

This is a redacted version of the original decision. Select details have been removed from the decision to preserve the anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

CLOSED HEARING

ODR No. 27262-22-23

Child's Name:

E.J.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent

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Decision Date:

July 23, 2023

Hearing Officer:

Charles W. Jelley Esq.

OVERVIEW OF THE DISPUTE

The Parent filed the pending Due Process Hearing Complaint alleging failures under the Individuals with Disabilities Education Act (IDEA), the Americans with Disability Act, and Section 504 of the Rehabilitation Act (504).¹ The Parents contend that under either Act, the District failed to locate, identify, evaluate, and educate the Student, in the least restrictive setting, in a timely fashion. Parents further allege the District's conduct rises to the level of intentional discrimination within the meaning of Section 504 and the Americans with Disabilities Act (ADA). Parents seek an Order directing the District to educate the Student in the regular education classroom with supplementary aids and services, an Independent Educational Evaluation (IEE), and compensatory education.

On the other hand, the District seeks a declaratory ruling that, at all times relevant, they procedurally and substantively complied with each Act during each school year. The District next seeks an Order affirming the proposed "action" placing the Student in an all-[disabled] school outside of the District. The District denies all claims of discrimination.

For all the reasons that follow, applying the preponderance of evidence standard, and after reviewing the intrinsic and extrinsic evidence, I now favor the Parents, in part, and the District in part. Finally, I now find that the

¹ 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 CFR §§ 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 federal regulation implementing Section 504, 29 U.S.C. §794 and 794a are set forth at 34 CFR 104, *et seq.*. The state regulation implementing Chapter 15 are found at 22 Pa. Code Chapter 15, *et seq.*

discrimination claims are otherwise exhausted and dismissed without prejudice.²

STATEMENT OF THE ISSUES

At the outset of the hearing, the Parent identified the following issues:

1. Did the District timely and comprehensively evaluate the Student within the meaning of the IDEA? If not, is the Student entitled to an Independent Education Evaluation, a public expense?

2. Did the District timely and comprehensively evaluate the Student within the meaning of Section 504? If not, is the Student entitled to an Independent Educational Evaluation (IEE) at public expense?

3. Was each Individual Education Program (IEP) offered reasonably calculated to allow the Student to be educated in the regular education classroom and make meaningful progress in light of their circumstances? If not, is the Student entitled to compensatory education?

4. Did the District engage in intentional discrimination within the meaning of Section 504 or the Americans with Disabilities Act?

At the close of the hearing, the Parties requested, and the hearing officer agreed to extend the decision due date.³

THE [redacted] YEAR 2020-2021

1. In April 2021, the District issued a Permission to Reevaluate. The Family returned the Permission to Reevaluate in June 2021. The District completed its evaluation over the summer. (S-3; S-4).

² Applying *Luna Perez v. Sturgis Pub. Sch.*, 143 S. Ct. 859, 864, 215 L. Ed. 2d 95 (2023) I now conclude that I do not have the authority to grant a "remedy" or "relief" for claims of intentional discrimination under 29 U.S.C. Section 794a - Section 504's remedy provision.

³ The Parties later filed post hearing Motions which are otherwise addressed in a separate Order.

2. The Reevaluation included Parent input, input from the preschool staff, ability, achievement, social-emotional assessment, and a speech and language evaluation. (S-4).
3. The evaluation team concluded that the Student had a moderate articulation delay that required specially-designed instruction. The team also concluded that the Student's delays qualified the Student as a person with a disability of Speech or Language Impairment. (S-4; S-5).
4. In August 2021, the Student started [redacted] at (S-4). Shortly after the start of the school year, the Student displayed challenging behaviors, like kicking others. (NT p.1039, NT p.1042).
5. To manage the challenging behaviors, the teacher placed the Student in close proximity and allowed for "brain breaks." (NT pp.1044-1045).
6. The building level team gave the teacher multiple strategies like a cool-down area, fidget toys, yoga stretches, a star chart, animal walks, and talking walks. (S-6 p.3, NT p.1041, pp.1054-1064, p.1080). The strategies had little to no effect. (NT pp.1057-1060, pp.1082-1084, S-13).
7. In mid-October 2022, the Student began to punch the teacher. ((S-14). The Student's behavior also began to affect the other children's learning. (NT p.1040).
8. The classroom behaviors of concern included: hitting and kicking adults, grabbing peers and the teacher, shoving, throwing, and kicking furniture, scribbling on peers' school work, throwing books, throwing backpacks and school supplies, and screaming at peers. (S-14; S-15). At times, other children in the class were sent to the nurse for wellness checks. (S-15).
9. In May 2022, the Student received a one-day in-school suspension for [harming] another Student [redacted]. (S-16).

10. In January 2022, the District issued, and the Parents consented to another permission to reevaluate this evaluation, including a Functional Behavioral Assessment (FBA). (S-7).
11. The reevaluation included a review of outside records, updated behavior rating scales, measures of attention and concentration. The review of the outside records shows that in March 2021, the Student was also diagnosed with a conduct disorder-child onset type. (S-8).
12. In completing the FBA, the examiner noted the staff employed 12 different behavior and attention strategies. The examiner opined that the Student seemed to benefit from individual attention but did not benefit from sensory experiences. Furthermore, the star chart did not improve behavior or increase self-regulation. (S-9).
13. The new evaluation team concluded that the Student did not display signs of Emotional Disturbance but did display weaknesses under the category of "Other Health Impairment." (S-8 pp.28-29).
14. The January 2022 reevaluation report recommended coping skills instruction, explicit social skills instruction, conflict resolution strategies, clear class rules, brain breaks, rewards, a predefined calming area, extended time to complete tasks, and structuring activities to ensure the Student participated in group activities, chunking assignments, avoiding power struggles, and possible use of outside services to address aggressive behaviors. The one constant theme that ran through the teacher's comments was that the team could not identify a consistent trigger or antecedent consequence. (S-8).
15. The IEP team met in February 2022 to revise the IEP and develop a Positive Behavior Support Plan (PBSP). (S-11; S-12 NT 116).
16. The February 2022 IEP included specially-designed instruction to address coping and social skills, including scheduled breaks, rewards

for positive behavior, and daily check-in and check-out times. (S-11). The learning support teacher was assigned to work with the Student and was part of the team developing and implementing the PBSP. (NT 203-204).

17. Although the learning support teacher implemented the IEP for the remainder of the school year, the specially-designed instruction did not change the Student's behavior. (NT p.216; N.T. pp.246-248). Eventually, the team recommended changing the Student's placement to another elementary school that offered Emotional Support. (NT p.246; NT p. 1108). The change in placement did not occur as the teacher was going out on maternity leave. (NT pp.1046-1047).
18. At the end of March 2022, the psychologist recommended additional strategies like focused choice reinforcement, visual schedules, social stories, coping, and social skills instruction. (S-18).
19. As the school year progressed, the [Parent] reported similar incidents of aggressive behavior in the home. In school, the staff developed a series of "safety" strategies, including using a walkie-talkie to call for additional staff, increasing the distance between the Student and peers when seated and walking, and taking the other students out of the classroom. At times the Student's acting out lasted between 30 minutes to two (2) hours. (NT p.1069; NT 1071, S-16; S-35).
20. The teacher reported that the "star chart," the new reinforcement system, did not change the Student's behavior. (NT 1116-1118).
21. When the end of the year arrived, the staff again suggested changing the Student's placement to an Emotional Support class, at a different elementary, for the start of [redacted] Grade. (NT p.1196). After considering the change in placement, over the summer, the Parents reluctantly agreed to move the Student to the Emotional Support

placement at a different elementary school in the District. (S-21: NT pp.1196-1197).

