

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:

26181-21-22

Child's Name:

K.W.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

07/31/2022

INTRODUCTION AND PROCEDURAL HISTORY

The student, K.W. (Student),¹ is late elementary school-aged student who resides in and attends school in the Upper Darby School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) based on Autism and Other Health Impairment.²

In early March 2022, one of Student's Parents filed a Due Process Complaint under the IDEA and Section 504 of the Rehabilitation Act of 1973,³ challenging the District's programming for Student and demanding compensatory education and prospective relief. The District denied the Parent's assertions and maintained that its programming for Student was appropriate, and that no remedy was due. The case proceeded to an efficient due process hearing.⁴

Following careful review of the record and for all of the reasons set forth below, the claims of the Parent must be granted in part and denied in part.

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ 29 U.S.C. § 794.

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. The communications of July 25, 2022 regarding closings have been marked as Hearing Officer (HO) Exhibit 1 and is hereby admitted. Citations to duplicative evidence may not be to all. References to Parent in the singular refers to the Parent who filed the Complaint.

ISSUES

1. Whether the District's programming for Student provided and proposed over the 2020-21 and 2021-22 school years was appropriate;
2. If the District's programming for Student was not appropriate, whether Student is entitled to compensatory education;
3. Whether the District discriminated against Student or the Parent in violation of Section 504; and
4. Whether prospective relief is appropriate?

FINDINGS OF FACT

1. Student is a late elementary school-aged student who resided in the District over the relevant time period. Student has been identified as eligible for special education based on Autism and Other Health Impairment. (N.T. 29-30.)
2. At the time of the due process hearing, Student was residing temporarily with family in another Pennsylvania county. (N.T. 157-58, 167-69.)⁵
3. Student has been medically diagnosed with Autism Spectrum Disorder, Attention Deficit Hyperactivity Disorder (ADHD), and a recessive-expressive language disorder. (P-13.)

⁵ The District did not formally raise any issue related to its continued obligation to Student after the move, nor ask for a resolution of such a claim.

Early Educational History

4. Student was eligible for and received early intervention services provided by the local Intermediate Unit (IU) beginning at age three. Student has a history of disruptive and aggressive behaviors in the home and educational environments, as well as speech/language deficits, task refusal/noncompliance, distractibility and impulsivity, and difficulty maintaining attention to task. (N.T. 47-48; P-24; S-1 at 2-5; S-2 at 2-4.)
5. Student entered school-age programming at the District in the fall of 2016. Student's program was provided in the District until the spring of 2019. (N.T. 50-51, 107-08; P-15; S-2 at 2-3.)
6. An Individualized Education Program (IEP) was developed for Student by the District in February 2019. A number of strengths were identified with respect to early learning, including reading and mathematics, as well as compliance with directions, task completion, functional communication (having progressed on answering literal WH questions but not inferential WH questions), problem solving, working memory, and willingness to learn. Needs were specified for improving functional communication, mathematics computation and problem solving (subtraction, having mastered an addition goal with regrouping), reading comprehension (having mastered a goal for reading CVC words), coping strategies, behavioral regulation and rigidity, visual cues, and sensory sensitivity. (P-16.)
7. Goals in the February 2019 IEP addressed reading comprehension of grade level passages; solving subtraction problems; speech/language (answering literal and inferential WH questions); and behavior (completing non-preferred tasks without inappropriate language, physical aggression, or elopement through calming and coping strategies; decreasing aggression). Program modifications and items

of specially designed instruction included a highly structured classroom; firm expectations, visual cues and supports; strategies and practice for academic and behavioral weaknesses; redirection, prompting, and positive reinforcement when needed; a quiet space and sensory room; a daily schedule; small group and individual instruction; adequate wait time; and adult support throughout the school day. A Positive Behavior Support Plan (PBSP) provided antecedent strategies, replacement behaviors, and consequences. (P-16.)

8. Related in the services in the February 2019 IEP included occupational and speech/language therapy and a full time personal care assistant (PCA). Student's program was one of autistic support at a supplemental level. (P-16.)
9. Student transitioned to First Private School in April 2019 with the consent of the Parent. (P-15.)

September 2019 IEE

10. The Parent obtained an Independent Educational Evaluation (IEE) by a private psychologist in March of 2019 funded by the District. That IEE, with a report issued in September 2019, noted Student's prior IDEA classifications as Autism and Speech/Language Impairment. (P-1; S-1.)
11. The September 2019 IEE included administration of a number of assessments. Student attained a below average cognitive ability score, and low to low average range scores in all areas of academic achievement with the exception of passage comprehension (a relative strength in the average range)(Woodcock-Johnson Tests of

Achievement, Fourth Edition, WJ-IV-ACH).⁶ Other identified deficits were identified in executive functioning (with some variability among the raters); attention and concentration; visual motor integration; social skills; and adaptive functioning in all three domains: conceptual (communication, functional academics, and self-direction); social (leisure and social skills); and practical (community, home and school living; health and safety; and self-care). (P-1; S-1.)

