency and improve generalization of skills. (N.T. pp.283-284). The Student's related service providers consult with and work in the classroom daily. (N.T. p.286, p.305, N.T. pp.461-462).
55. The Student continues to exhibit levels of behaviors such as self-chinning or nose scratching and pica. Staff now use redirection and differential reinforcement of other behavior. (N.T.pp.278-280). Emerging data trends collected from early October 2020 to late December 2020 reflect a downward trend compared to anecdotal statements about other school years. (P-58).

THE VERBAL BEHAVIOR MILESTONES ASSESSMENT AND PLACEMENT PROGRAM⁷

56. The evaluation team and the IEP team, at various times, used data acquired from repeated administrations of the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP), first on May 14, 2019, of 3rd-grade year and then on November 20, 2021, of the 5th-grade year, to assess the Student's disability and need for SDI. The VB-MAPP includes the Milestones Assessment and the Barrier Assessment, and the VB-MAPP Transition Assessment. (S-14, S-9, P-63, P-44, P-49). The Student's private provider of in-home ABA services also administered the VB-MAPP Milestones Assessment. (P-63, S-14).
57. The VB-MAPP Milestones Assessment is designed to provide a sample of the child's existing verbal and related skills, containing 170 measurable learning and language milestones that are sequenced according to typical development and balanced across three (3) developmental levels. Level 1 ranges from birth to 18-months, Level 2 ranges from 18-to-30-months, and Level 3 ranges from 30-to-48 months. It also addresses the following domains: mand (i.e., requests), tact (i.e., labels), echoic, intraverbal (i.e., conversational), listener, motor imitation, independent play, social and social play, visual perceptual and matching-to-sample, linguistic structure, and group skills. By assessing skills across these

⁷ The Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) is a criterion referenced assessment based on the analysis of Verbal Behavior. The VB-MAPP contains five components (i.e., Milestones Assessment, Barriers Assessment, Transition Assessment, Task Analysis, and Curriculum Placement Guide) that are designed to assess child's existing skills, determine appropriate treatment plans and placement, and to assist in developing treatment goals and objectives. (P-63, P-44, P-49,

- domains, appropriate instructional goals and objectives can be identified. (P-63).
58. The VB-MAPP Barriers Assessment provides information about 24 common issues that interfere with learning referenced in the VB-MAPP Milestones domains. (S-14, S-9, P-63, P-44, P-49).
59. The VB-MAPP Transition Assessment — contains 18 assessment areas and can help identify whether a child is making progress and has acquired the skills necessary for learning in a less restrictive educational environment. The assessment is comprised of several summary measures from other parts of the VB-MAPP, as well as a variety of other skills that can affect transition. The assessment includes measures of the overall score on the VB-MAPP Milestones Assessment, the overall score on the VB-MAPP Barriers Assessment, negative behaviors, classroom routines and group skills, social skills, academic independence, generalization, variation of reinforcers, rate of skill acquisition, retention, natural environment learning, transfer skills, adaptability to change, spontaneity, independent play, general self-help, toileting skills, and eating skills. (S-14, S-9, P-63, P-44, P-49).
60. The Student's 3rd grade May 2019 overall scores on the VB-MAPP fell within Level I and Level 2 with some scores at Level 3. The Student earned a score of 54.5 out of a possible score of 170. The Student earned a Barriers Assessment score demonstrated elevations on 18 of 24 barriers, with an overall score of 40 out of 96 possible 40. A lower score on this assessment indicates fewer barriers. (P-63 pp.4-5). For example, the Student's Listener Responding: "[Redacted] did not score any points on the Level 2 Listener responding by function, features, and class assessment." The 2019 VB-MAPP report notes that the Student "[Redacted] is currently learning letter sounds." (P.63 p.5).
61. In October 2020, the Student earned a VB-MAPP score of 33.5 out of a possible score of 170. This score places language abilities around the 0-12 months of developmental age of approximately months with a few splinter skills in the range of 0 to 18 months. For example, the Student's Listener Responding: scored a 3.5 on the Level 1 Listener Responding Assessment. The Student can

orient toward the speaker when [Student's] name was called five (5) times, look at the correct picture in an array of two (2) for five (5) times, and perform four (4) motor actions without visual prompts. Student struggles with selecting the correct item from an array of four (4) and responding consistently to [Student's] name.

- 62. The private provider did not administer the VB-Barrier assessment. (P 63).
- 63. In November 2020, the Student earned a VB-MAPP score of 80.5. The Student earned a VB-MAPP Barrier score of 49.0. (S-14 pp.10-23, P-50). (S-9, P-43, P-49).

