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

ODR No. 28286-23-24

CLOSED HEARING

Student's Name:
C.C.

Date of Birth:
[redacted]

Parent(s)/Guardians:
[redacted]

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Date of Decision:
08/30/2024

Introduction, Procedural History, Unusual Demand

This special education due process hearing concerns the educational rights of a former student of the Quaker Valley School District (the Student and the District, respectively). The Student is now an adult by most legal definitions. The Student's parents (the Parents) requested this hearing. The Parents raised claims under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*, and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*. The Parents claimed that the District violated the Student's right to a free appropriate public education (FAPE) under both statutes.

To remedy the alleged FAPE violation, the Parents demanded a form of relief that is unusual in this jurisdiction. Compensatory education is a well-established remedy for substantive FAPE violations. Courts in Pennsylvania and the Third Circuit recognize two methods of calculating compensatory education awards: hour-for-hour and make-whole. These methods are described in greater detail below but, but some context is necessary to understand this matter. Using the hour-for-hour method, students receive an hour of compensatory education for each hour that their school violated their right to a FAPE. Using the make-whole method, students receive an amount and type of compensatory education that is necessary to place the students where they would be educationally, but for the violation. In this case, the Parents demanded a make-whole compensatory education award to the exclusion of an hour-for-hour compensatory education award.

This type of demand is highly unusual. Parents frequently demand both methods in the alternative, or exclusively demand an hour-for-hour remedy.[1] Demands for make-whole compensatory education remedies on their own, let alone to the exclusion of other methods, are unheard of in Pennsylvania and the Third Circuit. To my knowledge this is the first time in Pennsylvania or the Third Circuit that parents have demanded a make-whole remedy *to the exclusion* of an hour-for-hour remedy.

The Parents made no allegations about the amount and type of compensatory education that would make the Student whole. Rather, the Parents demanded that I appoint an independent expert to make that determination, and then bind the parties to the expert's determination.

The Parent's due process complaint included 15 years of allegations going back to when the Student first enrolled in the District. The District filed a

[1] Hearing officers have held that demands for compensatory education that do not specify a method are treated as pleadings in the alternative, particularly when filed by *pro se* parents.

motion to limit claims. The District's motion was based on the IDEA's statute of limitations (which also applies to the Parents' Section 504 claims) and the doctrine of laches.

To resolve the District's motion, I convened a hearing to take evidence about when the Parents knew or should have known that the District's actions amounted to special education violations. Establishing this "KOSHK" date is necessary to resolve IDEA statute of limitations defenses, and hearings to establish the KOSHK date are colloquially called KOSHK hearings. During the KOSHK hearing, the Parents confirmed that they were seeking a make-whole remedy *to the exclusion* of hour-for-hour compensatory education.

After reviewing the KOSHK evidence, I issued a pre-hearing order denying the District's motion to limit claims as moot because – as applied in this case – the Parents' exclusive demand for a make-whole remedy made the KOSHK date irrelevant.[2] While the order speaks for itself, for context, I found that the Parents must have an opportunity to present evidence about what it would take to make the Student whole, regardless of when that evidence was created:

> The Parents were clear: they are demanding a make-whole remedy and not an hour-for-hour remedy. *See* NT 25-26. As a result, the number of hours that the District violated the Student's right to a FAPE (if it did) does not matter for purposes of calculating a compensatory education award. Rather, what is necessary is evidence of the Student's current educational abilities, evidence of what those abilities would be had the Student received a FAPE, and what is required to close that gap. The duration of the violation is irrelevant to that analysis.

In the same pre-hearing order, I dismissed the District's laches defense. Also, *sua sponte* and on jurisdictional grounds, I dismissed the Parents' demand to appoint an independent expert to calculate a binding compensatory education award. I wrote:

> Hearing officers are empowered to order independent educational evaluations (IEE) at public expense. IEEs often surface information about

[2] The KOSHK date may be important to some make-whole compensatory education calculations. The method by which a remedy is calculated cannot entirely invalidate any law's statute of limitations. The holding that the KOSHK date is irrelevant is limited to the particular facts and circumstances of this case.