12. With regard to social/emotional/behavioral functioning for the September 2019 IEE, one or more raters endorsed clinically significant concerns across most scales: aggression, conduct problems, anxiety, depression, atypicality, withdrawal, adaptability, activities of daily living, and functional communication; and at-risk concerns with attention and learning problems as well as leadership. ADHD and Autism were also confirmed by the IEE. (P-1; S-1.)
13. This September 2019 IEE determined that Student met criteria for the IDEA categories of Autism, Emotional Disturbance, and Other Health Impairment based on ADHD. (P-1; S-1.)
14. The September 2019 IEE made a number of recommendations: a highly structured educational program to include intensive behavioral and autistic support, academic skill development across subject areas, executive functioning coaching and instruction (for attention, emotional regulation, flexibility, inhibitory control, initiation, organization, planning, self-monitoring, and working memory), a weekly social skills group, and interventions for adaptive behavior. A program of full time autistic support with a low student-to-teacher ratio and a full time aide, and a behavior plan based on a Functional

⁶ The WJ-IV-ACH compares the scores attained to those of peers, and in this administration were age-based (P-1 at 14-17; S-1 at 14-17).

Behavior Assessment (FBA) with a crisis plan, were described as necessary for Student, along with limited distractions and test and assignment accommodations. (P-1 at 39-41; S-1 at 39-41.)

15. A Reevaluation Report (RR) was issued in November 2019. This evaluation retained the eligibility categories of the March 2019 IEE, identifying needs relating to academic (mathematics calculation), emotional regulation, expressive and receptive language, fine motor skills, as well as task completion and maintaining focus and attention. Many of the recommendations mirrored those in the March 2019 IEE. (S-2.)
16. A meeting convened in the spring of 2020 after First Private School asked to have Student removed from its program.⁷ Student remained there while the District explored other placements, but shortly thereafter schools were closed due to the COVID-19 pandemic. (N.T. 103, 392-94.)⁸

2020-21 School Year

17. Student attended a second private school (Second Private School) beginning in the fall of 2020 [redacted] pursuant to a tuition agreement between Second Private School and the District. The Parent approved the Notice of Recommended Educational Placement (NOREP) for that transition. (N.T. 181, 195-96; S-4; S-6; S-8.)
18. The tuition agreement between Second Private School and the District provided for termination by either of the parties to the contract, with written notice. In such circumstance, the termination date was to be

⁷ It does not appear that Student's IEP was revised or a new IEP developed at that time.

⁸ This hearing officer takes notice of the statewide school closures beginning in March 2020 and continuing through the end of the 2019-20 school year pursuant to orders of the Governor of the Commonwealth of Pennsylvania, see <https://www.governor.pa.gov/newsroom/governor-wolf-announces-closure-of-pennsylvania-schools/> and <https://www.governor.pa.gov/newsroom/governor-wolf-extends-school-closure-for-remainder-of-academic-year/> (last visited July 25, 2022).

mutually agreed or otherwise occur on the 16th calendar day after written notice of termination. (S-8.)⁹

19. Student began the 2020-21 school year attending Second Private School remotely [redacted]. After a brief period of all remote instruction, the Parent elected not to have Student attend in person when first available. Student experienced difficulty with remote learning and began in-person instruction in early November 2020. (N.T. 54-55, 110-11, 185-86, 194-95; S-5 at 13; S-48 at 4-5.)
20. The classroom at Second Private School for the 2020-21 school year had approximately eight in-person students, and four paraprofessionals in addition to the special education teacher who had reviewed Student's records. Student had classes in language arts, reading, mathematics, science, social studies, and special subjects. (N.T. 188-92, 194-95; S-49.)
21. Second Private School implemented the IEP from the prior school year in the fall of 2020. (N.T. 181-82.)
22. Student was provided both classroom-based and small group reading instruction on a daily basis at Second Private School. (N.T. 202-03.)
23. Student was provided with an Orton-Gillingham-based reading program at Second Private School, in a one-to-one setting with a reading specialist to address deficits in that area; and programming was individualized based on Student's needs. Student was performing below expectation in the areas of mathematics and written expression, as well as fine motor skills and social skills; but did not demonstrate difficulty with executive functioning skills that are expected of students of that age. (N.T. 188-91, 198-99.)

⁹ S-8 is the agreement for the 2021-22 school year, but the terms were generally consistent including the termination provision. (N.T. 395-96.)