LEVEL OF PARTICIPATION IN THE REGULAR EDUCATION

- 64. During 2nd and 3rd grade years, Student spent 37%-39% of the school day with regular education peers. (S-2, p.37, S-10 p.30).
- 65. In 4th grade, the Student was included in regular education peers for 42% of the school day, including morning meeting, movement group, lunch, recess, all Specials (Music, Art, Library and Regular Gym) and social activities class parties. The Student participated in Adapted Library and Adapted Physical Education, where the teachers pre-teach and re-teach skills needed to participate in the regular education classroom. (S-11 pp.6, 34). At some time during the school year, the Student also participated in an adapted aquatics program. One day a week, the Student participates in community-based instruction – which includes visits to a restaurant and supermarket – where Student works on communicating using the A.A.C. device. (N.T. pp.202-205, S-11, S-12).
- 66. During the 2021-2022 school year, the Student spends roughly 2.75 hours per day or 42% of the school day in the regular education class and 3.75 hours per day in the autistic support class. (S-12, p.34, N.T.pp.284-285; N.T.pp.466-467).

THE GOAL STATEMENTS, THE PROGRESS REPORTS, AND THE DATA SETS

67. The February 2018 IEP included a goal to independently answer three "wh" questions or appropriately request an item or activity. The baseline stated "full visual/verbal prompting." (S-2, February 2017 IEP p.26). The records do not include a progress report describing any data on this goal. (S-6, March 2019 R.R. p.13).
68. The February 25, 2019, IEP included an annual goal calling for the Student to identify the sound associated with 10 different levels with 80% accuracy across 5 consecutive data opportunities for a current baseline of 0. (S-5).
69. The May 25, 2019, IEP discontinued the sound associated goal. (S-10). The May 2019 does not state why the goal was deleted. *Id.*
70. Exhibit P-35 is one of two exhibits, labeled as the 2019-2020 progress report; however, while the reporting period covered the time frame when the sound association goal was in effect, the progress report does not contain any data about the sound associated goal from March 2019 to May 2019. (P-35).
71. Exhibit P-23 is also labeled as the 2019-2020 progress report; while the reporting period covered when the sound association goal was in effect, it does not contain any data about the sound associated goal. (P-23).
72. Exhibit P-35 is the second exhibit, labeled as the 2019-2020 Progress report, yet the report does not contain any data about "W.H." questions. (P-35).
73. The teacher did not report data on the five IEP goals for the three months from February 25, 2019, IEP to May 2019. The speech and language therapist gave the classroom teacher the data, yet the teacher did not provide or report the progress monitoring to the Parents or the team. (N.T. p.418-420).
74. The March 2019 and the May 2019 IEP deleted the skip counting goal statement. (S-5, S-7, S-10).
75. The present levels statements in the February 25, 2019, IEP states the Student did not master the "wh" goal independently (S-5, p.7), yet, the goal did not appear in the February 25, 2019, IEP. (S-5).

76. The February 25, 2019, IEP includes two new speech and language goals. The goals call for the Student to make at least 5, 3-4 word contextually relevant comments and request adult or peer assistance. (S-5, p February 25, 2019, IEP p.14-15). The progress monitoring reports provided to the Parents, the IEP team, and the reevaluation team did not include data on the new speech and language goals. (S-5, February 25, 2019, IEP pp.14-15, P-13). The speech and language therapist shredded the raw speech data. (N.T. 485).
77. The Completing Three Jobs and Requesting the Bathroom speech and language goals were deleted from the IEP without data review. (S- 2, February 27, 2018 pp.18-19; S-5, February 25, 2019. IEP p.6).
78. The telling digital time goal, request assistance goal, increase functional communication goal was deleted from the May 21, 2019, IEP; while at the same time, the identify number 1 to 30 goal was reduced to 1-20. (S-10 compared to S-5). Without the benefit of a data review, the team removed multiple-goal statements from the May 21, 2019, IEP P-13 February 2, 2019, IEP with the S-10, May 21, 2019, progress report vs. S-10, May 21, 2019, IEP revision, N.T. 419).
79. The February and May 2019 goals statements included short-term objectives with measurement criteria calling for the data collection on reduction of physical or verbal prompts; yet, no data was collected or reported for prompt reduction. (S-10, S-11, N.T. p.38, p. 65, S-5, p.14, p.15, S-10, p.15, p.19, pp.24-25).
80. The May 21, 2019, IEP added two new goals. The first speech and language goal called for the Student to make a 3-word request for 5 different items/activities. (S-10, p.2). Short-term objectives call for the Student to start at 1 different item or activity and work up to 5 (the annual goal). (S-10, p.20). The data collection sheets do not match up with the goal statement criteria for performance. The data sheets omit data on the number of items across 3 different partners and do not correspond to the description of the goal. (P-11, p.4).