22. The IEP team met on September 8, 2023, and developed a new IEP for the Iterant Emotional Support class at the new location. (S-20). At the new school, the Student received "push-in" Emotional Support from the special education teacher in the regular education classroom (NT pp.230-314, 1207). The IEP goals remained the same. (S-20).
23. Within a few days, the Student displayed acts of aggression like scratching, pinching, and pushing others, chasing others around the class, jumping on others, poking one peer with a pencil, and throwing books. The teacher also reported that the Student [had other various acts of aggression to the other students]. (S-31 pp 1, 8, 28, 29, 9, 10).
24. The revised IEP included three behavior goals. The first goal targeted how the Student uses and applies process sensory information to interact with others. In an effort to stop the aggression, the second goal targeted self-regulation when frustrated. The third goal focused on sharing with others. (S-11). The IEP, however, does not include a functional statement of the Student's present levels of academic achievement or a functional statement of performance, how the Student's disability affects involvement and progress in the general education curriculum. (NT p.832; NT p.850; NT p.870: NT pp.901-903).
25. The IEP repeated the previously used specially-designed instruction like daily social skills instruction, the check-in checkout strategy, behavior rewards, and scheduled breaks that did not work. (S-11).
26. The learning support teacher developed a series of social stories to teach coping and social skills. (S-12 pp.4-6; NT pp.216-217).

27. The coping and social skills data indicate that the social stories and specially-designed instruction did not change the Student's behavior. (NT p.216; N.T. pp.246-248).
28. The social stories were taught in a room with minimal furniture, a small trampoline, sensory objects like bean bag chair, and a mat-like crash pad. (NT p.486). The Student would take breaks for more than 30 minutes and began to miss upwards of 150 minutes of instruction per week. (S-8 p.28).
29. As the year progressed, the parents of other students began to complain about the disrupted school days. (NT p.502).
30. From August 2022, of [redacted] Grade, through October 19, 2022, the Student was suspended for seven (7) days (S-26; S-32; NT 1201).
31. On October 26, 2022, the Parents requested, and the District agreed to participate in a manifestation determination to review the Student's behavior and the District's discipline practices. (S-26; S-32).
32. After reviewing twenty-three (23) incidents of physical aggression, the team concluded that the Student frequently misbehaved when provided one-on-one support (S-26 p.8). The team also concluded that the aggression and dysregulation were unrelated to sensory-based needs. (NT p.489, p.1202). At the conclusion of the meeting, the team concluded that the Student's misbehaviors were a manifestation of the Student's disability. (S-26 p.11).
33. The Parents requested, and the District released documentation that all staff who work with the Student follow de-escalation and crisis prevention techniques. When necessary, the Staff also used physical restraint. (NT pp.495-495).
34. After reviewing the existing data, the District recommended that the Student receive full-time emotional support services. (S-26; NT p.1210).

35. Before issuing a Notice of Recommended Educational Placement (NOREP) offering a full-time emotional support class, the District considered increasing time in the Emotional Support classroom and changing the Student's lunch schedule. (NT pp.492-493).
36. After not responding to the NOREP and after the District sent a bus to the house to take the Student to the new placement, the Parents requested a due process hearing. (NT pp.87-92 P-34 S-28).
37. After the due process Complaint was filed, the staff decided that the Student would receive one-on-one instruction in the classroom, in a designated area away from peers and physically separated from the others by a bookshelf. The staff also decided that the Student would not participate in group activities and would not travel in the hallways with peers. (NT pp.692-693; NT p.1204; S-37).
38. The staff moved the Student to the emotional support classroom to decrease misbehavior when the Student acted out. (S-27; NT 476-477).
39. When the Student hurts a peer, the staff take the Student to the office for the rest of the day. (S-37; NT pp.472-473; NT 476-477).
40. The behavioral data sheets indicate that in [redacted] grade, the Student had 100 incidents of physical aggression. (S-31; S-41).
41. During March 2023, the Student went to the office twice a week. (NT p.476). Even with one-on-one support, the Student still hits peers and adults. (NT p.681; NT p.580, NT p.511).
42. The staff uses "Zones of Regulation" throughout the day to teach social skills. (NT p.497, p. 727).
43. The proposed Full Time Emotional Support class is an all-[disabled] student classroom in a building that does not offer any interaction with [typical] peers and is operated by the IU outside of the District. (NT pp.1132).

44. The student-to-teacher-class ratio in the proposed classroom includes one teacher, two behavioral specialists, and seven to eight students. The students in the classroom range from Kindergarten to Second grade. (NT pp.1126-1137; NT p.1139).
45. All staff at the IU placement are trained in de-escalation techniques and use physical restraint as a last resort. (NT pp.1137-1138).
46. Students in the emotional support classroom receive daily group therapy, social work services, and psychiatric support from a physician's assistant and a physician. (NT pp.1134-1135).

THE PARENTS' EXPERT REPORT

47. The District arranged for the Parents' experts to observe the Student's current classroom and the proposed I.U. classroom. (S-36)
48. The Parents retained two former Ph.D. university professors to provide an expert opinion regarding the appropriateness of the proposed placement in the IU classroom. (P-27 p.1).
49. The experts' opinions were formed after analyzing the following resources:
 - a. Review of field notes from I.U. classroom observation on February 23, 2023. (P-27).
 - b. Review of filed notes from observation of Student's class in District. (P-27).
 - c. Review of Student's February 8, 2022, IEP
 - d. Review of January 28, 2022, IEP
 - e. Review of the FBA dated January 28, 2022.
 - f. Review of Positive Behavior Support Plan December 9, 2022.
 - g. Review of staff documents regarding behavior plan data.
 - h. Two sixty-minute ZOOM conversations with the Student and Parents.
 - i. Conversation with the District Director of Special Education for IU.
 - j. Conversation with Assistant Superintendent for Student Services at the IU. (P-27).

50. The experts observed the intermediate unit (IU) class for over two hours. (P-27: NT p.40).

51. The experts used the Classroom Assessment Scoring System (CLASS) to rate the I.U. classroom. (P-27 p.5). The Expert Report did not include a summary of the CLASS scoring for the District class. (P-27; NT *passim*).