24. An IEP was developed for Student at a meeting in December 2020 attended by the Parent. This IEP provided updates on present levels, progress, and programming at Second Private School. At that time, based on a Qualitative Reading Inventory, Student was instructional at levels of Primer and 1, and at Step 1.3 of the Orton-Gillingham-based reading program. Student remained below grade level expectations in mathematics and written expression. Speech/language and occupational therapy were recommended to continue to address weaknesses in those areas. Behaviorally, the school-wide program was considered to appropriate. (N.T. 219; P-6; S-5.)
25. Parental concerns at the time of the December 2020 IEP were reading comprehension, mathematics, and maintaining attention to and focus on task, in addition to communication with school staff. (S-5 at 15-16.)
26. The December 2020 IEP identified a number of strengths including following the daily schedule and routines, and meeting behavioral expectations. Needs were for oral reading (decoding), listening comprehension, written expression (including encoding), mathematics, occupational and speech/language therapy (including social skills), and general academic skills. (S-5.)
27. Annual goals in the December 2020 IEP were based on then-current performance, and addressed oral reading at a second grade level; decoding; listening comprehension at a second grade level; written expression through writing sentences with a prompt; spelling; development of grade level mathematics skills; occupational therapy (fine motor and daily living skills); and speech/language (receptive/following directions and expressive/ functional communication skills). All of the goals contained a number of short term objectives. (S-5 at 22-41.)

28. Program modifications and items of specially designed instruction in the December 2020 IEP provided for social skills development, multisensory and direct instruction, accommodations for writing tasks and fine motor skills, visual cues and schedules, frequent breaks, and communication with the Parent. A crisis plan was included. Student's program was one of full time autistic support at Second Private School with occupational and speech/language therapy, as well as Orton-Gillingham-based reading instruction, as related services. (S-5 at 42-44, 47-48.)
29. Student did exhibit some frustration during the 2020-21 school year, and staff employed the school-wide behavior plan for de-escalation and prompting as needed. Students were also provided with frequent breaks and positive reinforcement. Student did not exhibit behavioral needs that could not be met through the school-wide plan. (N.T. 206-07, 223-25.)
30. Another IEP meeting convened in February 2021, attended by the Parent. Concerns of the Parent were noted at that time, and included Student's progress, ability to understand materials, language deficits, need for updates on progress, staff rotation, and suggestions for the home to support Student's academic skill development. The team discussed and responded to each concern reportedly to the Parent's satisfaction. Goals for counseling and social skills were added to provide for development and use of coping skills and behavior regulation, and Extended School Year eligibility was also confirmed. (N.T. 219; S-23 at 2-4, 68-70, 75-78.)
31. Progress reporting by Second Private School for the second half of the 2020-21 school year reflected mastery of oral reading objectives and steady progress toward that goal; near mastery of listening comprehension objectives with some inconsistency and steady

progress toward that goal; progress toward or mastery of the objectives for the written expression objectives and steady progress toward that goal; mastery of mathematics objectives and steady progress toward that goal with development of a variety of grade level skills; mastery of most decoding objectives and steady progress toward that goal; mastery of most encoding objectives and steady progress toward that goal; progress toward some but not all occupational therapy objectives and goals; mastery of several speech/language objectives and progress toward those goals; and some progress with social skill development. Student made limited progress toward the new counseling goal due to absences and behaviors. Student's report card grades were in the 90-100 range over the 2020-21 school year across subject areas. (S-49.)

32. Second Private School sent progress reports to the Parent for each marking period. Staff also reviewed Student's progress with the Parent when she expressed concerns about Student. (N.T. 220, 227.)
33. The Parent expressed concerns over the 2020-21 school year with Second Private School involving staff in the classroom and peer relationships. Toward the end of that school year, the Parent conveyed those to the District. (N.T. 220-23, 355-57, 397-99.)
34. Student attended a private summer camp program in 2021 through an agreement with the District. (N.T. 501-02; P-18.)

Second IEE Summer/Early Fall 2021

35. The Parent obtained a second IEE completed in September 2021 funded by the District. (N.T. 71-72; P-3; S-10.)
36. Cognitive assessment for the September 2021 IEE reflected a very low range Full Scale IQ score but that result was possibly a low estimate of actual ability in light of Student's behavioral response to some tasks

and variability among subtest and Index scores. On the latter, Student displayed relative strengths with Verbal Comprehension, Fluid Reasoning, and Working Memory, with relative weaknesses with Visual Spatial skills and Processing Speed. (P-3 at 8-10, 32-34; S-10 at 8-10, 32-34.)