> children's educational needs. IEEs do not, however, formulate compensatory education or function as a substitute for a hearing officer's resolution of the issues presented. In fact, the IDEA itself details the circumstances under which parents may request an IEE at public expense, what LEAs must do in response to those requests, and how hearing officers should resolve such disputes. None of those elements are present in this case. The Parents are not demanding an IEE.
>
> The Parents' demand is inconsistent with their burden. Under *Schaffer v. Weast*, [546 U.S. 49 (2005)], the Parents must prove entitlement to the relief that they seek under a preponderance of the evidence standard. **When Parents *exclusively* demand a make-whole remedy, they must prove what remedy will make the Student whole.** The Parents cannot escape their burden through an artfully pleaded demand.

Italics original, **bold** added.

After the pre-hearing order, the parties filed extensive stipulations and a hearing on the merits convened. The parties then filed post-hearing briefs.

Issues Presented

While the parties phrase the issue somewhat differently, The issue presented for adjudication is: Did the District violate the Student's right to a FAPE under the IDEA or Section 504 during the entirety of the Student's enrollment in the District?[3]

In their closing brief, the Parents raised an additional demand, and framed that demand as an issue: "Are Parents Entitled to an Independent Educational Evaluation to Calculate the Appropriate Compensatory Education Remedy in this Case?" Compensatory education is a remedy that flows from the issues presented, not an issue in and of itself. Regardless, I accept the Parents' demand for an evaluation to calculate compensatory education both

[3] The Parents allege two violations of the Student's IDEA right to a FAPE. One of those flows from inappropriate evaluations and inappropriate communication programming. The other flows from inappropriate transition services. Scrutiny of the record, however, reveals that these issues are one and the same because any transition-based FAPE violation ultimately flows from evaluation deficiencies and program failures.

as a motion for reconsideration of my pre-hearing order denying the same, and as a new motion that is substantively different from what I have already decided. I will address the Parents' motion below.

Findings of Fact

The primary source of fact-finding in this hearing is the parties' Joint Stipulations of Fact, which is a 38-page document that includes 213 stipulated facts. Some of those facts are tables of data, each representing multiple stipulated facts.

In addition to the 213 stipulated facts, three witnesses testified, the Parents entered 22 exhibits, and the District entered 45 exhibits. After the hearing, the Parents filed five additional exhibits. The exhibits are referenced within – and form the basis of – the stipulated facts. The witness's testimony, to the extent that it was relevant to the issues presented, was consistent with the stipulations as well.

Before the parties submitted their Joint Stipulations of Fact, I explained that I would adopt any stipulated fact as if it were my own finding. No evidence entered during the hearing suggests that I should reconsider that determination. Therefore, the entirety of the parties' Joint Stipulations of Fact is hereby adopted as my own findings of fact, and as if set forth verbatim herein.[4]

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of

[4] I am cognizant of Pennsylvania regulations requiring that the "decision of the hearing officer shall include findings of fact …" 22 Pa. Code § 14.162(f). By adopting the parties' stipulations as my own findings, and incorporating them as if set forth in full, I have substantively complied with this regulation. This may frustrate those who will read a redacted copy of this decision on ODR's website, but I write for the parties. Moreover, I cannot copy or otherwise embed the Joint Stipulations of Fact into this decision and would decline to do so if I could. While the parties were appropriately cautious in their drafting, the task of further redacting the document to satisfy ODR's strict redaction requirements would be herculean (in comparison to most courts, ODR requires a stricter and more complete level of redaction). I decline to re-write the stipulations into this decision for the same reason. In the event of appeal, the Joint Stipulations of Fact will be part of the certified record that ODR will transmit to the tribunal.

judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

Applied in this case, the importance of my witness credibility determinations is diminished. The parties proceeded on a stipulated record. The parties' witnesses did not contradict each other, and their testimony was consistent with the stipulations. Even so, I find that all witnesses testified credibly in the sense that all witnesses believed what they were saying. This does not mean that I assign equal weight to all testimony. Those weight differences are referenced below, but are not outcome-determinative in this case.

Applicable Laws

The Burden of Proof

The burden of proof, generally, 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. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the Parents are the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*,

575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE*-1, 580 U.S. 386, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id* at 3015.

Third Circuit consistently interpreted Rowley to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew F.* decision in no different.

A school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. *See, Lachman v. Illinois State Bd. of Educ*., 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "*de minimis*" benefit. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the IDEA guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than *de minimis*" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate

progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress even for an academically strong child, depending on the child's circumstances.