52. The Experts made five (5) Findings:

- a. The staff at the elementary school were using inappropriate resources and strategies to support social-emotional development and prevent challenging behavior.
- b. The Staff used a "non-credible," "non-researched based resource-PBIS World Book" as a source for developing the positive behavior management program.
- c. The teaching staff erred when they removed the Student from the regular education classroom and then used ineffective standalone social-emotional learning strategies to deliver specially-designed instruction outside of the regular classroom.
- d. The IEP and PBSP lack the proper supports to provide an effective program. Furthermore, the staff are not properly trained to provide appropriate social-emotional learning in the regular education or the special education classroom. For example, the staff misuse strategies and are not delivered with fidelity. Finally, the misuse of the supports likely contributes to the unpredictability of the Student's lack of self-regulation and impulse control, limiting the learning of coping skills.
- e. The IEP and behavior plan lack intensive, individualized interventions to manage challenging behaviors.
- f. Relying on the volumes of behavioral data collected and submitted by the staff, the Experts opined that the teaching staff failed to construct a proper behavior plan and also failed to implement the existing behavior plan with fidelity.
- g. The staff failed to follow or incorrectly implemented the accommodations listed in the IEP in the following ways:
 - i. The Experts did not observe the staff repeat the target stimulus multiple times during the observation.
 - ii. The staff failed to correct the Student's articulation errors across the daily routine.
 - iii. The staff failed to use visual cues across the daily routine.

- iv. The staff failed to tell the Student to take a break.
- v. The staff failed to prompt the Student to use the explicit coping instruction.
- vi. The staff failed to use and prompt the Student to use anger management techniques.
- vii. The staff failed to establish explicit and clear classroom rules.
- viii. The staff failed to establish and use a positive reward system.
- ix. The staff failed to offer extended time to complete a task.
- x. The staff failed to "chunk" assignments.
- xi. The staff failed to structure activities to avoid the Student being left out.
- xii. The staff did not use the check-in or check-out strategy.
- xiii. The experts did not observe the staff provide breaks.
- xiv. The experts did not observe the Student use the noise-dimming headphones. (P-27 pp.17-18)

53. The Experts did not observe the staff provide the following behavioral supports:

- a. Use visual schedules.
- b. List, post, or use the suggested coping skills strategies.
- c. Prompt the Student to use the preferred coping skills.
- d. Use transition phrases that very likely set up transition difficulties.
- e. The Experts believe that the behavior plan is unclear about when staff are to use verbal reminders versus verbal rewards.
- f. Although the Student had one-on-one support, the staff did not appear to interact with the Student.
- g. Use "prompting" strategies.
- h. Use reminders to set expectations.
- i. Use flexible seating and walk breaks when called for.
- j. Use the headphones or support the use of assistive technology.
- k. The prevention strategies lacked clarity, were not implemented with fidelity, and sometimes may have prompted misbehavior.
- l. Due to the lack of operational definitions, many behavior plan supports/strategies were not often used (P-27 pp.18-20).

54. The experts opined that the following behavior consequences were not used with fidelity. For example:
- a. The experts did not observe the staff use positive check marks.
 - b. Although the staff used verbal praise, the staff did not follow the schedule listed in the behavior plan.
 - c. The experts did not observe the staff use independent play, group play, self-selection, or rewards as listed in IEP or B.I.P.
 - d. Overall the prevention and consequence strategies lacked clarity and specificity.
 - e. The variability in the behavior plan created a differential reinforcement pattern that can cause confusion and limit or reduce behavior change. (S-27 p.20-22).
55. The expert opined that the behavior was not comprehensive and lacked a statement of Student specific strengths. The expert stated that the FBA lacked operational definitions, clarity, and specificity. The expert also opined that the behavior plan is "nearly impossible to implement with fidelity across environments and staff" (P-27 22-24).
56. The expert opined that several of the behavioral strategies were outdated and may even be harmful. For example, the use of "back rubbing," "hair twirling," and "walks with heavy work activities" are not research-based. (P-27 p.23).
57. The experts opined that the IU classroom was chaotic, adult-focused, and "highly unpredictable." The CLASS composite score ratings were low. (P-27 p.25).
58. The experts' report applied the Polyvagal theory of brain-based analysis and brain-aligned regulation strategies as a way to understand the Student's dysregulation. Polyvagal brain-based theory ascribes a view of brain-based behavioral regulation instead of applied behavior analysis. (NT pp.782-796; NT pp.854-857; NT pp.784-785 applied behavior analysis is outdated).

59. Applying the Polyvagal theory of learning, the experts concluded the following:

- a. The experts opined that the IU classroom "was devoid" of relevant visual supports and was not personalized to the students. (P-27, p. 6; Tr. 1144-45, 1225).
- b. The experts reported that staff communicated mainly by threats or warnings. (Tr. 1213-15; S-39).
- c. One expert concluded that reinforcing the appropriate behavior of another student is not an appropriate behavioral technique. The expert stated that she considers it "public shaming." (Tr. 873).
- d. The experts reported that the IU staff would "yell out." (P-27, p. 6; Tr. 1220).

60. The experts also opined that the regular education staff failed to use a variety of interventions in the regular classroom to increase academic, social, and behavioral learning. (NT pp.826-827; NT p.829; NT p.841).

GENERAL LEGAL PRINCIPLES

BURDEN OF PROOF AND CREDIBILITY

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. The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. In this case, the Parents are the party seeking relief and must bear the burden of persuasion.⁴

During a due process hearing, the hearing officer makes "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses."⁵ Explicit credibility determinations give

⁴ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

⁵ *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).

courts the information that they need in the event of a judicial review. While no one-factor controls, a combination of factors causes me to pause and comment on particular testimony.⁶

On the Parents' side, I found the [Parent] open, thoughtful, and candid in acknowledging what [they] knew, did, and did not do. Although the Parents' experts' report endorsed the Classroom Assessment Scoring System™ (CLASS™- Pianta, La Paro, & Hamre, 2008) as an objective basis to compare and contrast the two locations, the experts failed to use the instrument to rate the District's classroom. Therefore, I will give the expert's subjective comments about the two locations moderate weight.

I also found the testimony of the District and the I.U. witnesses credible, candid, and non-evasive. Although I found the District's witness's testimony helpful, the testimony did not cogently explain how the Student's needs could be met in the IU class.

THE IDEA'S FREE APPROPRIATE PUBLIC EDUCATION MANDATE

The IDEA is a "comprehensive scheme of federal legislation designed to meet the special educational needs of children with disabilities."⁷ In exchange for federal funding, states pledge to comply with several substantive and procedural conditions in providing educational services to qualifying disabled students.⁸ In turn, state recipients then apportion federal funds to Local Educational Agencies ("LEAs"), like the school districts responsible for providing day-to-day educational services under the IDEA.⁹

⁶ The fact finder's determination of witness credibility was based on many factors. Clearly, the substance of the testimony, the amount of detail and the accuracy of recall of past events affected my credibility determination. Whether the witness contradicts him or herself or is contradicted by the testimony of other witnesses can play a part in the credibility determination. When the testimony is delivered in a persuasive fashion factors like body language, eye contact, and whether the responses are direct or appear to be evasive, unresponsive or incomplete are important in determining persuasiveness. *Id.*

⁷ *M.A. ex rel E.S. v. State-Operated Sch. Dist.*, 344 F.3d 335, 338 (3d Cir. 2003).

⁸ *T.R. v. Sch. Dist. of Philadelphia*, 4 F.4th 179, 182-83 (3d Cir. 2021).

⁹ 20 U.S.C. §§ 1401(19), 1412-1414.