37. Assessment of academic achievement for the September 2021 IEE (Wechsler Individual Achievement Test, Fourth Edition, WIAT-IV) yielded somewhat variable results. Student's Composite scores ranged from the very low range (reading) to the extremely low range (written expression, mathematics, and total achievement). (P-3 at 10-11; S-10 at 10-11.)
38. In the area of Adaptive Behavior, Student's overall functioning and presentation across the Communication, Daily Living Skills, and Socialization Domains were rated as well below expectations by both the Parent and teacher. (P-3 at 12-25; S-10 at 12-25.)
39. Assessment of Student's social/emotional/behavioral functioning through rating scales completed by the teacher and Parent yielded somewhat disparate results, with the Parent ratings overall more indicative of deficits than those of the teacher. The Parent endorsed clinically significant concerns with hyperactivity, anxiety, depression, attention problems, atypicality, withdrawal, adaptability, functional communication, and activities of daily living, and additional at-risk concerns with aggression, conduct problems, and leadership. The teacher endorsed clinically significant concerns with hyperactivity and atypicality, as well as at-risk concerns with aggression, anxiety, depression, somatization, attention problems, adaptability, and study skills. Student attempted but was unable to complete a self-report. (P-3 at 25-32; S-10 at 25-32.)

40. Additional assessments for the September 2021 IEE reflected additional needs with visual motor skills and social communication and interaction supporting Student's Autism diagnosis. (P-3 at 12, 32; S-10 at 12, 32.)
41. The conclusions of the September 2021 IEE included IDEA classifications in Autism, Other Health Impairment (ADHD), Speech/Language Impairment, and Specific Learning Disability (written expression). Specific recommendations in the September 2021 IEE included full time autistic support with intensive behavioral services, a highly structured program with a low student-to-teacher ratio, a full time aide, academic support and intervention, and programming to address executive functioning, social, and emotional regulation skills; most of those in the previous IEE were considered to remain appropriate. Private therapy was also suggested. (P-3 at 33-37; S-10 at 33-37.)

2021-22 School Year

42. The Parent frequently questioned staff at Second Private School over the summer of 2021 and at times made complaints about its programming for Student. This continued into the fall of 2021. (N.T. 114-15, 121-22, 124-25, 127-28, 234, 358-59, 367-68.)
43. Second Private School began to consider asking Student to be dismissed over the summer of 2021 and contacted the District. At that time, District administrators made unsuccessful attempts to convene a meeting with the Parent and to avoid or at least mediate any conflict between the Parent and Second Private School. It also took steps to consider alternatives in the event Student could no longer remain there. (N.T. 128-29, 236-38, 242-43, 364-65, 401-06, 34-35.)

44. Student returned to Second Private School at the start of the 2021-22 school year. There were six students with a special education teacher and two paraprofessional in the classroom. Student had classes in language arts, reading, mathematics, science, social studies, and special subjects. (N.T. 296, 302-03; S-12.)
45. Student exhibited difficulties with problem-solving and other executive functioning skills in the fall of 2021, and demonstrated concerning behaviors such as physical aggression towards staff and peers, verbal aggression and screaming, elopement, and dropping to the floor. These behaviors became more frequent, lasting up to ninety minutes in duration. The teacher spoke with a behavior specialist, who conducted some observations and made recommendations. (N.T. 299-301, 305, 314-15, 328-29; S-17; S-23 at 19-20, 69-71.)
46. Student continued with the Orton-Gillingham-based reading instruction during the 2021-22 school year, then at Step 2.4, in addition to classroom-based reading. (N.T. 303-04, 342; P-6 at 13; S-23 at 13.)
47. As in the prior year, the school-wide behavior support plan was implemented, but when Student's behavior deteriorated and became more concerning, a paraprofessional was assigned to Student for support when needed. Incentives were also used which were somewhat effective for Student. (N.T. 304-05, 324-28; S-17; S-23 at 19-20.)
48. Student had approximately twenty absences from school in the fall of 2021, and Student's performance was affected by inconsistency in attendance. Behavioral challenges also impacted Student's instruction. (N.T. 319, 329-30, 334-35, 339-40, 344; S-37.)
49. Progress reports from Second Private School for the fall of 2021 reflected mastery of the oral reading goal; near mastery of the

listening comprehension goal; ongoing progress toward the written expression goal; ongoing progress toward the mathematics goal; ongoing progress toward the decoding and encoding goals; limited progress toward the occupational therapy objectives and goals due to behaviors and absences; ongoing progress toward some but not all of the speech/language goals, impacted by pandemic safety restrictions and behaviors; some progress toward social skill development but limited progress with counseling due to absences and behaviors. At the end of the first marking period in the fall of 2021, Student's report card grades ranged from a low of 86 to a high of 100 across subject areas. (S-12.)