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Compensatory Education

As described in the pre-hearing order:

> Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that they are receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Noted above, if a school violates a child's right to a FAPE, there are two methods by which a compensatory education award may be calculated: "hour-for-hour" or "make-whole." Those methods are discussed in greater detail, with citation to applicable case law, in the pre-hearing order.

In addition to that discussion, there is a variation of the hour-for-hour method that some view as a third method: "whole-day" or "full-day" compensatory education. There are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) are warranted. Such awards are fitting if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-

being" *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39.[5]

The *Jana K. v. Annville Cleona* case, *supra* and discussed in the pre-hearing order, is particularly instructive regarding the practical task of calculating compensatory education awards. *Jana K.* illustrates a preference that students should receive some form of remedy when FAPE is denied. *Jana K.* shows how that preference can be achieved when families either plead in the alternative or do not demand one method of calculation to the exclusion of all others. I subscribe to Judge Rambo's logic: If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default.

In this case, the Parents demand for a make-whole remedy to the exclusion of an hour-for-hour remedy thwarts the safety valve that *Jana K.* would otherwise provide. As explained in the pre-hearing order (and above), in the absence of an hour-for-hour fallback, the Parents must establish the amount and type of compensatory education that will make the Student whole, assuming a FAPE violation.

Discussion

Parents Presented No Evidence to Formulate a Make-Whole Remedy

The novel circumstances of this case require me to discuss damages before liability. That is, I must discuss the Parents' highly unusual demand for "make-whole" compensatory education before I determine if the District violated the Student's right to a FAPE. I do this because I must determine if the Parents have established any entitlement to the relief that they demand, regardless of the merits of their claim.

The District's primary position is that it did not violate the Student's right to a FAPE. In the alternative, the District argues that the Parents failed to

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[5] *See also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

present *any* evidence about what type or amount of compensatory education is required to repair educational harms attributable to a FAPE violation. Assuming that a FAPE violation occurred at any point during the Student's 15-year tenure, the District argues that the Parents have completely ignored their burden regarding evidence to establish a make-whole remedy. I agree.

The Parents concede this point. In their closing brief, the Parents provide no argument or analysis about what amount or type of compensatory education will make the student whole. Instead, they ask me to do a slightly different version of what I have already denied: appoint an independent evaluator to determine what compensatory education is owed, pause these proceedings until that work is done, then reconvene the hearing to take evidence on what remedy would be appropriate. The key difference between this request and their original demand for an independent compensatory education evaluation is that the Parents do not ask me to preemptively bind the parties to the evaluator's conclusions.

For the sake of argument, I will ignore the fact that I cannot grant the Parents' request to suspend these proceedings indefinitely. The IDEA establishes a regulatory timeline for due process hearings. That timeline can be extended – as it was in this case – but always to a date certain. I cannot simply stop the hearing for however long the evaluation would take. Yet, even if I had that power, I could not and would not exercise it in this case. Instead, I will do as the IDEA and the Supreme Court instructs: I will resolve the case on the record before me.

For nearly two decades, the Supreme Court has held that a party demanding relief in a special education due process hearing must prove entitlement to that which they demand. *Schaffer v. Weast*, 546 U.S. 49 (2005). In response to that holding, some states passed burden-shifting laws. For example, two years after *Schaffer,* New Jersey passed a law assigning both the burden of proof and the burden of production to school districts in special education hearings. *See* N.J.S. 18A:46-1.1. No equivalent law exists in Pennsylvania. Consequently, in the absence of preponderant evidence to establish the form of relief that the Parents demand, the Parents cannot obtain that relief.[6]

[6] In their closing brief, the Parents cite to several cases from the District of Columbia. D.C. is the home of make-whole compensatory education and the leading case on the subject is *Reid ex rel. Reid v. D.C.*, 401 F.3d 516 (D.C. Cir. 2005). Some of the cases that the parents cite suggest that it is the court's responsibility – not the parents' responsibility – to generate make-whole evidence if the parties do not produce any. Absent from the Parents' argument is reference to D.C. law that shifts the burden to public agencies in IDEA cases concerning tuition reimbursement or the appropriates of child's placement (like this case). *See* D.C. Code 25C § 38-2571.03(6)(A).