SPECIALLY-DESIGNED INSTRUCTION, AND THE LEAST RESTRICTIVE ENVIRONMENT MANDATE

One of the essential promises of the IDEA is its mandate that qualifying students be provided with a "free appropriate public education" ("FAPE").¹⁰ Though the IDEA does not specifically prescribe what a FAPE entails, it does make clear that it consists of both "special education" and "related services."¹¹ The IDEA also contains a "least restrictive environment" promise.¹² To this end, the "least restrictive environment" guarantees that the Student's instruction must "to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled."¹³

THE DISTRICT'S DUTY TO PROVIDE A FAPE IN THE LEAST RESTRICTIVE SETTING

The "centerpiece" of the IDEA is the "individualized education program" ("IEP"), which serves as the "primary vehicle" by which states provide students with a FAPE.¹⁴ "An IEP is a written statement, 'developed, reviewed, and revised' by [an] 'IEP Team'—a group of school officials and the parents of the Student—that spells out how a school will meet an individual disabled student's educational needs."¹⁵ In addition, an IEP sets

¹⁰ *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 390, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017) (citing 20 U.S.C. § 1412(a)(1)).

¹¹ *Bd. Of Educ. Of Henrick Hudson Cent. Sch. Dist., Westchester Cnty. V. Rowley*, 458 U.S. 176, 188-89, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982) (citing 20 U.S.C. §§ 1401(26), (29)).

¹² *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 390 (3d Cir. 2006).

¹³ *S.H. v. State-Operated Sch. Dist. of City of Newark*, 336 F.3d 260, 265 (3d Cir. 2003) (citing 20 U.S.C. § 1412(a)(5)(A)) (internal quotation marks omitted); see also *Oberti by Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1213-14 (3d Cir. 1993) ("[T]his provision sets forth a 'strong congressional preference' for integrating children with disabilities in regular classrooms.").

¹⁴ *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988); See, also 20 U.S.C. § 1412(a)(4).

¹⁵ *Y.B. ex rel. S.B. v. Howell Twp. Bd. of Educ.*, 4 F.4th 196, 198 (3d Cir. 2021) (quoting 20 U.S.C. §§ 1414(d)(1)(A), (B)).

forth the Student's "present levels of academic achievement, offers measurable annual goals to enable the child to . . . make progress in the general educational curriculum, and describes supplementary aids and services . . . provided to the child to meet those goals." *Id.*¹⁶ The hearing officer must analyze the appropriateness of the IEP at the time it was issued, not at some later date. The appropriateness of the IEP is judged as of the time it was developed.¹⁷

TWO TYPES OF IDEA VIOLATIONS

Generally speaking, the IDEA identifies two classes of IDEA violations. First, there is a "substantive violation," which arises when an "IEP's content, such as the educational services, is insufficient to afford the student a FAPE."¹⁸ A "procedural violation" occurs "when the school district fails to comply with the processes required by the IDEA."¹⁹

THE LEAST RESTRICTIVE ENVIRONMENT DECISION-MAKING PROCESS

The IDEA requires that a disabled student be educated in the "least restrictive environment" capable of providing a meaningful educational benefit.²⁰ Placing a student in the least restrictive environment, to the maximum extent possible, requires a school district to provide appropriate

¹⁶ 20 U.S.C. §§ 1414(d)(1)(A)(i)(I), (II)(aa), (IV)) (internal quotation marks omitted) (omissions in original).

¹⁷ *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 564- 65 (3d Cir. 2010) (citing *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 762 (3d Cir. 1995)).

¹⁸ *S.W. v. Elizabeth Bd. of Educ., No. 22-11510*, 2022 U.S. Dist. LEXIS 47495, 2022 WL 807344, at *6 (D.N.J. Mar. 17, 2022).

¹⁹ *Id.*; See also *ASAH v. New Jersey Dep't of Educ.*, No. 16-3935, 2017 U.S. Dist. LEXIS 101736, 2017 WL 2829648, at *10 n.10 (D.N.J. June 30, 2017) ("A procedural violation generally concerns the process by which the IEP and placement offer was developed and conveyed; on the other hand, a substantive violation arises from a deficiency in the programming being offered." (internal quotation marks omitted)).

²⁰ *D.S.*, 602 F.3d at 556-57 (citing *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 390 (3d Cir. 2006); *S.H. v. State-Operated Sch. Dist.*, 336 F.3d 260, 265 (3d Cir. 2003); See also 20 U.S.C. § 1412(a)(5)(A).

supplementary aids and services.²¹ Placement into a regular education classroom is not required if doing so would jeopardize a student's ability to achieve a meaningful educational benefit. Thus, a regular education placement is not appropriate when the nature or severity of a student's disability precludes an educational benefit from such placement with nondisabled students by means of supplementary aids and services.²²

The Third Circuit, in *Oberti*, announced a two-part test to determine whether a student has been placed in the least restrictive environment in compliance with IDEA.²³ The first prong asks whether the Student can be educated satisfactorily in a regular classroom with supplementary aids and services. *Id.* The second *Oberti* prong comes into play only if it is determined that the disabled Student cannot be satisfactorily educated in a regular classroom using supplementary aids and services, assesses the school district's "efforts to include the child in school programs with nondisabled children whenever possible." *Id.*

In determining whether a student can be educated adequately in a regular classroom with the use of supplementary aids and services, three factors are considered: "(1) the steps the school district has taken to accommodate the child in a regular classroom; (2) the child's ability to receive an educational benefit from regular education; and (3) the effect the disabled child's presence has on the regular classroom."²⁴ These balanced considerations resolve the tension "between the strong preference for mainstreaming . . . and the requirement that schools provide individualized programs tailored to the specific needs of" the Student.²⁵

²¹ *Carlisle Area Sch.*, 62 F.3d at 535 (citing 20 U.S.C. § 1412(5)(B))

²² See 20 U.S.C. § 1412(a)(5)(A).

²³ *Oberti v. Bd. of Educ. of Clementon Sch. Dist.*, 995 F.2d 1204, 1215 (3d Cir. 1993) (citing *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989)).

²⁴ *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 579 (3d Cir. 2000) (citing *Oberti*, 995 F.2d at 1215-17).

²⁵ *Oberti*, 995 F.2d at 1214 (internal citation omitted)

THE MANIFESTATION DETERMINATION REVIEW PROCEDURE

A manifestation determination requires the team to review the records and complete a quasi-evaluation of a child's misconduct to determine whether a student's misconduct is a manifestation of the child's disability. It must be performed when a district proposes disciplinary measures that will result in a change of placement for a child with a disability.²⁶ Traditionally, the determination is performed within 10 school days of "any decision to change the placement of a child with a disability because of a violation of a code of student conduct." *Id.*

According to 34 CFR 300.530 (e)(1), the misconduct must be found to be a manifestation of the child's disability if: 1. The conduct in question was caused by or 2. Had a direct and substantial relationship to the child's disability; or 3. The conduct directly resulted from the District's failure to implement the IEP. When the determination reveals that the misconduct was a manifestation of the child's disability, the IEP team must either: 1. Conduct a functional behavioral assessment, unless the [District] had conducted an FBA before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or (2). If a behavior improvement plan (B.I.P.) has already been developed, the team must review the B.I.P. and modify it, as necessary, to address the behavior. (3) And, except as provided in 34 CFR 300.530 (g), the team should return the child to the placement from which the child was removed unless the Parent and the [District] agree to a change of placement as part of the modification of the behavior plan.²⁷

²⁶ 34 CFR 300.530 (e)

²⁷ 34 CFR §300.530 (f).