50. Student was asked by Second Private School to leave its program in November 2021. That decision was based on communications from the Parent regarding Student's aggression in responding to behaviors of other children that was wholly inconsistent with the school's own directives, as well as the Parent's demeanor with staff over the fall of 2021. (N.T. 75-76, 362-64, 368-69, 373-75, 381; S-11.)
51. At the District's request, Second Private School agreed to extend Student's enrollment to later in November 2021. The District used the time to begin to secure an alternative placement for Student and immediately identified some possible options for full time autistic support. This process of securing a new private program at the middle of the school year was challenging with limited potential placements. In mid-November 2021, the parties agreed to the District making additional referrals to other private schools for Student, and the District did so. (N.T. 91, 242-43, 407-00, 442; P-25; S-11.)
52. The Parent was not able to attend an IEP meeting scheduled in November 2021 following notice of Student's removal from Second Private School. One new private school, which has four locations

within the Commonwealth in both day and residential programs, did accept Student and was able to enroll Student immediately upon discharge from Second Private School. A representative of the new proposed private school (Proposed Private School) attended that meeting with District and Second Private School representatives. Proposed Private School proposed to provide the services in the existing IEP from Second Private School in a day program on a particular campus, with only very minor revisions (updates to performance and its behavioral supports including a crisis plan). Proposed Private School also planned to convene an IEP meeting following Student's transition. The campus offered a highly structured environment, consistency, and small class sizes with emotional support and social skills instruction. (N.T. 81, 252-53, 267-68, 411-12, 474-80, 485-87, 491-92, 496; P-5; S-13; S-14; S-19; S-23.)

53. The Parent did not agree to the proposed placement at Proposed Private School for its day program, because of the family's prior experience with a sibling at a different campus as well as allegations that have been made against staff in some of its residential programs nationwide. The Parent maintained that position as of the due process hearing, and declined to take a tour of the campus. (N.T. 82-84, 87-88, 147-48, 151-52, 247-49, 480-81, 489-90; S-19.)
54. Only one of the additional private schools to which referrals were provided accepted Student. The Parent declined the one which did accept Student, operated by the IU, as an option, and did not tour its location because of previous negative experience with the IU. (N.T. 153-54, 162, 420; S-16; S-38; S-40.)
55. The parties agreed to Student receiving tutoring by a staff member of a previous private psychologist. Those services were provided for a brief period of time, approximately one month, then were discontinued

by the Parent. The District did contact the private psychologist about continuing, but the possibility ended there. (N.T. 94-96, 152-53, 156-57, 271-72, 447; P-19; S-45.)

56. The Parent attended a second November 2021 meeting that was ordered to convene by a different hearing officer following a previous Due Process Complaint filed by the Parent. The director of Proposed Private School also attended. The parties agreed to additional referrals to private placements and identified several more together, and the Parent disapproved the NOREP for Proposed Private School. (N.T. 89-90, 148-50, 257, 259, 413-14, 420, 480-81, 500-051; P-4; P-7; P-19; S-18; S-25; S-28; S-34.)
57. None of the additional private placements to whom referrals were sent after the last IEP meeting accepted Student, with communications between the District and the referrals continuing into late January or February 2022. (N.T. 420; S-42; S-43.)
58. As of June 2022, the District was not able to provide an appropriate program for Student within its schools. (N.T. 464-65.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

In general, the burden of proof may be viewed as consisting of two elements: the burden of production and the burden of persuasion. In an administrative proceeding such as this one, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parent who filed the Due Process Complaint. Nevertheless, application of this principle determines which party prevails only in those rare cases where the

evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, who assume the role of fact-finder, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible as to the facts and did not discern any witness to try to deceive her. Contradictions in the accounts, which appear to be relatively few, are attributed to lapse in memory or to differing perspectives, rather than any intention to mislead. The weight accorded the evidence, however, was not equally placed.

The testimony of the Parent who filed the Complaint included a significant degree of lack of recollection, and some of that testimony was not logical. For example, the Parent described an encounter over the summer of 2020 as also involving the finished report of an IEE that was not completed until the end of September (N.T. 141-43). While one cannot fault an individual for lacking precise memory, particularly of events that may have been uncomfortable or emotionally charged, this hearing officer is unable to conclude in this case that certain actions were not taken by the District or one of the private schools, such as providing progress reports, merely because the Parent may not remember them doing so. By contrast, the testimony of the witnesses from Second Private School and the Proposed Private School in November 2021 was particularly persuasive based on the demeanor of the witnesses and the documentary support of their accounts. The District administrator who attempted to intervene when the relationship

between the Parent and Second Private School became strained was clearly knowledgeable, convincingly describing the efforts made by the District to investigate program options beginning in November 2021, and his testimony was accorded significant weight.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

General IDEA Principles

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

The various states, through local educational agencies (LEAs), meet the obligation of providing FAPE to an eligible student through development and implementation of an IEP which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court has confirmed, an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth."