THE BEHAVIORAL DATA SET

81. The October 19, 2020, to October 23, 2020, behavioral data sheets collected data on "aggression, self-injury behavior and pica." (P-57 p.1). The term "aggression" is not defined. The exhibits and the testimony did not mention concerns about "aggression." (N.T. *passim*). Later on, in the same exhibit, the data sheets switch to collecting data on "chinning, self-injury - hitting head and pica." The later data sheets describe self-injury behavior as "hitting head" the testimony as a whole does not discuss "hitting head" as a behavioral concern. (N.T. *passim*).
82. When the Student's behavior "chew strap" was dirty, the teacher, at the direction of the O.T., provided the Student with ice chips to chew on. At other times, the staff would provide sensory activities. (N.T. pp.345-347). The staff did not collect behavioral data. (N.T. *passim*).

THE O.T. AND P.T. DATA SET

83. The 2018-2019, 2019-2020, and the 2020-2021 IEPs included O.T. and P.T. goal statements. The goal statements included a criterion for performance, like "with no more than 2 verbal prompts for 4/5 trials" (P-13 p.6, P-23 p.12, P-23 p.13, S-5 p.22, P-13 p.6). The IEPs further provide that the District will provide quarterly reports. Neither the O.T. nor the P.T. collected data, graphed or reported objective data as stated in the goal statements to the Parents or the IEP team. At times, the O.T. and the P.T. did provide anecdotal statements. (P-13, P-23, S-5, S-10, P-23, P-35, S-6, S-14).

THE SPEECH THERAPY DATA SET

84. The 2018-2019 progress reports include data about the speech and language goal statements for "hi" and "bye." The progress report notes the Student would say or communicate "hi" or "bye" in 4 out of 10 trials across 5 consecutive trials. The "hi" and "bye" goal appears in the February 25, 2018-2019 IEP the "hi" and "bye" goal was removed from subsequent IEPs.

The Student's progress report at P-23, page 21, reports data for "hi" as completed; however, "bye" statements were not yet mastered. (P-23 p.21, P-4 p.16, S-5, P-23 p.21). The record does not explain why the goal was deleted.

THE FUNCTIONAL ACADEMIC DATA SET

85. The 2017-2018, 2018-2019, 2019-2020 and the 2020-2021 IEPs included coin identification goal statements. The goal statements included an objective criterion for performance. The 2017-2018 IEP included goals for identification of a penny, nickel, dime, quarter, one dollar (\$1), five dollars (\$5), ten dollars (\$10) and twenty (\$20) dollar bills. The 2017-2018 progress monitoring report states the Student could identify: a penny with 56% accuracy; a nickel with 52%; a dime with 48%; a quarter with 56%; a \$1 bill with 28%; a \$5 bill with 44%; a \$10 bill with 48%; and, a \$20 bill with 60%. (P-4 pp.17-23). The February 25, 2019, progress report includes data on identifying a quarter and a penny. The five (5) data point progress monitoring set for the quarter ranges from a zero percent correct to a high of 40%. The three (3) point data set for identifying a penny ranges from 80% to 100%. (P-13 p.5). The April 2020 progress report states that the Student can identify a penny 2 out of 5 times correctly [40%]. (P-23 p.4).
86. The June 2020 progress report states the Student was "confused when working to implement this goal [identify coins] virtually. (P-23 p.4). When the 2020 progress data is compared to the 2017-2018 data, the trend line for identifying a penny and a quarter is either stagnant or moving in a downward slope. (N.T. *passim*).