The obligation to revise and review a behavior plan under 34 CFR 300.530 (f) exists even if the behavior plan was created shortly before the misconduct occurred.²⁸

A student's need for behavioral interventions and support must be decided on an individual basis by the Student's IEP team.²⁹ In *Herron Charter*, while the manifestation team found that a student's involvement in a fight was not a manifestation of his disability, his charter school was still required to determine whether an FBA and/or behavior plan was needed to address his behavior. The failure to develop a behavior plan when a child needs one can result in a denial of FAPE.³⁰

The IDEA does not require an IEP to detail specific behavioral goals, but an IEP team must consider a positive behavior program if behavior impedes a student's learning. *Id.* While a district may have any number of reasons for wanting to change a student's current educational placement after determining that the behavior prompting the removal was a manifestation of a disability. To do so, the District must obtain the Parent's express agreement; it can't rely on the Parent's lack of disagreement to show she approves of the proposed change.³¹

²⁸ See, e.g., *District of Columbia Pub. Schs.*, 68 IDELR 83 (SEA DC 2016) (finding that despite the fact that the BIP was developed just prior to the misconduct, the district violated the IDEA where the MDR team failed to address whether the BIP needed changes in the wake of the incident).

²⁹ 71 Fed. Reg. 46,683 (2006).

³⁰ See, *R.K. v. New York City Dep't of Educ.*, 56 IDELR 212 (E.D.N.Y. 2011), *aff'd*, 59 IDELR 241, *cert. denied*, 113 LRP 24542, 133 S.Ct. 2802 (2013); *Enterprise City Bd. of Educ. v. S.S. and J.S.*, 76 IDELR 295 (M.D. Ala. 2020) (The district denied FAPE to a student by failing to incorporate appropriate positive behavioral interventions in the student's IEP and properly documenting the behavior strategies implemented in the classroom.); and *Neosho R-V Sch. Dist. v. Clark*, 38 IDELR 61 (8th Cir. 2003) (any slight academic benefit the student received was lost because of ongoing behavior problems that interfered with [Student's] ability to learn.).

³¹ *East Valley Sch. Dist.*, 120 LRP 17286 (SEA WA 01/16/20)(because the parent did not agree to the student receiving instruction in the counselor's office, the district should have returned the student to the behavior intervention program).

THE IDEA AUTHORIZES APPROPRIATE RELIEF

The type of appropriate relief awarded depends on the specific violation alleged. Parents who allege a substantive violation—such as a denial of a FAPE—may seek compensatory education.³² Parents may only seek prospective injunctive or declaratory relief for procedural violations independent of any resulting deprivation of a FAPE. *Id.*

OVERVIEW OF THE ANALYSIS AND CONCLUSIONS OF LAW

The following Analysis and Conclusions of Law begins with an examination of the District's efforts to initially evaluate the Student in the [redacted] and [redacted] Grade school year. I now find that the initial August 1, 2021, reevaluation that identified the Student as a person with a speech impairment was individualized, comprehensive, and appropriate. I next find the follow-along IEP was otherwise appropriate.

Shifting over to the [redacted] Grade January 2022 reevaluation and the February IEP, I next find that the reevaluation included a variety of instruments that identified weaknesses and then thoughtfully described the Student's emerging needs and circumstances. The standalone FBA likewise was also appropriate.³³ The FBA here included a working hypothesis, a review of existing data, frequency counts, a review of existing academic triggers, a direct observation, and a baseline data tracking misbehaviors by environments.

The February 2022 IEP goals and the Positive Behavior Support Plan were based on a well-developed FBA. Therefore, when viewed as a whole, I

³² *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3d Cir. 2010).

³³ Pennsylvania case law provides that 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 that fosters a hypothesis about the function of the behavior. *H.D. v. Central Bucks School District*, 59 IDELR 275 (E.D. Pa. 2012)(once the objective data is reviewed, a team can design a personalized PBSP).

conclude that the Parents failed to meet their burden of proof that the District failed to educate the Student in the least restrictive setting from August 2021 to January 2022. For all the following reasons, I now find in favor of the District in part and now deny the Parents' [redacted] through mid-[redacted] Grade claims.

Applying the snapshot rule, the same does not hold true for the proposed October 2022 significant change in placement from Itinerant Services, in a regular education classroom, to a full-time Emotional Support classroom, in the all-disabled IU school outside of the District. The Parents relying on *Oberti*, contend that the regular education classroom is the least restrictive setting. The District, also relying on *Oberti*, argues the opposite. I now find that an inappropriate or, in this instance, the failure to offer a revised IEP cannot be used as the predicate for a significant change in placement.

Accordingly, I find in favor of the Parents on their claims that the proposed full-time placement suggested in November 2022 at the all-disabled school was inappropriate and overly restrictive. Finally, I conclude that the Student's education from November 2022 through the end of the school year was also inappropriate and insufficient. An Order awarding compensatory education follows.

THE INITIAL EVALUATION

The District's initial evaluation concluded that the Student qualified as a student with a disability in the Speech or Language Impairment category. After administering various assessments, the evaluator found that the Student's moderate articulation difficulties adversely affected education performance and suggested speech therapy to address articulation. The initial IEP also included multiple sessions of occupational therapy.

The [redacted] team also considered two other disabilities but untimely concluded that the data, at that time, did not rise to the level to identify

other qualifying disability. While noting behavioral and self-regulation concerns, the early intervention records did not raise a suspicion that the behavior impeded learning or indicate identification as a person with an Emotional Disturbance. Therefore, I now find that the evaluation complied with the evaluation requirement at 34 CFR §300.304 *et seq.* I further find that at the time of the assessments, the Student's profile and existing data did not create a reasonable suspicion to include an FBA as part of the initial assessment battery. Therefore, the Parents' claim for an IEE is denied.

As the [redacted] school year began, the District prepared an appropriate Speech and Language IEP with Parent and teacher input, which included ambitious goals. Therefore, the Parents' demand for compensatory education for this time period is denied.

THE [redacted] TEACHER PROVIDED MULTIPLE REGULAR EDUCATION SUPPORTS

In early fall, the [redacted] teacher informed the principal and the Parents that while the Student seemed bright, the Student was often off task, hit others, and was often highly dysregulated. The [redacted] teacher could not identify any warning signs when outbursts would occur. To her credit, the teacher tried a variety of regular education strategies, like a change of seating, frequent breaks, a token economy, frequent rewards, stretching, and animal walks, to manage the behavior. Although the teacher did not keep data about what, if anything, seemed to work, the consensus between the staff and the Parents was that "nothing" seemed to decrease the Student's aggression.³⁴ On several occasions, after acts of peer-on-peer aggression, the teacher would send students to the nurse for check-ups. The record is also preponderant that the Student's peers became reluctant to

³⁴ The record is preponderant that the Student would [have aggressive behaviors and actions against staff and peers]. (S-14; S-16).

interact with the Student. This pattern of behavior led to a timely reevaluation.

THE JANUARY 2022 REEVALUATION AND THE UPDATED IEP

By early January, acting on the teacher's suggestion, the District asked, and the Parents consented to another reevaluation. The January 2022 reevaluation included an FBA, a review of the outside behavioral health records, and updated behavioral rating data. Based on conflicting data, the reevaluation team ruled out the possibility of two new IDEA disabilities – Other Health Impairment or Emotional Disability. Although the team ruled out eligibility under the category of "Emotional Disturbances," the January 2022 report recommended explicit emotional, social, and behavioral forms of specially-designed instruction.