Endrew F. v. Douglas County School District RE-1, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

Individualization is, thus, the central consideration for purposes of the IDEA. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.”

Ridley School District v. M.R., 680 F.3d 260, 269 (3d Cir. 2012).

Additionally, a proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made.”

D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010);

see also *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031,

1040 (3d Cir. 1993)(same). “The IEP *must aim* to enable the child to make

progress.” *Dunn v. Downingtown Area School District*, 904 F.3d 248, 255

(3d Cir. 2018)(emphasis in original). IEP development, of course, must

follow and be based on an evaluation as monitored and updated by changes as they occur. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320-300.324.

General IDEA Principles: Least Restrictive Environment

The IDEA contains a crucial mandate that eligible students are to be educated in the “least restrictive environment” (LRE) that also satisfies meaningful educational benefit standards.

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.S. § 1412(a)(5)(A); see also *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993).

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family including parents have “a significant role in the IEP process.” *Schaffer, supra*, at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b). Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 565 (3d Cir. 2010).

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

Winkelman v. Parma City School District, 550 U.S. 516, 530 (2007). Full participation in the IEP process does not mean, however, that parents have the right to control it. See, e.g., *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) (noting that IDEA “does not require school districts simply to accede to parents' demands without considering any suitable alternatives” and that failure to agree on placement does not constitute a procedural violation of the IDEA); see also *Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D. Md. 2002) (explaining that “parents who seek public funding for their child's special education possess no automatic veto over” an LEA’s decision). As has previously been explained by the U.S. Department of Education:

The IEP team should work towards a general agreement, but the public agency is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE). It is not appropriate to make IEP decisions based on a majority "vote." If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint.

Letter to Richards, 55 IDELR 107 (OSEP 2010); see also 64 Fed. Reg. 48 at 12472 (1999)(same).

General Section 504 Principles

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

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

With respect to discriminatory retaliation, the following principles are applicable.

The elements of a retaliation claim require a showing by the filing party (1) that they engaged in a protected activity, (2) that defendants' retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or her rights, and (3) that there was a causal connection between the protected activity and the retaliatory action.

Lauren W. v. DeFlaminis, 480 F.3d 259, 267 (3d Cir. 2007) (citations omitted).

The Parent's Claims

The first issue is whether the program for Student over the 2020-21 and 2021-22 school years was appropriate, both procedurally and substantively. This claim requires an examination of the special education and related services that that were provided in both school years separately.

Student transitioned to Second Private School at the start of the 2020-21 school year with approval of the Parent, and there appears to be no disagreement that Student requires such a restrictive setting. Student was in a full time autistic support program, attending a small classroom with a low student-to-teacher ratio and paraprofessional support. Second Private School implemented the existing IEP, and developed a new IEP for Student with academic goals based on Student's then-present levels to include individual and small group reading instruction. In other domains, the December 2020 IEP provided for social skills intervention, occupational and speech/language therapy, and a school-wide behavior plan that was generally effective over the 2020-21 school year, together with program modifications and items of specially designed instruction. Counseling and additional social skills support were added in February 2021. Student's progress toward IEP goals, while gradual, was ongoing and strongly

supportive of the appropriateness of the expectations over a year's time in light of Student's circumstances.

The Parent's argument regarding Student's scores on the WIAT-IV and WJ-IV-ACH, two different standardized achievement test instruments (Parent Closing at 20), does not present preponderant evidence of regression; rather, to the extent such a comparison may be made, the result suggest only that Student may not have made the equivalent of a year's worth of growth in some subject areas that one would expect of typical same-age peers over a one year period. Once again, it is Student's individual presentation that must be considered, and Second Private School's December 2020 IEP reflected a recognition of Student's then-current present levels and growth with the goals adjusted accordingly.

The Parent also points to the September 2019 IEE and its recommendations, contending that Second Private School and the District ignored those to a significant extent (Parent Closing at 15-16). Specifically, the Parent contends that the absence of IEP goals relating to social skills, emotional regulation, behavior, executive functioning, and adaptive behavior amounts to a fatal flaw in terms of providing FAPE to Student. It is true, as the Parent observes, that the December 2020 IEP did not indicate in the Special Considerations section that Student had communication, assistive technology, or behavior needs. This, however, is but a minor procedural irregularity that, standing alone, does not constitute a denial of FAPE. If Student had needs over the 2020-21 school year that were not addressed through individual, classroom, or schoolwide programs, this argument would likely favor the Parent. Nonetheless, the implemented previous and newly developed IEPs at Second Private School were largely consistent with the recommendations in the September 2019 IEE. Furthermore, the convincing testimony of Student's special education teacher that year, who

was familiar with Student's previously identified needs, was that Student did not need an individual behavior plan or additional executive functioning support that year. Thus, the recommendation for a new FBA and PBSP was not applicable. Moreover, merely because there was not a specific provision in the IEP for adaptive behavior interventions does not mean that this deficit was ignored; on the contrary, those skills are part and parcel of many of the special education and related services that were provided for Student at Second Private School.