In reaching this conclusion, I recognize that evidence to establish a make-whole remedy can be difficult, costly, and time-consuming to obtain. That pragmatic reality cannot be a factor in my analysis. The Supreme Court considered and rejected a nearly identical argument in *Schaffer*. Justice O'Connor, writing for the majority, addressed the real-world difficulties parents may face in proving their IDEA claims:

> Petitioners' most plausible argument is that "[t]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *United States v. New York, N.H. & H.R. Co.*, 355 U.S. 253, 256, n. 5, 78 S.Ct. 212, 2 L.Ed.2d 247 (1957); *see also Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 626, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993). But this "rule is far from being universal, and has many qualifications upon its application." *Greenleaf's Lessee v. Birth*, 6 Pet. 302, 312, 8 L.Ed. 406 (1832); *see also McCormick* § 337, at 413 ("Very often one must plead and prove matters as to which his adversary has superior access to the proof"). School districts have a "natural advantage" in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them. *See School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 368, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). As noted above, parents have the right to review all records that the school possesses in relation to their child. § 1415(b)(1). They also have the right to an "independent educational evaluation of the[ir] child." *Ibid*. The regulations clarify this entitlement by providing that a "parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." 34 CFR § 300.502(b)(1) (2005). IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the

> government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 60–61, 126 S. Ct. 528, 536, 163 L. Ed. 2d 387 (2005).

Extending the logic of *Schaffer* to this case, there might have been ways for the Parents to come to this hearing with the "firepower" they needed. The IDEA includes a mechanism by which the Parents could have obtained an IEE in advance of this hearing. 34 C.F.R. § 300.502(b). The Parents did not take advantage of that provision but, instead, asked me to abdicate my responsibilities and exceed my jurisdiction by ordering an evaluation to formulate and bind the parties to a remedy. When that effort proved unsuccessful, the Parents waited for the record of this matter to close before requesting an evaluation for a nearly identical purpose. But *Schaffer* instructs that parents who do not avail themselves of helpful IDEA provisions must still satisfy their burden of proof.

I recognize that the pertinent part of *Schaffer* discusses only one of the two methods by which Parents may obtain an IEE at public expense. The method discussed in *Schaffer* is codified at 34 C.F.R. § 300.502(b). Nothing in that regulation specifics the purpose of an IEE at public expense. However, a threshold for obtaining an IEE at public expense through this method is a disagreement about an LEA-conducted evaluation in the context of IEP development. *See* 34 C.F.R. § 300.502(b)(1). Not only is that threshold not met in this case, but the language of the regulation strongly suggests that the intended function of an IEE at public expense is a second opinion for the purpose of resolving disputes about what special education a current student requires to receive a FAPE. [7] The evaluation that the Parents request in this hearing is not for that purpose. Rather, the purpose of the evaluation that the Parents demand is to formulate a remedy. Consequently, public funding for an IEE pursuant to 34 C.F.R. § 300.502(b) was likely not available to the Parents in this case.[8]

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[7] The Parents certainly allege that the District's evaluations were inappropriate, but those allegations do not come in the context of IEP development. The Parents raised those allegations after the Student aged out of IDEA eligibility. Nothing in the IDEA sets a timeline for parents to disagree with an LEA's evaluation, but the regulations at 34 C.F.R. § 300.502(b) unambiguously concern evaluations for the purpose of developing an appropriate IEP.

[8] I appreciate the real-world difficulty, or impossibility for some families, of funding an evaluation to establish a remedy that may or may not be owed – before requesting a hearing and while the statute of limitations runs. My obligation, however, is to apply the law and binding precedent to the facts of this case. Whether the law could or should be better attuned to circumstances like those presented in this case is not for me to say.

Separate from the method discussed in *Schaffer*, hearing officers may request an IEE at public expense "as part of a hearing on a due process complaint." 34 C.F.R. § 300.502(d). This regulation confers authority to hearing officers to request IEEs on their own motion. There are two important differences between this method and the method discussed in *Schaffer*. First the method discussed in *Schaffer* is initiated by parents while the option found at § 300.502(d) is initiated by hearing officers. Second, the method discussed in *Schaffer* details the circumstances under which IEEs at public expense become available to parents while the § 300.502(d) method is silent about when hearing officers should exercise their authority.