APPLICABLE LEGAL PRINCIPLES

CREDIBILITY DETERMINATIONS

Hearing officers, as fact-finders, are charged with the responsibility of making determinations about witness credibility, assessing the persuasiveness of the

witnesses' testimony and giving due weight to the proffered testimony.⁸ This hearing officer now finds the District's and the Parents' witnesses were, for the most part, credible. For all the reasons that follow, however, I found the testimony of some witnesses to be less convincing and persuasive than others. I now find the special education teachers' and the District BCBA's testimonies were not always clear, cogent, or convincing. At times the teachers' and the BCBA's testimony directly conflicted with the physical exhibits. While the witnesses suggest the Student made progress, different staff members failed to report, collect, prepare, and provide progress monitoring data. I also give less persuasive weight to the testimony of the District's three BCBA's regarding the administration of the VB-MAPP. While exhibits establish the first BCBA administered the VB-MAPP Milestones, Barriers and Transition Assessment, the VB-MAPP report provided to the Parents, and the IEP team failed to report the otherwise available and completed Transition data. Email exhibits establish that the second BCBA omitted the VB-MAPP Transition Assessment. These omissions cut against the persuasiveness of the BCBA's ability to administer and interpret the data. Finally, I will give reduced weight to the Parents' independent evaluator. While her assessment of and description of the Student's functional skills was similar to the District's description, she failed to explain why she did not know the Student was a person with an intellectual disability or why she did a limited review of the record. Despite these weaknesses, I now give her testimony about the Student's circumstances some weight. I do this as her testimony is corroborated by the Parents' other witness, the Students' in-home ABA discrete trial program supervisor.

⁸ See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *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).

APPLICABLE LEGAL PRINCIPLES
CREDIBILITY DETERMINATIONS
IDEA FAPE MANDATE

The starting point of the IEP process is to identify the child's "intellectual potential." *Shore Reg'l*, 381 F.3d at 198 (quoting *Polk*, 853 F.2d at 181). A full evaluation requires the school district to determine the child's aptitude and achievement. 34 C.F.R. §§ 300.304(b)(3), (c)(1). Districts must evaluate students using proper assessment tools that identify and monitor the development of his or her unique special education needs. 20 U.S.C. § 1414; 34 C.F.R. § 300.304. *T.M v. Quakertown Cmty. Sch. Dist.*, 251 F. Supp. 3d 792, 801 (E.D. Pa. 2017). The IDEA guarantees students with disabilities a "basic floor of opportunity" consisting of "access to specialized instruction and related services." *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), IEP's must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. 206-207. An IEP must be "likely to produce progress, not regression or trivial educational advancement." *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260 (3d Cir. 2012). The requisite degree of meaningful benefit, significant learning and progress varies, depending on the student's abilities, circumstances and potential. *Andrew F.* 137 S. Ct. at 999.⁹ However, "[a]ny lack of progress under a particular IEP does not render the IEP inappropriate." *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 530 (3rd Cir. 1995). IEP's must include measurable annual goals designed to enable a student to make progress, describe how the child's progress toward meeting those goals will be measured, along with a description of SDIs and related services the student will receive. 20 U.S.C. § 1414(d)(1)(A)(i)(II)-(IV).

⁹ *K.D. by & through Dunn v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 254 (3d Cir. 2018) (quoting *M.R.*, 680 F.3d at 269). *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 557 (3d Cir. 2010), *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).

"Meaningful benefit" means that a student's program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis* or minimal educational progress. *Andrew F.* 137 S. Ct. 1000, *K.D. v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 254 (3d Cir. 2018). An IEP team must periodically review a student's IEP, and at least once annually, determine whether goals for a student are being achieved and revise the IEP as appropriate to address any lack of expected progress. *Id.* § 1414(d)(4)(A); 34 C.F.R. § 300.324(b)(1). At each IEP meeting, the team must consider if the IEP still reflects the student's individual needs. IEP teams review the extent to which the student has or has not accomplished the annual goals. Based on the student's level of success, the team members can then decide which adjustments are necessary. At each IEP meeting, the team must determine, consider and decide, (1) any lack of progress toward the student's annual goals, if appropriate; (2) the results of any reevaluation conducted; (3) information about the child provided to or by the parents should be considered; (3) the child's anticipated needs; and, (4) any other IEP-related matters like related services, SDI's. 34 CFR 300.324 (b)(1)(ii), *District of Columbia Pub. Schs.*, 112 LRP 30760 (SEA DC 02/24/12). Regular progress monitoring and periodic progress reports provided to the parents and the IEP team are critical to a substantively appropriate IEP. 34 C.F.R. § 300.320(a)(3). *T.M v. Quakertown Cmty. Sch. Dist.*, 251 F. Supp. 3d 792 (E.D. Pa. 2017).