The Parent concedes that the record contains limited data regarding Student's social/emotional/behavioral functioning over the course of the 2020-21 school year (Parent's Closing at 16), while attributing this missing information to a lack of such IEP goals. But it is the Parent who has the burden of persuasion, and this hearing officer cannot accept the premise that the absence of specific IEP goals to address previous and historic social/emotional/behavioral needs amounts to a denial of FAPE, where individualized goals and specially designed instruction in the supportive Second Private School environment were considered to be unnecessary. Nor is the evidence preponderant that Student's IEP, in hindsight, was sufficiently flawed such that it was not reasonably calculated to confer meaningful educational benefit. There is certainly a possibility that Student's special education program over the 2020-21 and 2021-22 school years was less than ideal in some respect or another, but the law does not demand perfection of LEAs, and the record does not establish a denial of FAPE for the 2020-21 school year.

Analysis of the 2021-22 school year is and must be much different. Student's behavior deteriorated from the start, with the teacher and others implementing strategies that were somewhat but not largely successful, leading to involvement of a behavior specialist. Although Student's

absences contributed to Student's experience at school, they cannot be deemed the sole reason for the newly observed behavioral difficulties and then-inconsistent academic growth. Involvement of the behavior specialist was a reasonable and logical step to take, and was likely to be followed development of an individualized behavior plan. That did not occur because Second Private School unilaterally terminated Student's enrollment, but educational professionals must be given time to recognize signs of a need for program revision and formulate a plan to do so as was done here.

It is, of course, true that the decision to remove Student from Second Private School was not made by the IEP team. It was an unfortunate event that may be viewed as functionally equivalent to a school closing its doors unexpectedly. *See, e.g., Weil v. Board of Elementary and Secondary Education*, 972 F.2d 1069, 1072 (5th Cir. 1991)(finding no change of placement when a school closed and the student was transferred to a different location with substantially similar programming; and concluding that prior written notice and the exercise of due process rights would not have changed the result under the circumstances). Issues surrounding changes to location of special education services frequently arise in the context of a pendency dispute. *See, e.g., A.W. v. Fairfax County School Board*, 372 F.3d 674 (4th Cir. 2004)(construing the term "educational placement" in the IDEA to not include physical location); *R.B. v. Mastery Charter School*, 762 F. Supp. 2d 745, 763 (E. D. Pa. 2010)(acknowledging that local educational agencies have the discretion to determine the physical location of a student's special education program); *Letter to Fisher*, 21 IDELR 992 (OSEP 1994)(stating that, "[i]f the District determines, based on the student's individual needs, that the student should have the same educational program and opportunities for interaction with his or her nondisabled peers at [a different location], the change in location alone would not constitute a change in educational placement."). Thus, a parent's

right to meaningful participation is not necessarily implicated when a change in the location of services is made necessary through a circumstance that did not result from any action by the LEA. Here, the District actively took steps to try to prevent Student's disenrollment by attempting to engage the Parent before it occurred.

The issue therefore turns to whether the District's proposal in November 2021 was appropriate. This hearing officer cannot construe the facts as reflective of District predetermination of that proposal without the participation of the Parent. The District began considering options based on Student's need for full time autistic support. Proposed Private School was able to immediately enroll Student and begin to provide all identified services. A representative of that program attended both November 2021 IEP meetings and, in testimony, provided a compelling understanding of how Student's needs could be met there, as well as a plan for a subsequent IEP meeting following Student's enrollment. There was nothing inappropriate in a plan to reconvene after the transition was made to gauge how well Student's needs were being met in the new environment. *See Weil, supra*, 972 F.2d at 1073.

The District's proposed program and placement in November 2021 was appropriate for Student based on information known at the time. The District could not have foreseen that the Parent would reject Proposed Private School for reasons that were not based on the IEP. When District did become aware that the Parent would not consider that proposal, its representatives continued to explore options with the Parent. The evidence is more than preponderant that the District's November 2021 proposed program and placement and its actions following its rejection by the Parent were wholly appropriate under the applicable standards.