Jurisprudence concerning the circumstances under which hearing officers should, on their own motion, order an IEE pursuant to 34 C.F.R. § 300.502(d) is all but nonexistent.[9] In practice, Pennsylvania hearing officers exercise this authority rarely, and only in cases were an LEA's evaluation is found to be inappropriate and an IEE is necessary to ensure that a child's ongoing right to a FAPE is fulfilled. *See, e.g. In re: P.A., a Student in the School District of Philadelphia*, ODR 27567-22-23; *In re: B.L., a Student in the Owen J. Roberts School District*, ODR 25004-20-21; *In re: B.D., a Student in the Cornwall-Lebanon School District*, ODR 23213-19-20. This case is different because the Student has aged out of IDEA eligibility. No evaluation is necessary to determine what services the Student should receive under an ongoing FAPE obligation.

To my knowledge, there is only one due process decision in which a hearing officer has awarded relief similar to the relief that the Parents request in this hearing. That case, *In re: N.B., a Student in the Williamsport Area School District*, ODR 24951-2021 (11/19/2021), is not binding on these proceedings but merits serious consideration. In the *N.B.* due process decision, the gravamen of the parents' claim was that the school committed gross procedural and substantive IDEA violations through the evaluation and reevaluation process, resulting in inappropriate special education. The parents in the *N.B.* hearing proved that the school knew that evaluations were needed, delayed those evaluations by 18 months or more, and then conducted evaluations that failed nearly all of the IDEA's requirements. The hearing officer in *N.B.* found that the school violated the student's right to a FAPE over a protracted period, that those violations flowed from the school's inappropriate evaluations, and that those violations resulted in grievous, pervasive educational harms. However, the hearing officer was unable to

[9] I am aware of only one, unreported case in Pennsylvania in which a court has discussed that provision. In *Lyons v. Lower Merrion Sch. Dist.*, No. CIV.A. 09-5576, 2010 WL 8913276 (E.D. Pa. Dec. 14, 2010), the court found that 34 C.F.R. § 300.502(d) did not preclude parents from requesting a due process hearing to pursue an IEE at public expense.

formulate a compensatory education award because the school's actions and inactions resulted in the parents' inability to present make-whole evidence or hour-for-hour evidence. In fact, the school's violation of nearly every regulation concerning IDEA evaluations made it impossible for the hearing officer to determine not only what amount and type of compensatory education would make the student whole, but also made it impossible to know how many hours of appropriate special education the Student should have had. Rather than punishing the student for the school's violation, Hearing Officer Jelley ordered the school to fund a "comprehensive compensatory education independent educational evaluation." *Id* at 35.

This case is different in several ways. The Parents allege deficiencies in the District's evaluations, claiming that the evaluations fell short of the IDEA's mandate for comprehensive assessments. At the same time, the Parents rely upon the District's evaluations to argue that the Student did not make meaningful progress. The Parents make this argument by pointing to the data collected as part of the District's various evaluations to illustrate how the results of the Student's assessments did not change over time. Accepting the Parents' position for the sake of argument, the District's evaluations were necessary but insufficient. Those evaluations were, therefore, entirely different from the evaluations in the *N.B.* hearing. Unlike the evaluations in the *N.B.* case, the Parents in this matter were able to use the District's evaluations as evidence. Second, and perhaps more importantly, the school's actions and inactions in the *N.B.* case blocked those parents from presenting evidence for *either* compensatory education calculation. That sort of interference is neither alleged nor proven in this case. There is no dispute in this case about the amount of special education that the Student received.[10] If some, or all, of that special education was substantively inappropriate, there is ample evidence in the stipulated record to calculate an hour-for-hour remedy. Similarly, there is no dispute in this case about the nature and pervasiveness of the Student's disabilities or the overarching impact of those disabilities upon every aspect of the Student's life. As a version of hour-for-hour relief, there is ample evidence in the record to support full-day relief if the Parents had established a FAPE violation.[11]

In sum, *N.B.* (a not-binding but well-reasoned due process decision) stands for the proposition that when a school makes it impossible for parents to

[10] There are disputes in this case about the amount of special education that the Student should have received. The record of this is sufficient to resolve those disputes to enable an hour-for-hour or whole-day calculation.