The resulting IEP included coping skills instruction; explicit social skills instruction to address anger management; conflict resolution strategies, frequent home and school communication; explicit and clear classroom rules; a reward system for positive behavior; "Brain Breaks"; setting up a clear and consistent calm-down area; extended time to complete tasks; "chunking" assignments; structuring activities so that the Student was not left out or picked last; and, the use of assistive technology.

Incorporating the findings of the community behavioral health provider, the reevaluation report further recommended that the Staff avoid power struggles, refrain from "you need to..." or "you must..." statements, and the consideration of outside services to address aggressive behaviors. In light of the circumstances and applying the snapshot rule, I now find that the evaluation was a complete, comprehensive, and individualized assessment of the Student's then-current needs, weaknesses, and strengths.

After reviewing the report, the February 2022 IEP team added three new behavioral, social, and emotional goals to the school day. The building-level

learning support teacher then began providing daily coping skills instruction for 30 minutes daily. The coping skills instruction also included "social stories" to teach coping skills and dysregulation.

The learning support teacher also developed a positive behavior support plan. The positive support plan included a behavioral goal to teach coping skills, a working hypothesis, identifying possible academic triggers, and suggested various forms of reinforcement and consequence strategies. The positive behavior support plan, like the IEP, included scheduled breaks and structured contingent and non-contingent positive rewards. The behavior plan utilized included visual reminders of ongoing success that contributed to the daily check-in and checkout strategy. The initial goals were measurable, the specially-designed instruction was responsive, the teacher supports were adequate, and the related services appropriate.

After reviewing the report, the February 2022 IEP team considered and ruled out transferring the Student to another school in the District that offered "Emotional Support." The placement change was ruled out as the teacher was about to take a leave of absence.

By March 2022, the learning support teacher told the Parents and the other team members that the positive behavioral supports and coping skills instruction were not "working." In March, acting on the update, the District's psychologist weighed in and recommended the following: focused choice reinforcement; repeated the check-in and checkout strategy; suggested individual and visual schedules; using social stories; teaching conflict resolution skills; teaching coping skills and teaching relationship skills. The record is preponderant that many of these recommendations were already in use.

By April 2022, the learning support teacher developed the "Aggressive Behavior Procedure." The "Procedure" equipped the teacher with a radio to

call others for backup when the Student acted out. The "Procedure" called for the additional staff to take the other children to a different room. The "Procedure" as implemented disrupted teaching for all students.

At or about the same time, the staff concluded that the updated "Star Chart" and visual feedback were no longer working. Finally, as the year ended, the staff again revisited the suggestion that the Parents move the Student to the other elementary school. The Parent declined the change, and the school year ended. The behavioral data reveals a running record of 51 behavioral incidents, while the discipline record notes nine days of out-of-school suspensions. The record is preponderant that throughout the second half of the [redacted] year and the first half of [redacted] Grade, the staff remained vigilant, implemented the IEP, collected data, communicated with Parents, and revised the IEP as needed.

After reviewing the record, I now find the District's actions tracked the IDEA evaluation and IEP procedural due process protections. Therefore, I now find in favor of the District and against the Parents on their [redacted] school year IDEA and Section 504 denial of FAPE claims.

THE PROPOSED ACTION TO MOVE THE STUDENT TO THE IU CLASS WAS PROCEDURALLY AND SUBSTANTIVELY FLAWED

After carefully reviewing the record, I now find that the team in October 2022 reached a breaking point, which in turn caused a series of procedural and substantive errors. First, the decision to change the Student's placement without writing a new IEP violated the black letter law requiring the District to write a program before taking "action" to make a placement. Second, the failure to offer an IEP before making a placement proximately caused a substantive error - *i.e.*, a predetermined placement. When the District predetermined the placement, they interfered with the Parents' participation in the IEP process. Third, in the alternative, knowing full well that the Student's aggressive behaviors were a manifestation of the Student's

disability, the change to the restrictive placement, without offering a new IEP, is tantamount to a disguised *de facto* form of discipline. Fourth, the change from the regular education curriculum to a modified or functional curriculum, in the restrictive IU placement, without considering supplementary aids and services, caused a standalone Student specific substantive FAPE violation. Finally, each violation discussed here caused an IDEA and Section 504 procedural FAPE violations that also caused substantive FAPE violations. I will now explain these legal conclusions.

THE SUBSTANTIVE AND PROCEDURAL VIOLATIONS

The District's special education director, who attended the manifestation meeting, testified that the District would, contrary to the black letter law, proposed changing the Student's placement without an evaluation.³⁵ She next stated, "we would be writing the IEP based on that program and [the student's] needs within that program." *Id.* This practice caused a substantive FAPE violation.

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6 HEARING OFFICER: Okay. Then in
7 November, there's a conclusion reached that [Student]
8 is not doing good, so we think the place to go
9 is this other place, this Academy place?
10 THE WITNESS: Yes.
11 HEARING OFFICER: Okay. How come
12 there's no IEP that says what good stuff [redacted]
13 supposed to get at the [redacted] in place, there's
14 just the NOREP?
15 THE WITNESS: We wouldn't write an IEP
16 until [student is] in the placement.
17 HEARING OFFICER: But aren't you
18 supposed to write IEP and then make the
19 placement, rather than shoehorn it in?
20 THE WITNESS: No. I've never done it
21 that way. We have an IEP with the team once we
22 have that placement determined. And then, we
23 would be writing the IEP based on that program
24 and her needs within that program. We would
25 adopt that current IEP until [the student] went there.
1 And then within 30 days, we'd be writing a new
2 IEP. (NT pp.1275-1276

Before determining a placement, the IEP team must first gain a comprehensive picture of the Student's needs, which in turn sets up the District's offer of a FAPE. A FAPE is offered when the package of specially-designed instruction set out in the IEP's present levels, goals, related services, modifications, supplementary aids, and services offers significant learning and meaningful benefit. After the IEP is set, the team must decide on each child's educational placement. Each placement "must be determined on an individual case-by-case basis depending on each child's unique educational needs and circumstances, rather than by the child's category of disability."³⁶

In other words, only when the Student's program is set can the placement team use the IEP to select the placement where a student's academic, social and behavioral needs can be met. The failure to create a cohesive, reasonably calculated program before placement for the Student was a denial of a FAPE. The Director's testimony is contrary to the requirement that an evaluation precede significant changes in placement.³⁷ Simply stated, the IDEA requires the IEP team to write the program before the placement team, which in most cases, is the same group of people to discuss the placement.

In this instance, the team, rather than create a new IEP, passed off the IEP designed for the regular education classroom as the package of proposed services for placement in the I.U. class. When an IEP is created out of order or when components are missing, the appropriateness of the IEP is substantively compromised. Stated another way placement decisions can

³⁶ IDEA Regulations, 34 C.F. R. §300.116(b)(2006; Section 504 Regulations 24 CFR 104.32 through 104.36).