A FAPE does not require school districts to offer "every special service necessary to maximize each handicapped child's potential" *Rowley*, 458 U.S. 199, *Andrew F.*, 137 S. Ct. at 1001. See *K.D.*, 904 F.3d 248, 256 (3d Cir. 2018) ("slow progress does not prove that [the student's] IEP's were not challenging enough or updated enough."). "Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the

court regards it as ideal." *Endrew F.*, 137 S. Ct. at 999.¹⁰ The IDEA directs that an impartial hearing officer's decision about the appropriateness of an IEP must be made on substantive grounds. 20 U.S.C. § 1415(f)(3)(E)(i).¹¹

SECTION 504 FAPE REQUIREMENTS

Section 504 requires that districts comply with specific procedures in the provision of services to students with disabilities. Section 504 FAPE requires adherence to the following requirements regarding the provision of a FAPE. (34 C.F.R. § 104.35), educational settings (34 C.F.R. 104.34), and procedural safeguards (34 C.F.R. 104.36). In particular, Section 504 FAPE requires the provision of regular or special education, including related aids and services that "are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met." 34 C.F.R. §104.33 (b)(1)(i). Section 504's FAPE standard supports and reinforces the nondiscrimination directive at 34 C.F.R. §104.4. The requirement to provide a FAPE under Section 504 includes students receiving services under the IDEA and different accommodations and related services according to a 504 Plan. *C.G. v. Commonwealth of Pennsylvania Dep't of Educ.*, 62 I.D.E.L.R. 41 (3d Cir. 2013).¹²

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

¹¹ A proposed IEP meets the above FAPE 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), *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993) (applying the snapshot rule).

¹² Parents' Section 504 claims here repackage the IDEA child-find and FAPE claims as violations of § 504; therefore, in this instance the disposition of the IDEA claims resolves the Student's 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).

APPROPRIATE RELIEF

The remedies available under the IDEA are generally available under Section 504. Therefore courts and hearing officers may award compensatory education and reimbursement to remedy alleged IDEA and Section 504 violations.¹³ Compensatory education is appropriate relief designed to compensate a disabled student who has been denied a FAPE.¹⁴ Compensatory education should place the child in the position they would have been in but for the IDEA violation.¹⁵ Compensatory education "accrue[s] from the point that the school district knows or should know of the injury to the child."¹⁶ A child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." *Id.* With these fixed principles in mind, I will now turn to the claims.

ANALYSIS, CONCLUSIONS AND DISCUSSION

THE FUNCTIONAL BEHAVIORAL ASSESSMENT IS INSUFFICIENT

In February 2018, while the Student was in 2nd grade, the IEP team met to develop a new IEP. The February 2018 IEP crossed over into the latter half of the 2nd grade and the first half of the 3rd grade. The IEP team checked the box indicating the Student needed a positive behavior support plan, which then

¹³ *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015).

¹⁴ *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 276 (D.D.C.2011) (citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir. 2005)).

¹⁵ *Boose v. District of Columbia*, 786 F.3d 1054, 2015 U.S. App. LEXIS 8599 (D.C. Cir. 2015). IEPs are forward looking and intended to "conform to . . . [a] standard that looks to the child's present abilities", whereas compensatory education is meant to "make up for prior deficiencies". *Reid*, 401 F.3d at 522-23. Unlike compensatory education, therefore, an IEP "carries no guarantee of undoing damage done by prior violations, IEPs do not do compensatory education's job." *Id.*

¹⁶ *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

required the District to prepare an FBA. Once the team decided the Student's behavior impeded learning, the Student expected that the District would complete an FBA and develop a PBSP

The February 2018 IEP present levels included a two-paragraph statement labeled "Functional Behavior Assessment Update and Positive Behavior Support Plan." The two-paragraph statement identifies "mouthing objects" and "off-task" as interfering behaviors of concern. The two-paragraph statement does not include objective data, a description of the antecedents, or the reinforcers maintaining the behavior. The FBA statement suggests two strategies. First, when the Student mouths or chews inedible objects, the staff should give the Student a "chew strap." Second, the FBA statement calls for the staff to provide positive reinforcement and redirection to address "off-task" behavior. Curiously the SDIs did not list the "chew strap" as an intervention.

While the IEP includes a proffered FBA and PBSP, the proffered statements do not meet the Student's substantive behavioral needs. While neither the IDEA, its regulations, nor the applicable state regulations define the essential elements of an FBA or a PBSP, the case law and model state forms provide a working checklist. In *H.D. v. Central Bucks School District*, 59 IDELR 275 (E.D. Pa. 2012), the court held an FBA is generally understood to include at least three steps: (1) a clear definition of the problem behavior; (2) data collection and observation describing the antecedents and consequences of the behavior; and (3) data fosters a hypothesis about the function of the behavior.¹⁷ Once the objective data is reviewed, a team can design a personalized PBSP. Falling short in any of the *H.D.* factors creates doubt in the team's ability to identify the function of the behavior and the selection of