[11] If the Parents had demanded hour-for-hour or full-day compensatory education as an alternative, the District's statute of limitations defense would come back into play and the KOSHK date would be relevant. Instead, the Parents consistently confirmed that they seek a make-whole remedy to the exclusion of other methods.

establish entitlement to compensatory education under either recognized standard, hearing officers may order a compensatory education evaluation. Doing so is, by necessity, a last resort. It is an exercise of the hearing officer's equitable authority to ensure that children are not left without a remedy for a FAPE violation. This case is different from *N.B.* for many reasons but, primally, there is an abundance of evidence that would enable me to calculate an hour-for-hour or full-day compensatory education remedy. Such evidence is almost always present, which may explain why Pennsylvania hearing officers have ordered an evaluation to formulate compensatory education only once in the history of the IDEA. Regardless, given the absence of factors contributing to the result of the *N.B.* decision, and upon consideration of the evidence presented in this case, I decline for the second time to appoint an independent evaluator to formulate a compensatory education award. To the extent that the motion embedded in the Parents' closing statement is a request for reconsideration, that motion is denied. To the extent that motion is something different, that motion is denied as well. I will not reopen the record of this case, require the District to fund an IEE for a purpose not contemplated in the IDEA, and suspend the hearing timeline in a way that the IDEA does not permit.

Only the Parents know why they chose to demand a make-whole compensatory education remedy to the exclusion of other formulations. That choice is confounding, especially when the stipulated record would enable the most common method. Having confirmed and verified this choice several times as the hearing progressed, I now hold the Parents to their demand. If a FAPE violation occurred, it was the Parents' obligation to prove what type and amount of compensatory education would make the Student whole. The Parents did not satisfy their burden. Consequently, the Parents' demand for compensatory education is denied.

Other IDEA Demands

The Parents' due process complaint included four demands in total. *See Complaint* at 10. The third and fourth demand were for a compensatory education evaluation.[12] The second demand was for compensatory education. Discussed above, the Parents' second, third, and fourth demands have been denied. That leaves the Parents' first demand: "A finding that District failed to provide FAPE from the date that [Student] enrolled in the District through the date of [Student's] placement at [a private placement]." This is a demand for declaratory relief. If the Parents have proven a FAPE

[12] The language that the Parents used to demand an evaluation to formulate compensatory education is one of numerous examples of the Parents' demand for a make-whole remedy to the exclusion of an hour-for-hour or "quantitative" remedy. *See Complaint* at 10, demand #4.

violation, they are entitled to this declaratory relief regardless of their demand for compensatory education.

The stipulated record of this hearing includes evidence of significant, pervasive violations of the Student's right to a FAPE over the Student's entire enrollment in the District. The record overwhelmingly supports the Parents' contention that the District failed to appropriately address the Student's inability to communicate. The Student's inability to communicate is the core deficit function of the Student's disability. The severity of this need was always well known to both parties. The Student's inability to communicate was extensively documented by the District through implementation of the Student's IEPs and through multiple evaluations. Despite this overwhelming need, the District offered a smaller and smaller amount of support in this domain. Worse, the District's IEPs failed to say with any specificity or consistency what special education the District would provide in response to the Student's primary need. The Stipulated facts concerning the Student's actual programming paint a picture of a haphazard, unsystematic program of trial and error in which methodologies, practices, and devices were trialed – seemingly at random – and then abandoned before new systems were selected.

There are times when trial and error is the correct path forward, particularly when communication technology is involved. Trial and error is the hallmark of the SETT framework. The District's effort to find systems, methodologies, and technologies that the Student might be able to use is laudable in theory. In practice, that theory fell apart in this case. Assuming the best intentions (and there is no reason not to), the District's various attempts to find something that would work for the Student do not explain or excuse the reduction in programming over time that targeted the Student's ability to communicate. In this regard, the Parents are correct: nothing that the District did to improve the Student's ability to communicate worked and, in response to that lack of progress, the District offered less.

IEPs are not judged in hindsight, and lack of actual progress is often a red herring. An IEP that was reasonably calculated to offer a FAPE at the time it was drafted may not work as intended. What matters more is how a school responds to a lack of progress. When an IEP proves ineffective, it is the LEA's obligation to reassess and try something different. Here, again, the District's use of multiple methods over time is reasonable in theory. In practice, the massive, stipulated record of this case shows the District's choices were not systematic or implemented with fidelity. And even if the District's broad authority to choose methodologies excuses the District's selection process, it is baffling that the District reduced the amount of special education targeting the Student's communication needs over time.