³⁷ 34 CFR 300.305 (a)(2)(iii)(iv) provides that a district must examine whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum. District must reevaluate students before subjecting them to any "significant change in placement"; 34 CFR 104.35 (a).

only be made after the development of the IEP³⁸ The reversal of the mandated IEP process here denied the Student a FAPE in the least restrictive setting 34 CFR § 300.116(b) vs. 34 CFR § 300.114.

When the District proposed the change, they either knew or should have known that the regular education [redacted] Grade IEP could not be implemented at the I.U. For example, the team knew that the Student would not have contact with nondisabled peers, yet they made the placement. The team knew or should have known the Student would not have access to the regular education curriculum, yet they made the placement. The team knew or should have known that the Student would not participate with nondisabled peers during lunch, recess, non-academics, or bussing. Yet, the District proposed the restrictive placement.³⁹

Subsequently, each educational placement must be determined on an individual case-by-case basis, depending on each child's unique educational needs and circumstances.⁴⁰

³⁸ *Spielberg v. Henrico County Public School*, 853 F.2d 256, 441 IDELR 178 (4th Cir. 1988).

³⁹ 34 CFR 300.305 (a)(2)(iii)(iv) provides that a district must examine whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum. District must reevaluate students before subjecting them to any "significant change" in placement." 34 CFR 104.35 (a); See, *Mason v. Bd. of Educ.-Howard Pub. Sch. Sys.*, 56 IDELR 14 (D. Md. 2011); *Alpena (MI) Pub. Schs.*, 116 LRP 26121 (OCR 02/23/16); and *Independence 30 (MO) Sch. Dist.*, 120 LRP 33538 (OCR 07/28/20); *Board of Educ. of City of White Plains*, 20 IDELR 1475 (SEA NY 1994)(A change in placement generally will trigger a reevaluation, particularly when the new placement is a more restrictive environment; *Brimmer v. Traverse City Area Pub. Sch.*, 22 IDELR 5 (W.D. Mich. 1994); *West-Linn Wilsonville School District v. Student*, 63 IDELR 251 (D. Ore. 2014) (district had clear notice of the need for a reevaluation when the principal informed the director of student services that the special education teacher felt unsafe around the child and it discontinued the student's participation in a mainstream music class, stopped sending him to an inclusion PE class, and began delivering his one-to-one instruction in a room adjacent to the principal's office).

⁴⁰ Substantive changes in placement should be accompanied by an IEP meeting before implementing those changes. See, *Letter to Lott*, 213 IDELR 274 (OSERS 1989); *Letter to Fisher*, 21 IDELR 992 (OSEP 1994); *Fairfield-Suisan (CA) Unified Sch. Dist.*, 79 IDELR 259 (OCR 2021) (A California district may have significantly changed the placement of a middle-schooler with an undisclosed disability on three occasions without first convening a 504 meeting); *Washoe County Sch. Dist.*, 115 LRP 3790 (SEA NV 01/05/15)(A Nevada

In other words, only after the IEP has been developed does the discussion shift over to the placement team to determine the classroom where the Student's needs can be served.⁴¹ When the IEP – placement process - is reversed, like here, the child's IEP conforms to the services at the predetermined setting, thereby denying the child a FAPE in the least restrictive environment.⁴²

Simply put, the District violated the IDEA when it predetermined the Student's placement before the IEP was offered and when it steered the Student to the predetermined restrictive placement.⁴³ Predetermination violates the IDEA because the Act requires that the placement be based on the IEP, not vice versa.⁴⁴ The predetermination procedural violation here caused substantive harm and deprived the Student of a FAPE when the Parents were "effectively deprived . . . of meaningful participation in the IEP process[.]"⁴⁵ Strong evidence exists that the District refused to depart from its closed-minded thinking when the team predetermined the Student's

district violated the law when it unilaterally modified the IDEA services of a high schooler with an undisclosed disability. Any modifications to a student's services or IEP must be based on his individual needs, not "the availability of services.").

⁴¹ If the proposed change substantially or materially affects the composition of the educational program and services provided to the child, then a change in placement occurs, triggering the notice requirement. *Letter to Flores*, 21 IDELR 233 (OSEP 1980); *Letter to Fisher*, 21 IDELR 992 (OSEP 1994); *Veazey v. Ascension Parish Sch. Bd.*, 42 IDELR 140 (5th Cir. 2005, unpublished), *cert. denied*, 112 LRP 58755, 546 U.S. 824 (2005).

⁴² 34 CFR § 300.116(b); *Spielberg v. Henrico County Public School*, 853 F.2d 256, 441 IDELR 178 (4th Cir. 1988)(placement decisions can only be made after the development of the IEP).

⁴³ *W.G. v. Bd. of Tr. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir.1992), *superseded by statute on other grounds*, as recognized in *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932 (9th Cir.2007); *see also Spielberg v. Henrico Cnty. Pub. Schs.*, 853 F.2d 256, 258–59 (4th Cir.1988); *Doyle v. Arlington County School Board*, 806 F.Supp. 1253, 1262 (E.D. Va 1992); *Union School District v. Smith*, 15 F.3d 1519, 1526, (9th Cir. 1994)(court emphasized the importance of the formal offer of a FAPE before placement is consider requirement); *Deal*, *supra*, 392 F.3d at p. 858.

⁴⁴ *Spielberg*, 853 F.2d at 259.

⁴⁵ *Deal*, at 857

placement.⁴⁶ The use of boilerplate language in NOREP supports the predetermination conclusion.

THE FAILURE TO PROVIDE PROPER NOTICE AND OBTAIN CONSENT

A review of the NOREP indicates a failure to make an individualized determination about the Student's ability to participate in the general education setting with supplementary aids.⁴⁷ While the I.U. class has mental health support and access to a psychiatrist, no one testified, based on an evaluation, what mental health services the Student needed. No one testified about the frequency and intensity of the alleged need for mental health services. No one cogently explained why a small class would provide a FAPE when one-on-one services were unsuccessful.⁴⁸ Using boilerplate language in the NOREPs here indicates a failure to make individualized determinations about students' ability to participate in the general education curriculum and

⁴⁶ *Deal*, 392 F.3d at 858.

⁴⁷ The purpose of providing supplementary aids and services is to support students with disabilities as active participants with nondisabled peers, as well as to enable their access to the general curriculum. To that end, supplementary aids and services include modification to the general curriculum and so that child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modification in the general curriculum. 34 CFR 300.116 (e); Full Range of Supplementary Aids and Services 34 CFR 300.114 (ii) states that, "Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs **only if** the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." [emphasis added]. *Yonkers (NY) Pub. Schs.*, 69 IDELR 18 (OCR 2016). See, Questions and Answers (Q&A) on U.S. Supreme Court Case Decision *Endrew F. v. Douglas County School District Re-1*, U.S. DEPT. OF EDUC. (Dec. 7, 2017).