¹⁷ *Cobb County Sch. Dist, v. D.B.*, 66 IDELR 134 (N.D. Ga. 2015) (court held absent objective data the FBA failed to determine the child's educational or behavioral needs and in turn failed to develop an effective IEP/PBSP).

appropriate SDIs. The FBA here lacks an objective baseline. The FBA statement also lacks a working description of the function of the behavior. For example, at one point, the staff suggests the Student's behavior is reinforcement motivated. At another point, the staff suggests the behavior is sensory-based. Based on these conflicting circumstances, the failure to complete an FBA, gather baseline, create a working hypothesis, and implement measurable behavioral goals makes providing a FAPE impossible. The omission of the FBA also makes Parental participation meaningless. While the SDIs include behavioral strategies, like differential reinforcement, I now find, under these circumstances, absent a PBSP, with a goal statement and progress monitoring, the Parents and the team cannot set ambitious goals and challenging objectives. An appropriate Order granting appropriate relief follows.

THE WARNING SIGNS WERE PRESENT, YET NO ONE ACTED

In February 2018, the IEP team determined the "mouthing" and "off-task" behaviors were the chief concern. By February 2019, the IEP team reversed direction and dropped the description of the behaviors of concern and the FBA-PBSP statement from the present levels.

In March 2019, the O.T. noted in the IEP and RR that "mouthing and biting fingernails" were growing concerns. The O.T. further reported that the staff began "taping" or "putting stickers" on the Student's nails to discourage biting. The O.T. then reported that those strategies did not "deter" the behavior. Despite this clear statement that the interventions were not working, the IEP team did not act.

The May 2019 VB-MAPP Barriers Assessment reports that the Student's "nail-biting" occurred at a "high rate." The VB-MAPP report states that nail-biting "competes with learning and social activities." Yet, the team did not act.

The 2019 VB-MAPP data describes several ongoing behaviors of concern. The report states that the chinning, grabbing items and "obsessive-compulsive

behavior" were ongoing concerns. The O.T. reported the Student was "... continually mouthing "chairs" and "school tools," and "engaged in excessive bouncing and flapping and loud vocalizations." The O.T. next reported that a "blanket" was placed over the back of the Student's chair to reduce the frequency of chair "biting" and chair "face rubbing." The "blanket" strategy was not listed as an SDI, data was not collected and positive goals statements never addressed the chinning, grabbing, or hand flapping.

In February 2020, the BCBA IEP's input added "head hitting" as a concern. The December 2020 RR notes after returning to school, the Student began swiping markers and then licking the marker on a "few occasions." Yet, the team did not act.

The December 2020 VB-MAPP report states that "chinning," "self-stimulatory," "mouthing," and "obsessive-compulsive behavior" are barriers to learning. The record is preponderant that the subsequent IEPs lack objective functional behavioral data, a clear description of the antecedent behaviors, a description of the interfering behavior or a description of the consequences that maintain the behavior.

While the District's witnesses suggest they effectively manage the behaviors, they did not provide supporting progress monitoring data. Absent baseline data, the IEP team cannot develop and offer ambitious behavioral, emotional, social, self-regulation objectives. The lack of an FBA and a goal-based PBSP occurred during the 2018-2019, 2019-2020 and the 2020-2021 IEPs. Although the IEP team met on multiple occasions, the team never corrected the fundamental FBA and PBSP omissions.

Assuming the "chew strap" is an appropriate intervention, the witnesses never explained why it was not listed as an SDI. Assuming a "chew strap" is an appropriate intervention, the District witnesses never explained why they discontinued the "chew strap" and switched over to chewing shaved ice. Finally, no one explained why the shaved ice strategy was not listed as an SDI. When the constant face rubbing on furniture caused nosebleeds,

assuming the blanket on the chair is an appropriate intervention, it too was not listed as an SDI. Accordingly, under these circumstances, I now find that the Student did not benefit from the purported SDIs or the FBA-PBSP statement. I also find that the failure to offer and implement a specific PBSP denied the Student FAPE. An appropriate Order granting appropriate relief follows.

**THE FUNCTIONAL ACADEMIC PROGRESS MONITORING DATA
AND THE IEP GOAL STATEMENTS ARE OUT OF SYNC**

The Parents argue since the Student did not reach the goals, the Student was denied a FAPE. The District argues that when the VB-MAPP scores and the progress monitoring data are reviewed, the Student received a FAPE. I disagree with the District for all of the following reasons.