As part of its defense, the District highlights the parities' disagreements about what method of communication was, or could be, effective for the Student. Starting in 2013, the Parents came to believe that a form of facilitated communication was effective for the Student. The District concluded that facilitated communication is a dangerous pseudo-science that in no way enabled the Student to communicate. The Parents' private use of facilitated communication resulted in allegations of abuse, as frequently happens with such methodologies. *See* NT at 207.[13] I find that the District had no obligation under the IDEA to acquiesce to the Parents' preferred communication methodology.

To the extent that this hearing presents an IDEA methodology dispute, the District must prevail. But that methodology dispute does not resolve the underlying FAPE claim. The District's refusal to permit facilitated communication was wise, but in no way diminished the District's overarching FAPE obligation. The IDEA is clear that the FAPE obligation rests exclusively with the District. While the IDEA did not require the District to adopt the Parents' preferred methodology, the IDEA did obligate the District to provide a FAPE. For all the reasons discussed above, the District fell short of its FAPE obligation under the IDEA.

Section 504 Claims

Portions of this case are similar to *Le Pape v. Lower Merion Sch. Dist.*, 103 F.4th 966 (3d Cir. 2024). Like this hearing, *La Pape* involved a dispute over facilitated communication.

La Pape concerns the effective communications provisions of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq*. I have no direct jurisdiction to hear an ADA claim. I do, however, have jurisdiction to hear the sub-set of Section 504 claims that arise coextensively with 22 Pa Code § 15 (Chapter 15). Both *La Pape* and another recent Third Circuit case, *B.S.M. v. Upper Darby Sch. Dist.*, 103 F.4th 956 (3d Cir. 2024), stand for the proposition that separate analysis is required for IDEA and Section 504

[13] The shocking correlation between use of facilitated communication and unfounded allegations of abuse is well-documented. The absence of reputable, peer-reviewed research that facilitated communication elicits communication from the person with communication deficits, as opposed to conscious or subconscious communication from the facilitator, is also well documented. The citations in the District's closing brief on these topics provide an incomplete but representative sample.

claims if a student's rights under Section 504 are different from those under the IDEA.[14]

Like the ADA, Section 504 includes an effective communication provision at 34 C.F.R. § 105.40. That provision does not fall squarely within my Chapter 15 jurisdiction for two reasons: First, Chapter 15 does not apply to students who are protected by Pennsylvania's IDEA implementing regulations at 22 Pa Code § 14 (Chapter 14). *See* 22 Pa Code § 15.2. Second, the purpose of Chapter 15 is to implement Section 504 regulations at 34 C.F.R. § 104, not § 105. Even so, § 105 concerns enforcement of § 104, and the Third Circuit, speaking through *B.S.M.* and *La Pape*, has indicated a need for separate analysis – especially in cases involving effective communication. In an abundance of caution, I examine the Parent's Section 504 claims separately, to the extent that they are designable from their IDEA claims.

The ADA's "effective communication requirement imposes a greater obligation of equal access than does the [IDEA's] FAPE requirement." *La Pape* at 980. Under the ADA's effective communication requirement, a school "shall give primary consideration to the requests of individuals with disabilities." 28 C.F.R. § 35.160(b)(2). In *La Pape*, the Third Circuit emphasized the primacy of the Student's preference in an ADA effective communication analysis.

The applicable Section 504 regulation is nearly identical. In "determining what type of auxiliary aid is necessary, the Department shall give primary consideration to the request of the individual with handicaps." 34 C.F.R. § 105.40(a)(1). The logic of *La Pape* should apply equally to this Section 504 regulation.

I deny the Parents' Section 504 claims for three reasons: First, the Section 504 claims raised in the complaint are coextensive with their IDEA claims – no issue concerning Section 504's effective communication provision is pleaded. Second, there is no preponderance of evidence in the record that *Student* ever requested facilitated communication. Third, even if the District violated Section 504, the only demands are for make-whole compensatory education (denied above) and declaratory relief (provided above).