⁴⁸ The decision to send the Student to the IU class based on the February 2022 IEP does not met the long held requirement "[t]hat the level of the [district]'s commitment of resources will be clear to the parents and other IEP team members" IEP Teams must determine the frequency, location, and duration of supplementary aids and services (accommodations) and modifications, as well as special education and related services and support for school personnel and record it clearly in a child's IEP. See 71 Fed. Reg. 46,540, 46,667 (Aug. 14, 2006).

setting.⁴⁹ Therefore, I find the NOREP was not understandable when offered.⁵⁰

THE NOVEMBER 2022 TO JUNE 2023 SERVICES WERE FLAWED

To ensure all students in the class were safe, pending this Final Decision, the District assigned a designated staff person to be with the Student all day. The classroom teacher and the special education redesigned the classroom and created an area where the Student would receive one-on-one instruction in the regular education classroom, away from peers. When the Student acted out, the one-on-one would take the Student to either the principal's office or the Emotional Support. At times the Student was also taken to the principal's office for the entire day if a peer was struck. The record does not provide a date or a document when the IEP team met to design these supports.

Furthermore, the record lacks a NOREP or prior written notice recommending these significant program and participation changes. Finally, I disagree with the District's assertions that the IEP was implemented with fidelity from November 2022 until the end of the year. The constant classroom changes, like instruction in the Emotional Support class, the Learning Support class, the principal's office, and the regular class, created multiple transition troubles. While the record is unclear who provided the instruction for each

⁴⁹ *Yonkers (NY) Pub. Schs.*, 69 IDELR 18 (OCR 2016). See Questions and Answers (Q&A) on U.S. Supreme Court Case Decision *Endrew F. v. Douglas County School District Re-1*, U.S. DEPT. OF EDUC. (Dec. 7, 2017).

⁵⁰ Pursuant to 34 CFR 300.503 (c)(1), notice of placement must be: Written in language understandable to the general public. See, e.g., *Mill Valley Elem. Sch. Dist. v. Eastin*, 32 IDELR 140 (N.D. Cal. 1999) (ruling that a mere skeletal outline of a plan did not constitute the "formal, written offer" of placement required by the IDEA and that the district's failure to make any firm commitment to anything other than an unspecified, modified regular educational plan was more than a technical error); and *Yucaipa-Calimesa Unified Sch. Dist.*, 6 ECLPR 48 (SEA CA 2008) (The fact that a California district was still developing a special day class for children with autism at the time of a 6-year-old's IEP meeting did not excuse its failure to provide any details about the class or the services and supports offered.).

day the Student was in the office, it is safe to say that neither the regular education teacher nor the special education teacher presented the regular education curriculum or specially designed instruction each day in the office. Contrary to the IDEA program, participation, and assessment procedures, the constant removals from the regular and special education classes decreased the Student's participation in regular education, isolated the Student, and created ongoing progress monitoring challenges. Therefore, I now find that the District failed to provide prior written notice before making the unilateral changes from November to the end of the year to the last agreed-upon IEP. Accordingly, I now find that the District's actions also substantially interfered with the Parents' participation in the IEP process.

COMPENSATORY EDUCATION IS APPROPRIATE RELIEF

Applying *G.L.* and *M.C.*, once the denial of FAPE is established, the hearing officer must determine when the District either knew or should have known of the denial of a FAPE. Once the denial of a FAPE knew or should have known date is established, I must calculate and exclude the time reasonably required to rectify the violation. The District's decision to put in a complete defense denying all liability now requires me to find that the rectification period for all FAPE claims is zero.

The record is preponderant that the compensatory education knew or should have known date is October 2022, when the District failed to either issue a permission to reevaluate or revise the IEP, FBA, and Positive Behavior Support Plan. All of the above violations caused tangible, substantive losses that now require equitable relief.

THE SCOPE OF THE COMPENSATORY EDUCATION AWARD

Due to the lack of preponderant qualitative evidence, I now find the record does not support using a qualitative method described in *G.L.* to calculate the "make whole" remedy. However, applying *G.L.* and *M.C.*, I will now craft a blended equitable "make whole" quantitative hourly remedy.

Based on the failure to complete the IDEA reevaluation in October 2022, the Student was denied the chance to receive "significant learning" and "meaningful benefit" from November 2022 through the end of the school year. The record, as a whole, leads me to conclude that an award of six and a half (6.5) hours a day for each day the District was in session is appropriate relief. Therefore, the District is **ORDERED** to provide hour-for-hour, day-for-day compensatory education from November 2022 until the last day of school in June 2023. That compensatory education calculation should be reduced for any days the Student was medically excused from attending school.

USE, AND SELECTION OF COMPENSATORY EDUCATION

The Student may use the compensatory education for any developmental, corrective, remedial, specially-designed instruction, supplemental aids, or accommodations, including but not limited to tutoring, teaching, transition services, related services, auxiliary aids and services, private evaluations/diagnostic testing, assistive technology supports/devices, or career/vocational counseling as defined in the IDEA or Section 504.⁵¹

SELECTION AND PAYMENT FOR COMPENSATORY EDUCATION

The Parents can select the compensatory education service provider(s) at their sole discretion. The District should reimburse the provider(s) at the rate regularly charged for each service. To the extent the Student or the Parent incurs travel costs to and from the provider, the District should reimburse the Parents for all mileage or transportation expenses at the District's rate for travel reimbursement.

The mileage reimbursement is a separate award; therefore, the District should not reduce or offset the mileage charges from the funds used to pay for the Student's compensatory education costs. In January of each year,

⁵¹ *Berks County IU/El Program*, 117 LRP 9420 (PA 2017) (equal access to IDEA's promise of a free appropriate public education and the parallel promise of a full educational opportunity goal); 34 CFR § 300.109; 20 U.S.C. §1412(a)(2)).

the District should report unused compensatory education hours to the Student and the Parent.

SUMMARY

The record is preponderant the Student suffered a loss of a chance to receive a FAPE. The blended equitable relief awarded here is reasonably calculated to place the Student on the path otherwise disrupted when the District failed to identify, evaluate and educate the Student in the least restrictive environment. Applying *Perez*, I now find that I lack subject matter authority to grant the requested legal relief for the alleged acts of discrimination. Finally, the District is now **ORDERED** to take all necessary steps to offer a FAPE in the least restrictive setting before the 2023-2024 school year starts.

FINAL ORDER

AND NOW, this July 23, 2023, the District is now **ORDERED** as follows:

1. The Student's IDEA and Section 504 child find claims from August 2021 through October 2022 are **DENIED** as stated.
2. The Student's IDEA and Section 504 denial of FAPE claims from November 2022 through June 2023 claims are **GRANTED**.
3. The equitable relief of compensatory education **ORDERED** herein makes the Student whole for any Section 504 or IDEA FAPE violations.
4. The Parents' request for an Independent Educational Evaluation is **Denied**.
5. To remedy the FAPE violations, the District is now **ORDERED** to fund a bank of compensatory education services as described above. The Parties are directed to calculate the value of the compensatory education hours as required above.

6. The District is **ORDERED** to pay the cost of transportation to and from any compensatory education service, education, transition, or testing provider as described above.
7. The Parent can select the individual(s) or the provider(s) for all make-whole compensatory education services.
8. For all the reasons stated above, I now find this hearing officer cannot award legal or equitable relief or remedy the Student's claims of intentional discrimination; therefore, these claims are now exhausted and dismissed without prejudice.
9. All other claims for appropriate relief, causes of action, demands, or affirmative defenses not argued for in the Parents' or the District's closing statements and not discussed herein are now dismissed with prejudice.

Date: July 23, 2023

s/ Charles W. Jelley, Esq. LL.M.
Hearing Officer
ODR FILE #27262-22-23