First, I agree with the District that a student's inability to achieve a goal is not a per se IDEA violation. On the other hand, the failure to review, revise, and reset goal statements, adjust the SDIs and related services, after careful analysis of the progress monitoring data, in this instance, is a substantive violation.

On several occasions, the IEP team lacked updated behavioral, functional academic, O.T., P.T. and speech and language data, yet they acted. No one could explain missing updated progress monitoring data or the team's decision to eliminate multiple-goal statements, or for that matter, to add new goals. The staff did not cogently explain how the IEP skill goals are selected or prioritized. In one instance in February 2019 and again in March 2019, the IEP included the advanced skill of "skip" counting by 2s, 5s and 10s. The record is unclear why skip counting for this Student, a person with Autism and a severe intellectual disability, was selected as a functional goal when the Student cannot count to 20.

The record is preponderant that after six years of schooling, the Student has a working vocabulary of six (6) to 10 words. The speech progress reports and the IEP present levels do not explain why, when the Parents asked the team

to work on expressive language skills, the team added a goal to develop saying letter sounds and then abruptly deleted the goal months later, without a benefit of a data review.

The record as a whole does not explain why after three (3) or more years of direct instruction on tracing letters, identifying letters, identifying body parts and coin identification, the goals remain functional or ambitious in light of the VB-MAPP data. Back in 2017-2018, the Student had some success working on identifying four different coins and four different dollar combinations; today, the Student is still working on identifying three (3) coins. Granted, while the 2019 and 2020 goal statements call for the Student to generalize skills across materials and people, no one could explain why the penny identification goal is functional in a world where people use debit and swipe cards. Overall the cumulative data suggests little, if any, meaningful improvements or significant learning across all goal statements.

Given the Student's fine motor and gross motor deficits, no one could explain why the O.T. and the P.T., contrary to the agreed-on IEP measurement criteria, do not report objective data as stated in the goals.

The functional academic data collection sheets do not match up with the measurement criteria stated in the goals. While the goal statements include criteria, like performance on 4 out of 5 trials, the data sheets collect data on a single cold probe trial format. Although reducing prompts is a measurement criterion for success, the data sheets do not record prompt levels. In combination with the missing data sets, these omissions interfered with skill development and interfered with the Parents' participation in the IEP process. I also find the team failed to act on the provided results of VB-MAPP data. Although the first BCBA completed the VB-MAPP Transition Assessment, the data was not shared with the Parents or the team. When it came time to write the second May 2020 VB-MAPP report, the second BCBA, like the first, omitted the Transition Assessment. I now find these omissions constitute a failure to properly administer the VB-MAPP according to the test makers' instruction. 34 C.F.R. § 300.304. Following the test maker's instruction is instrumental in

interpreting the data and selecting functional goals. Therefore, I now find the District failed to consider the VB-MAPP results and failed to provide the Parents with a complete VB-MAPP assessment. This combination of violations interfered with a full evaluation of the Student's needs and the Parents' right to participate in the IEP process. An appropriate Order follows. 34 CFR §300.324 (b)(1)(ii); *T.M v. Quakertown Cmty. Sch. Dist.*, 251 F. Supp. 3d 792 (E.D. Pa. 2017). (regular progress monitoring and periodic progress reports provided to the parents and the IEP team are critical to a substantively appropriate IEP), 34 C.F.R. § 300.320(a)(3).

WHAT RELIEF IS APPROPRIATE

Appropriate relief can take on many forms, like reimbursement, directives for evaluations, directives to revise the IEP and compensatory education.

Compensatory education accrues when a district either knows or should have known of a denial of a FAPE and, when given a reasonable rectification period, fails to correct the denial. Case law suggests three different ways to calculate the amount of compensatory education. First, the fact finder can follow the hour-for-hour *aka* the cookie-cutter approach. Second, the fact-finder can make a "make whole" or *Reid* calculation. Third and finally, the fact-finder can combine the two methods and make an equitable calculation.

The Parents did not present any make-whole arguments; therefore, that approach is abandoned. While the District did not present any facts establishing the reasonable rectification timeline, I have factored in and adjusted the equitable calculation. Accordingly, based on the facts, the scope of the violations, the Student's circumstances and after reviewing the record as a whole, I will now employ the equitable calculation approach.

The FAPE denial here takes on many faces. First, the denial began in third grade when the District failed to complete an FBA and prepare a PBSP. This denial continues to the present day. Second, the FAPE denial expanded when the teaching staff, the O.T. and P.T., failed to prepare, produce and share progress monitoring data. Third, the denial continued when the team did not prepare challenging objectives and ambitious goals to address the Student's

extremely low VB-MAPP scores. Fourth, the IEP team failed to make needed adjustments to mitigate the Student's stagnant functional academic performance. Each omission affected the Student's entire school day; in turn, each omission crossed over into the ESY program and then into the following year. The following award is all-inclusive of any IDEA or Section 504 school year or ESY FAPE losses. Therefore, I now find the appropriate relief requires the District to provide three years or three thousand hours (3000) of compensatory education, subject to equitable reduction.

For this particular Student, the violations occurred throughout the school day, crossed over into the summer months and then into successive school years. Considering the challenges of providing a virtual FAPE, I will now equitably reduce the award by 550 hours. I reach this calculation by factoring in the District's efforts to provide services during the school closure, the obstacles encountered in providing the 2020 ESY program, and the ever changing advice on how to restart in person instruction encountered in starting the 2020-2021 hybrid school year experience. While health and safety precautions precluded the delivery of certain services, as stated in the IEP, they did not relieve the District from its IDEA and Section 504 duties to offer an appropriate program consistent with the existing circumstances.

The Parent is free to select the compensatory education services providers. The compensatory education hours and services should target appropriate corrective, developmental, remedial strategies, including all forms of SDI, related services, and/or transition services. The District is directed to either reimburse the Parents or pay the provider the invoiced rate or service charge. Annually, the District should update the Parents as to the number of remaining unused hours. The award of compensatory education hours does not end the discussion of appropriate relief.

The District is Ordered to fund an independent FBA. The District is free to select the evaluator; however, the person selected should not be an employee of the District or the local Intermediate Unit. The FBA provider shall complete the FBA within 45 calendar days of this Order. Once completed, the evaluator

and the IEP team will meet to prepare a PBSP. Once the Student returns to school in the fall, the FBA should be repeated and the PBSP updated as necessary.

The District is also Ordered to fund an independent evaluator to administer the VB-MAPP Milestones, Barrier and Transition Assessment. Once completed, the evaluator should prepare and present a report to the IEP team for consideration. The District is free to select the evaluator; however, the person selected should not be an employee of the District or the local Intermediate Unit. Since the VB-MAPP includes a standalone series of task-analyzed skills, the District and the IEP team should consider how that peer-reviewed resource could support ambitious goals and challenging objectives.

The Parents also seek an "intensive" or "strict" ABA program. The record does not define or describe either term. To the extent they rely on their expert, her knowledge gap about the Student's intellectual disability cuts against her overall conclusions. The record is unclear why the Parents did not share the in-home ABA data. Also, the record does not include any of the in-home ABA data, which may corroborate the increasing ABA instruction during the school day if provided to the team. Therefore, I now find the Parents failed to meet their burden of proof on this claim.

Finally, to the extent needed, the District should provide any and all supports for personnel and training necessary to implement the PBSP, the IEP, and/or the ABA sessions.

ORDER

And now the 3rd day of June 2021, I now find in favor of the Parents and against the District.

1. The District is Ordered to provide the Student with 2,450 hours of compensatory education. The Parents can select the provider, and the District shall either reimburse the Parents or pay the provider directly for

all compensatory education services within 30-days of receipt of an invoice.

2. Annually, the District should update the Parents as to the number of remaining unused hours.
3. The District is Ordered to fund an independent FBA. The District is free to select the evaluator; however, the person selected should not be an employee of the District or the local Intermediate Unit.
4. The FBA provider shall complete the FBA within 45 calendar days of this Order. Once completed, the evaluator and the IEP team will meet to prepare a PBSP. Once the Student returns to school in the fall, the FBA should be repeated and the PBSP updated as necessary.
5. The District is Order to fund an independent evaluator to administer the VB-MAPP Milestones, Barrier and Transition Assessment. Once completed, the evaluator should prepare and present a report to the IEP team for consideration. The District is free to select the evaluator; however, the person selected should not be an employee of the District or the local Intermediate Unit. Once completed, the IEP team, including the evaluator, should meet to develop a new IEP.
6. Consistent with the structure, design and organization in the autistic support classroom, the one-on-one aide should receive any and all supports for personnel, including but not limited to ongoing training needed to implement an ABA program, collect all needed data to implement the IEP, and the PBSP throughout the day, in all academic, non-academic and extracurricular settings.
7. All other claims for violations of the IDEA and requests for appropriate relief, including any and all affirmative defenses, are dismissed with prejudice.

Date: June 3, 2021

s/ Charles W. Jelley, Esq. LL.M.

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