At least by late February 2022, however, the District was aware both that Proposed Private School was not a possible program and placement for Student from the Parent's perspective and that no other non-IU referrals resulted in an acceptance. While the Parent's demeanor toward the District and Second Private School staff and the filing of a Due Process Complaint in early March 2022 provides context for the District's failure to continue exploring options for comparable placements after February 2022, there can be no dispute that the Parent firmly believes based on past experiences that there are serious and valid reasons to decline services provided by Proposed Private School and the IU. In any event, it is undisputed that Student is not currently receiving any public special education programming. This hearing officer is compelled to find that the District had an obligation to continue or renew its efforts to secure a program and placement for Student as of late February 2022. Allowing a reasonable period of time for additional referrals to be made and responses received following consideration by those entities, the conclusion must be reached that as of April 18, 2022 (the first school day following many schools' spring breaks), an appropriate full time autistic support program not operated by the IU or Proposed Private School should have been identified and made available in order to fulfill Student's entitlement to FAPE. An appropriate remedy shall be ordered as discussed *infra*.

Lastly, the Parent contends that Second Private School's termination of Student's enrollment was retaliatory because it was based on the Parent's advocacy for Student. Whatever the reasons for non-party Second Private School's decision, there is no question that the District took affirmative actions to attempt to minimize conflict between the Parent and Second Private School, and to intervene to the best of its administrators' ability. Those efforts are the polar opposite of retaliation. In any event, the conduct of the Parent as described by the Parent and others went far beyond

advocating for Student's disability-related needs, thereby eliminating any potential causal connection. In short, this hearing officer can find no discriminatory or retaliatory action by the District in this case.

Remedies

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

Although the IEP team will be directed to meet to begin the steps necessary to initiate further referrals to full time autistic support programs, having found a denial of FAPE beginning in the spring of 2022, Student is due a remedy. There is no evidence in the record from which one could fashion a qualitative award, however. Therefore, Student shall be awarded a quantitative form: five hours of compensatory education for each day that the District's schools were in session from April 18, 2022 through the end of

the 2021-22 school year, and for each day that an appropriate program and placement are not made available to Student at the start of the 2022-23 school year.¹⁰ The District may offset the award of compensatory education by the number of hours of tutoring provided by staff of the second private psychologist.

The award of compensatory education is subject to the following conditions and limitations. Student's Parent may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related services needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District or other provider to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age sixteen (16). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

This hearing officer makes the following additional observations and suggestions. The IEP team should consider securing the services of a

¹⁰ Students at Student's grade level are entitled to a minimum of 5 hours of instruction over a minimum period of 180 days for each school year. 22 Pa. Code §§ 11-1, 11.3.

facilitator for the upcoming and any future meetings.¹¹ A facilitator would not, however, be able to force the parties to work cooperatively and collaboratively. The parties must therefore make determined efforts to engage in respectful communications, with a commitment to actively listening to the views of all team members and taking a creative and thoughtful approach to exploring available options. The Parent is also cautioned that, with a limited number of local full time autistic support programs that may be able to meet Student's needs, a summary rejection of programming and placements without due consideration, to include a tour or visit, is inconsistent with the IDEA premise for productive team collaboration. Student has many more years of school-age eligibility but that status has a finite end, and no one could disagree that an appropriate program and placement must be secured as soon as possible.

CONCLUSIONS OF LAW

1. Student was not denied FAPE over the 2020-21 school year.
2. Student was not denied FAPE over the 2021-22 school year through April 15, 2022.
3. The District did not engage in retaliation or discrimination against the Parent.
4. Student is entitled to compensatory education.

¹¹ A facilitator is a service offered by the Office for Dispute Resolution.

5. The IEP must convene to consider additional program and placement options for full-time autistic support for Student for the start of the 2022-23 school year.

ORDER

AN NOW, this 31st day of July, 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Not later than August 19, 2022, the District shall convene a meeting of Student's IEP team to include the Parent to consider options for full-time autistic support for Student in programs that can address all of Student's needs. The options may include any of those previously considered without exception. All referrals shall provide the two IEE reports for consideration. Another IEP meeting shall convene within a reasonable following Student's transition into such new program and placement and not later than thirty days thereafter.
2. The District shall provide Student with five hours of compensatory education for each day that the District's schools were in session from April 18, 2022 through the end of the 2021-22 school year. That award shall continue from the first day of school for the 2022-23 school year until Student is accepted into and able to begin attending a full-time autistic support program outside of the District. Should the District be in a position to provide a program for Student that is not outside of its schools,

the award shall end on the day that such program is made available to Student.

3. The District may offset the award of compensatory education by the number of hours it funded for private tutoring in the spring of 2022. All of the conditions and limitations on that award set forth above are expressly made a part hereof as though set forth at length.
4. The District need not take any further action.
5. Nothing in this Order should be read to preclude the parties from mutually agreeing to alter any of its terms, in writing and signed by both parties and their respective counsel.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 26181-21-22