The complaint does not delineate which of the District's actions and inactions give rise to claims under the IDEA and which give rise to claims under Section 504. Section 504's effective communication provision is not

[14] United States Departments of Education and Justice take the position that those rights are often co-extensive and remediated through IDEA procedures. *See* USDOJ and USDOE Joint FAQ on Effective Communication, https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf

referenced in the pleadings (which were filed before *B.S.M.* and *La Pape*) or in the closing arguments (which were filed after *B.S.M.* and *La Pape*). The question of whether the District violated the Student's right to effective communication under Section 504 is not before me. However, *B.S.M.* and *La Pape* are new, and it is not clear whether the IDEA's low pleading thresholds and presumptive sufficiency carry over into Section 504 effective communication claims. *See* 20 U.S.C. § 1415(c)(2). Continuing in an abundance of caution, I address the Section 504 effective communication claim separate from IDEA claims as the Third Cricut instructs.[15]

Discussed above, there is no preponderant evidence in the record that facilitated communication was an effective means of communication for the Student. Nothing in Section 504 obligates schools to adopt a preferred but ineffective means of communication. The Parents' belief that facilitated communication worked for the Student is sincere. The Parent's testimony in this regard is afforded no weight at all. Belief is not proof. Nothing in the record substantiates the Parents' belief that facilitated communication was effective for the Student because nothing in the record establishes that the Student communicated anything at all through facilitated communication (as opposed to the facilitator's own communication).

Further, there is no preponderant evidence in the record that facilitated communication was the Student's "requested" or preferred method of communication. The Parents' preference is clear but, under Section 504's effective communication regulation, the Parents' preference is irrelevant. Primary consideration must be given to the "individual with handicaps." 34 C.F.R. 105.40(a)(1)(ii). This is no different from the ADA regulation concerning the preference of the "individual with disabilities." 28 C.F.R. § 35.160(b)(2). That person is the Student, and the large record of this case is silent concerning the Student's preferences.

Finally, even if the District violated Section 504's effective communication provisions, the Parents demand the same relief that they demand for their IDEA claims: make-whole compensatory education and declaratory relief. The impossibility of make-whole compensatory education is discussed above. Declaratory relief is provided above.

[15] This also continues my assumption that I have authority to hear the issue. There are strong indications that I do not have authority to hear the issue. My jurisdictional analysis in this section should not be viewed as definitive or conclusive.

Summary and Conclusions

The Parents allege that the District violated the Student's special education rights under both the IDEA and Section 504. To remedy those alleged violations, the Parents demand make-whole compensatory education to the exclusion of other forms of compensatory education. The Parents also demand declaratory relief.

To obtain a make-whole compensatory education award, the Parents were obligated to prove what the Student's educational performance would be today, but for the FAPE violation, and the type and amount of compensatory education necessary to close the gap. Recognizing the difficulty of that standard, the Parents confirmed what remedy they demand. Several times throughout the hearing, the Parents and confirmed that their demand for a make-whole remedy was to the exclusion of other methods. The Parents then put on no evidence to enable the hearing officer to formulate a make-whole compensatory education award. The Parents' demand for compensatory education is, therefore, denied.

The Parents did, however, prove that the District violated the Student's right to a FAPE under the IDEA. There is more than a preponderance of evidence in the record that the District failed to appropriately address the Student's communication needs. The Parents are entitled to declaratory relief that the District violated the Student's right to a FAPE under the IDEA.

Two recent decisions from the Third Circuit, *Le Pape v. Lower Merion* and *B.S.M. v. Upper Darby*, both *supra*, create ambiguity about my jurisdiction to hear Section 504 effective communication claims. Giving the timing of this hearing relative to those decisions, I consider the issue without drawing firm conclusions about the extent of my authority.

Assuming that I have jurisdiction to consider the issue, and further assuming that the IDEA's low pleading standards put the issue before me, *La Pape* and *B.S.M.* instruct that Section 504's effective communication provision must be examined separately from the IDEA's FAPE obligation. Through that analysis, I find no violation of 34 C.F.R. § 105.40(a)(1). There is no evidence that facilitated communication was effective communication for the Student, or that the Student preferred facilitated communication to other methods.

The order below provides the declaratory relief to which the parents are entitled and denies all other claims and remedies.

ORDER

Now, August 30, 2024, it is hereby **ORDERED** as follows:

1. The District violated the Student's right to a FAPE under the IDEA by failing to offer appropriate special education to address the Student's communication needs.

2. The Parents' demand for compensatory education is **DENIED.**

3. The Parents' claims arising under Section 504 that are not coextensive with their IDEA claims are **DENIED.**

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER