

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:

24443-20-21

Child's Name:

Z.B.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

4/12/21

INTRODUCTION

The Student¹ (hereafter Student) is a [redacted] District resident eligible for special education under the Individuals with Disabilities Education Act (IDEA)² as a child with multiple disabilities and visual impairment. In December 2020, the Parents filed a due process Complaint against the District alleging it failed to provide Student with a free appropriate public education (FAPE), as required under the IDEA, Section 504 of the Rehabilitation Act of 1973 (Section 504), and the American with Disabilities Act (ADA), as well as the federal and state regulations implementing those statutes.³ This case proceeded to a multi-session hearing convening virtually due to the COVID-19 pandemic and resulting school closures.⁴ During the hearing, the Parents sought to establish that the District failed to provide Student with FAPE for its refusal to provide an in home one to one (1:1) to Student during virtual instruction. As a remedy, the Parents sought compensatory education, a determination that the District discriminated against Student, and an order requiring the District to provide physical 1:1 home support to Student. The District maintained that its educational programming, as offered and implemented, was appropriate for Student and that no remedy is due. For reasons that follow, the claims of the Parents are granted.

ISSUES

- 1) Did the District deny Student a FAPE during the 2020-2021 school year for its refusal to provide in-person, at-home services during the days of virtual instruction?
- 2) If the District denied Student a FAPE, is compensatory education owed for every day of virtual instruction from the start of the 2020-2021 school year?

¹ In the interest of confidentiality and privacy Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of 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 implementing regulations are set forth in 22 Pa. Code § 14.010-14.163 (Chapter 14).

³ The applicable federal and state regulations implementing Section 504 are found at 22 Pa. Code Chapter 15, and 34 C.F.R. Section 104.101 et seq.

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number.

- 3) Is Student entitled to in-person, at-home services during the days of virtual instruction for the remainder of the 2020-21 school year?
- 4) Did the District's actions and inactions violate Student and the Parents' right to be free from discrimination and to receive reasonable accommodations under Section 504 of the Rehabilitation Act and the ADA.

FINDINGS OF FACT

1. Student is currently [redacted] years of age and enrolled in the District. (P-6)
2. [Redacted.] In October 2018, the County Intermediate Unit (IU) evaluated the Student. The Parents' concerns included Student's aggression, communication needs, difficulty with routine, and tantrums (head banging, head butting, biting, pinching, pulling hair). (S-1; N.T. 33)
3. The IU evaluation determined Student was legally blind. Student's medical diagnoses included [redacted], Autism Spectrum Disorder (ASD), allergies, asthma, constipation, and developmental disability. (P-1, S-1)
4. Based on Student's disability/diagnosis of visual impairment, Student was determined in need of specially designed intervention/instruction (SDI) to participate in typical activities and routines. (S-1, p.20)
5. During the 2018-2019 and 2019-2020 school years, the Student received early intervention services at an approved private school (APS) for visually impaired children. (P-2, P-4; N.T. 33, 41-42)
6. At the APS, Student received specialized instruction, a personal care assistant (PCA), occupational, physical, and speech therapy, behavior support, and transportation services. (P-2)
7. On December 27, 2019, the IU completed a reevaluation of Student (P-5)
8. On June 10, 2020, to prepare for the transition to 2020-2021 kindergarten school year, the District's IEP team met to develop educational programming for Student. (S-3, S-4; N.T. 39)
9. The June 2020 IEP contained special considerations that noted Student was blind or visually impaired, had communication and assistive technology (AT) needs, and exhibited behaviors that impeded learning. Other needs included dependence on an Epi-pen for allergies and an inhaler for asthma. (P-6, S-3)

10. The June 2020 IEP present levels noted Student as an engaged learner, with a short attention span, ability to follow simple directions, and that 1:1 PCA services were needed five days a week to assist in managing behaviors and allow participation in educational programming. (S-3, p. 8)
11. The June 2020 IEP behavior summary from April 2020 noted Student displayed a decrease in aggressive behaviors but still had escape-related behaviors that impeded full access to the learning environment. Student was reportedly able to follow one step directions 33% of the time and required verbal and physical prompting most the time. The PCA reported Student's transition behaviors were inconsistent and that the time spent taking a break decreased. (S-3, p. 16)
12. The June 2020 IEP contained present levels of academic achievement and functional performance, measurable annual goals, related services, and specially designed instruction (SDI), supports for school personnel, and an ESY determination. (P-6)
13. The June 2020 IEP offered goals designed to address speech/ASL, tabletop tasks, OT, sustaining attention with auditory cues, following directions, trailing with a human guide, travel with an alternative mobility device (AMD), sensory-seeking behaviors, stepping, and squatting. (P-6)
14. The speech goal focused on the use of American Sign Language (ASL) throughout the school day. The tabletop goal expected Student when given a tabletop task to use hands to "put in" or "put on" and search for items. The OT goals focused on fine motor and self-care tasks. The auditory cueing goal expected Student to tap in the direction of an object after receiving a cue, and use left to right tactual scanning to locate an object. The following directions goal expected Student to demonstrate an action or locate a body part with a one step direction. The trailing goal expected Student to use a human guide to trail for 25 feet. The AMD goal expected Student to use an AMD for 35 feet with limited physical or verbal prompts. The sensory seeking goal expected Student to engage in two step functional/sensory play for up to 5 minutes. The stepping goal expected Student to step up a four-inch step height or greater without physical assistance. The squatting goal expected Student to maintain a squat during functional play. (P-6, pp. 23-29)
15. Program modifications and SDI in the June 2020 IEP included a timer for auditory cues with counting and tapping, tactual cues for change of direction, sensory breaks, work try, immediate positive reinforcement, adaptive feeding utensils, use of (AMD) during transitions, use of ASL, and a human guide when traveling. (P-6, S-3; N.T. 50-54)
16. Many of the program modifications in Student's IEP cannot be implemented without an adult assisting the Student. (N.T. 50-53)
17. Related services included a personal care assistant (PCA) for 6.75 hours/school day, 5 days/week as permitted by the District calendar, specialized transportation, occupational therapy (OT), speech-language therapy, physical therapy, orientation and mobility services, vision support and school health services. (S-3, p. 33)

18. The June 2020 IEP determined that Student was eligible for ESY. The educational placement proposed was full-time, multi-disabilities placement. (S-3, p. 36)
19. On July 11, 2020, the Parent agreed to the proposed program and placement as set forth in the June 2020 IEP. (P-6)
20. After the June 2020 IEP meeting, the Parent contacted the District with concerns that included Student has shown “more and more aggression” toward others and himself, prompting the use of medication. The Parent indicated that Student [has self-injurious and aggressive behavior] when trying to escape. (S-3, p. 17)
21. At the beginning of the 2020-2021 school year Student entered kindergarten. The District offered only remote instruction to all Students in the District from August 31, 2020 until September 11, 2020. (N.T. 40, 269)
22. Student is unable to wear a mask and requires one on one monitoring because of daily self-injurious behaviors that include [redacted]. (P-9; N.T. 31-32)
23. From September 14, 2020 to September 29, 2020, Student participated in a hybrid learning model as a complex learner, receiving in person instruction at the District elementary school on Mondays and Thursday from 8:30 – 11:30. After returning home, Student participated in virtual instruction in the afternoon. During this time, Student received only virtual instruction on Tuesdays and Fridays.⁵ On Wednesdays, Student received asynchronous instruction offline, with a learning coach, on skills delineated in the IEP. During the periods of virtual instruction, the Parent provided one on one reinforcement to Student for a single 20-minute session a day. (P-8; N.T. 55-57, 101, 129, 187-188, 269-270)
24. Student is a tactile learner requiring prompting that includes physical hand-over-hand and hand under hand guidance. As Student becomes more aware of goal, prompting can occur on the elbow and other faded prompting. After completion of a task, Student expects immediate positive reinforcement from someone in proximity like an edible (cheerios, raisins) or through vestibular motion (rocking). Most of Student’s IEP goals require physical prompting or assistance for implementation. (P-6, P-15, P-28, P-31; N.T. 50, 34, 114)
25. By September 29, 2020, the Student transitioned to a hybrid model with four days of in-person instruction from 8:30-11:30 (Monday, Tuesday, Thursday, and Friday) and afternoon virtual instruction. Wednesday remained the asynchronous instruction day for Student. (P-10; N.T. 57, 187-188, 270, 273)
26. The Student needs a human guide to navigate all locations. Although an iPad is used during virtual instruction, Student is unable to see the tablet. (N.T. 47, 82)

⁵ Virtual instruction occurred from 9:00 a.m. to 3:10 p.m. (P-8; N.T. 269-270)

27. On October 8, 2020, the District closed the elementary school building attended by the Student because of a COVID concern. Citing Student's complex needs and health issues, the Parents expressed concern about a return to the classroom with a full student body. The Parents requested 100% virtual instruction and requested an in home 1:1 to facilitate Student's learning. (P-9, P-11, S-13, p. 5; N.T. 58, 189)
28. On October 9, 2020, Children's Hospital of Philadelphia (CHOP) through a letter advised that in-home support to assist with virtual school was medically necessary. On October 9, 2020, Student's allergy, and asthma specialists, through a letter, indicated that in-home educational support would benefit Student because of the inability to consistently wear a mask. (P-12, P-13; N.T. 107-109)
29. On October 9, 2020, the Parent advised the District of their decision for Student to receive 100% virtual instruction and requested 1:1 support in their home. The Parents further indicated their willingness to send Student back to the elementary school for in person instruction, assuming no more health setbacks, until a resolution could be reached. (P-11, p. 1; N.T. 109, 115, 133)
30. To substantiate the need for virtual instruction of Student, the Parents provided the District with recommendations from the Student's treating physicians. (P-12, P-13; N.T. 60, 106-109)
31. On October 27, 2020, an IEP revision meeting was held with the District and the Parents to discuss the assignment of a 1:1 to Student during times of virtual educational instruction in the home. (P-15, p. 14; N.T. 62-65)
32. The October IEP reported that in the classroom Student engaged in low intensity and high intensity self-injurious behaviors. During virtual instruction, it was reported that Student sat quietly during instruction and participated with assistance. (P-15, p. 25)
33. The October update to Student's IEP indicated that Student would receive a 1:1 PCA during in-person instruction to assist with self-care skills, IEP goals, implement strategies of ABA, reinforce task completion, and prompting. Student was also to be provided with a 1:1 virtual PCA during virtual instruction to assist with prompting when needed. The IEP goals remained unchanged, (P-15; N.T. 62)
34. On November 3, 2020, the Parents contacted the District with concerns, including the adherence CDC guidelines and the number of individuals in the school building and classroom. The District responded that it followed guidance from the County Health Department, and 10-12 students would be assigned per classroom. (P-16; N.T. 148)
35. On November 6, 2020, the District issued a NOREP that denied the Parent's request for an in-home 1:1 PCA for Student during times of virtual instruction because potential, health, safety, and liability concerns related to the pandemic prevented the District from supporting sending staff members to the home. (P-17, p. 2, S-6; N.T. 67)

36. The November 6 NOREP indicated the District would provide Student with a 1:1 PCA during in-person instruction to assist with self-care skills, IEP goals, and implement strategies of ABA, provide reinforcement, and provide prompting. The District offered to provide a virtual 1:1 PCA to Student during virtual learning to assist with prompting, when needed. (P-17, S-6)
37. Student's last day of in-person instruction in the District was November 13, 2020. (P-28, p. 2; N.T. 278)
38. On November 14, 2020, the Parents rejected the NOREP, reiterated their intention for Student to receive all virtual instruction, and requested in-home, 1:1 support to facilitate virtual learning. The Parents requested an informal meeting to discuss the District's recommendations. (P-18, P-19, P-20)
39. On November 16, 2020, the Parents advised the District that they could not act as Student's 1:1 because of the need for intensive physical prompting and calming from aggressive and self-harming behaviors. The Parents offered to set up Student's iPad in front of Student while in the rocking chair. The Parents also requested assistance with identifying strategies that would facilitate Student's virtual learning experience. That same day, the District acknowledged the Parents' support concerns and advised administration would be in contact to set up a meeting. (P-21; N.T. 68-69, 274, 278)
40. During virtual instruction, Student sat in a rocking chair or a chair with straps. When dangerous or self-injurious behaviors arose, Student was removed to an enclosed bed or other secure area in the home for the remainder of the session. Student's most intense negative behaviors occurred when the Parent acted as the 1:1. (N.T. 111, 314-315, 336-337)
41. On November 17, 2020, the District decided to offer only virtual instruction to its students until January 4, 2020. During this time, Student was scheduled to receive virtual instruction on Monday, Tuesday, Thursday, and Friday. On Wednesdays, Student would receive asynchronous instruction. During times of virtual instruction, Student would receive the services of a virtual 1:1 PCA. (P-28, p. 2; N.T. 188, 273)
42. From November 16 to January 11, 2021, the Parents did not log Student in for any special education classes. Student did attend the morning meeting for attendance, afternoon meetings when held and occasionally some general education classes like music. (N.T. 101-104, 116-117, 121-122, 126, 278)
43. On December 4, 2020, the District completed a functional behavioral assessment (FBA) of Student. For inclusion in the FBA, Student was observed only during classroom, face-to-face instruction. During the observation, Student engaged in severe problem behaviors making it difficult to maintain safety. (P-27; N.T. 211, 230)

44. On December 8, 2020, the District issued a NOREP refusing the Parents' request for a 1:1 to support Student in the home while receiving virtual instruction. On December 11, 2020, the Parents rejected the NOREP. (P-28, pp. 1-4)
45. On December 9, 2020, the Parents requested clarification as to whether Student's iPad should be set up without the 1:1 aide. The District did not respond. (P-26, p. 1; N.T. 70)
46. On December 18, 2020, the District developed a positive behavior support plan (PBSP) for Student (P-27, P-30; N.T. 72, 73, 213)
47. On December 21, 2020, an IEP revision meeting occurred to discuss the results of the FBA, review the PBSP and update Student's IEP with a behavior goal. The behavior goal expected Student to engage in socially acceptable behaviors and decrease episodes of maladaptive behaviors. All other IEP goals were unchanged. (P-31, P-33, S-10; N.T. 216-217)
48. Student's IEP goals require physical prompting or assistance to be implemented. (P-6, pp. 23-29, P-15, pp. 32-38, P-28, pp. 33-39, P-31, pp. 35-42)
49. On December 22, 2020, the Parents requested a due process hearing. That same day, the District closed for winter break. (P-32)
50. On December 23, 2020, the District issued a NOREP to the Parents that denied a 1:1 in the Student's home during virtual instruction. (P-33, P-35, S-10)
51. In December 2020, the District provided the 2021 virtual academy guide to students and families. In the guide, a learning coach's role and responsibilities were outlined to encourage breaks when appropriate, motivation for lesson completion, prompting the student to communicate with the teacher, asking student what was learned at the end of the day, answer minor questions, and assist with assignments, implement some learning activities. The Parent received the guide. As Student's learning coach, the Parent would need to set up and monitor the iPad, organize materials, maintain and supervise the engagement and safety of the learner. (P-34, S-12; N.T. 121, 133, 190)
52. The Parents have responsibility for four children under the age of nine, two with special needs. They are willing to serve as a learning coach for Student. (P-26, p. 1; N.T. 79-80)
53. On January 4, 2021, the District resumed classes with virtual instruction provided until January 11, 2021. (P-39; N.T. 134, 151)
54. On January 19, 2021, the BCBA conducted an observation of Student during virtual instruction. A second observation occurred the day before the first due process hearing session. Each observation lasted for 20-30 minutes. During the observations, the BCBA

did not observe Student engaged in maladaptive behaviors like those exhibited in the classroom. (N.T. 215, 231)

55. On January 25, 2021, all K-6 District students were offered the option of in-person or virtual instruction. (N.T. 130, 153-154)

56. The District did not assess Student's home or undertake measures to determine whether in-home 1:1 services during virtual instruction could safely be implemented. (N.T. 177-183)

57. Student receives wraparound TSS services in the home supported by a virtual BCBA. To receive the in-home services, the Parents agreed to a safety protocols that include the wearing of masks, temperature checks. The Parents limit outside contact. Student does not leave home except for medical appointments. (N.T. 36-37, 109-110, 365-386)

Joint stipulation placed on hearing record:

Since the filing of the due process complaint in this matter, the District has issued to the Parents another IEP and NOREP. That IEP and NOREP do not resolve the issue of in-person home support during virtual instruction raised in the original complaint. The parties agree that no new due process complaint is necessary to address that issue and that the issue as raised in the original due process complaint and persisting in the subsequent IEP and NOREP can be subsumed and addressed in the currently scheduled proceeding.

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

The Burden of Proof

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence that the moving party is entitled to the relief requested. The burden of going forward simply determines which party must present its evidence first, a matter that is within the discretion of the hearing officer. The burden of persuasion, in this case, was borne by the Parent, the filing party. 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. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here. Whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. *Id.*

Witness Credibility

It is the responsibility of the hearing officer, as factfinder, to determine the credibility and reliability of witnesses’ testimony. 22 Pa. Code §14.162 (requiring findings of fact); *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*, 88 A.3d 256, 266 (Pa. Commw. 2014) (it is within the province of the hearing officer to make credibility determinations and weigh the evidence to make the required findings). This hearing officer found each of the witnesses to be generally credible, testifying to the best of his or her ability and recollection concerning facts necessary to resolve the issues presented. The findings of fact were made as necessary to resolve the issues; thus, not all the testimony and exhibits were explicitly cited when unnecessary. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties’ comprehensive closing statements.

General IDEA Principles

The IDEA requires 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. 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 a child to benefit educationally from the program and comply with the procedural obligations in the Act. The State, through its local educational agencies (LEAs), meets the obligation of providing FAPE to eligible students 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). Fairly recently, the U.S. Supreme Court observed that 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). “A focus on the particular child is at the core of the IDEA.” *Id.*, ___ U.S. at ___, 137 S. Ct. at 999, 197 L.Ed.2d at 349-50 (2017) (citing *Rowley* at 206- 09) (other citations omitted). 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). Rather, the law demands services are reasonable and appropriate considering a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Endrew F.*, *supra*; *Ridley*, *supra*; see also *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Least Restrictive Environment

Another critical premise in the IDEA is the obligation that eligible students receive an education in the “least restrictive environment” (LRE) that also satisfies meaningful educational benefit standards. To the maximum extent appropriate, children with disabilities, including those in public or private institutions or other care facilities, must be educated with children who are not disabled. Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur 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 *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).

Section 504 and ADA Principles

In the context of education, Section 504 and its implementing regulations “require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); see also *Lower Merion School District v. Doe*, 878 A.2d

925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a). Under Section 504, “an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of” the related subsections of that chapter, §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b). The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit”. *Ridgewood, supra*, 172 F.3d at 247. Significantly, “[t]here are no bright-line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not.” *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood, supra*, 172 F.3d at 253. With respect to the ADA issues, the substantive standards for evaluating claims under Section 504 and the ADA are also essentially identical. *Ridley School District. v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those statutes. See, e.g., *Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). In this case, the coextensive Section 504 and ADA claims will be addressed together.

A student with a disability who is otherwise qualified to participate in a school program and was denied the benefits of the program or otherwise discriminated against based on disability, has been subject to disability discrimination in violation of Section 504 protections. (34 C.F.R. §104.4; *S.H. v. Lower Merion School District*, 729 F. 3d 248 (3d Cir. 2013)). A student who claims discrimination in violation of the obligations of Section 504 must show deliberate indifference on the part of the school district in its purported acts/omissions. *S.H.*,

Parents’ Claims

This Student has complex educational, behavioral, and functional needs, including blindness, Autism, and other impairments necessitating an array of services. Student is unable to wear a mask. At four, Student received early intervention services through the County IU to address developmental concerns (communication, Autism Spectrum Disorder (ASD), allergies, asthma) and behavioral concerns (tantrums, headbanging, head butting, biting, pinching, pulling hair). During the 2018-2019 and 2019-2020 school years, Student attended an APS for visually impaired children supported by related services that included a school day 1:1 PCA. In June 2020, in preparation for transition to kindergarten, the District and Parents developed an IEP using the December 2019 evaluation previously completed by the IU. Student entered kindergarten during a global pandemic at the commencement of the 2020-2021 school year with an IEP that offered a breadth of goals, specially designed instruction, and related services. Those related services included OT, PT, speech-language, vision support, orientation, and mobility support, and a notably a school day 1:1 PCA.

This District, like many throughout the Commonwealth of Pennsylvania, started the 2020-2021 school year, offering only remote instruction to its students. In mid-September, the District transitioned to a hybrid model where “complex learners,” like Student, received a combination of in-person and remote instruction. During times of virtual instruction, a Parent, who also has responsibility for other special needs children in the home and employment demands, provided limited assistance to Student as a 1:1 to support.

In October, the District closed the elementary school building attended by the Student because of a COVID concern. That same day, the Parents contacted the District, expressed concern about a return to the classroom with an entire student body, and requested that Student receive 100% virtual instruction, supported by an in-home 1:1 to facilitate learning, as mandated by the IEP. To substantiate the need for virtual instruction, the Parent provided the District with recommendations from Student’s treating physicians that in-home educational support was medically necessary and beneficial because of Student’s inability to wear a mask and underlying health concerns.

After an October IEP revision meeting, the District issued a NOREP that denied the Parent's request for an in-home, school-day 1:1 PCA on the grounds that potential health, safety, and liability concerns related to the pandemic prevented the District from supporting sending staff members to the home. The Parents rejected the NOREP, reiterated their intention for Student to receive all virtual instruction, and requested 1:1 support. They later advised the District that Student's need for intensive physical prompting, aggression, and self-harming behaviors made it difficult to act as Student's 1:1. The Parents offered to set up an iPad in front of Student while in the rocking chair but requested assistance with identifying strategies to facilitate virtual learning. Ostensibly waiting for a reply from the District, the Parents did not log Student in for any special education classes until later in January, resulting in numerous missed school days. After the District completed an FBA, developed a PBSP, another IEP meeting resulted in a NOREP rejecting the Parent's request for an in-home 1:1 for Student during virtual instruction, the Parents requested this due process hearing.

The Parents assert that for Student to meaningfully benefit from educational programming and receive FAPE, virtual instruction in the home is necessary with a full school day, 1:1, as the IEP mandates. The District counters safety concerns weigh against sending a 1:1 to Student's home, the IEP can be implemented without home- in person support and that no legal authority supports the Parents' position. The Parents have sustained their burden of proof in this matter that the District's refusal to provide an in home 1:1 to Student on days of virtual instruction denied Student a FAPE.

Basic Education Circulars (BEC), issued by the Pennsylvania Department of Education, offer guidance on the implementation of law, regulation, and policy applicable to the issues in this case.⁶ The relevant BEC summarizing the responsibilities of a District and its use of 1:1 support is succinctly stated. Whenever an IEP team or Section 504 team determines that a student with a disability requires one-to-one support services for all or part of the school day, the LEA is responsible for the provision of this service without delay, even if that means using LEA resources (including additional staff) to provide one-to-one support services. As such, the responsible LEA must ensure that all necessary services and supports required by an IEP or 504

⁶ <https://www.education.pa.gov/Policy-Funding/BECS/Pages/default.aspx>

Service Agreement are provided in a timely manner.⁷ One-to-one support is individualized adult support provided to address the behavioral and care needs of a student with a disability, over and above the individualized educational support that the student would normally receive from the teaching staff, including paraprofessionals. A personal care assistant provides one-to-one support and assistance to a student, including support and assistance in the use of medical equipment (for example, augmentative communication devices; activities of daily living; and monitoring health and behavior). 22 Pa. Code § 14.105. Personnel.

In addition to a PCA, Student's educational program also mandated the services of a TSS. Therapeutic Staff Support (TSS) services are one-to-one support services that are authorized and funded through the Office of Medical Assistance Programs (OMAP).⁸ TSS services provide one-on-one interventions to a child or adolescent at home, school, daycare, other community-based program, or community setting when the behavior without this intervention would require a more restrictive treatment or educational setting. An LEA cannot rely on the provision of a TSS service by the medical assistance system to meet its obligation of FAPE. Moreover, it is never appropriate to deny a student access to curriculum, school, school-sponsored activities, or transportation because of the unavailability of staff or funds to provide one-to-one services.⁹

In response to the need for direction during the COVID-19 pandemic, the Pennsylvania Department of Education (PDE), in reliance on direction from the US Department of Education, issued guidance that a District's obligation to provide FAPE was not altered, waived, or excused.¹⁰ Specifically, a District's obligation to provide IEP mandated PCA services in a student's home was addressed by the following question and answer supplied by PDE.¹¹

⁷ <https://www.education.pa.gov/Policy-Funding/BECS/FederalCode/Pages/SpEdSupport.aspx>

⁸ *Id.*

⁹ *Id.*

¹⁰ See *Report to Congress of U.S. Education Secretary Betsy DeVos*, <https://www.ed.gov/news/press-releases/secretary-devos-reiterates-learning-must-continue-all-students-declines-look-for-congressional-waivers-fape-requirements-idea>.

¹¹ Pennsylvania Department of Education, Bureau of Special Education
Answers to FAQs Regarding the COVID-19 Pandemic
<https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/AddInfoCOVID19.aspx>

If an Individualized Education Plan (IEP) includes a Personal Care Assistant (PCA) as a related service and a Local Education Agency (LEA) is utilizing a remote/blended learning model during the 2020-21 school year, must the LEA provide that service in the home?

An LEA must provide all related services as documented in the IEP to ensure each child's provision of free and appropriate public education (FAPE) during the COVID-19 pandemic. If an IEP team determines a PCA is no longer appropriate because the needs of the student have changed, the IEP should be revised. If the IEP team determines a student needs a PCA as a related service, the LEA should ensure necessary safety, and hygiene protocols are in place prior to providing in-home support. If in-home supports cannot be provided due to health and safety concerns, this should be considered as part of the Compensatory Services determination.

Applying the PDE guidance to this matter, the IEP team never determined that Student no longer required a PCA because of a change in needs. Instead, each IEP revision and consideration outlined why the services of a PCA were necessary and what the PCA would do to assist the Student. Through the IEP, the PCA was charged with assisting with implementation of IEP goals, self-care skills, prompting, and strategies of ABA. Through an IEP revision, the virtual PCA assigned to Student had similar duties. It is hard to precisely envision the level of assistance a virtual PCA could give to a child, unable to participate visually, entirely dependent on auditory interaction and physical prompts and concurrently challenged with the inability to sit and attend for extended periods of time. The PDE guidance, outlined above clearly contemplated a school district sending staff to a child's home to implement educational programming in precisely the situation of this Student. The very nature of a 1:1 support advises that interaction between the student and provider will occur, face to face while in the same room. In this matter, the Student engaged in negative behaviors like aggression and absconding that have necessitated removal to a secure area of the home. For the IEP to adequately be implemented, the Student required consistent and constant prompting and reinforcement that involves actual physical contact with the child.

In addition to the above-referenced advice regarding the continuation of PCA services in the home, PDE, in conjunction with the Department of Human Services (DHS), also issued safety guidance for providers and families in contemplation that in-home services would need to

occur during the pandemic.¹² No evidence exists that after determining that Student needed a PCA, the District assessed the safety and hygiene protocols in place in the Student's home. The District took no steps to determine under what circumstances a PCA could provide the needed support as mandated by Student's IEP. The Parents provided credible testimony they have complied with all necessary safety protocols (masking, cleaning, outside contact limitations) when Student received other in-home services.

Although limited judicial authority exists that has addressed this issue. The District has cited cases from other jurisdictions denying in-home services under similar circumstances. As previously discussed, in anticipation of the need to continue in-home services for the most complex learners, Pennsylvania has provided direction and established protocols for District implementation. Although the PDE guidance may lack the force of judicial authority, it is specific to this jurisdiction and the needs of the students it serves. As such an individual determination must be made about this child based on the facts presented and the educational needs. Although the school closures and modifications to in-person instruction due to COVID-19 were not the fault of the District, it is hard to justify how the lack of the mandated 1:1 did not amount to a material failure to implement the IEP. This is especially clear regarding the known individualized needs of this child, as blind, relying on audio direction, requiring hand over hand or hand under hand prompting and direction, and unable to wear a mask. Student is entitled to a PCA to access education and derive benefit from the education offered. The Parents elected virtual instruction of Student, an option available to all District students. As such, an in-home PCA is necessary to fulfill the District's FAPE mandate toward this Student. Considering this child's individual needs, the assignment of an in-home 1:1 during virtual educational instruction was reasonable and appropriate. Overall, the Parents have sustained their burden of proof that the District denied Student a FAPE under the IDEA and Section 504.

¹² <https://www.education.pa.gov/K-12/Special%20Education/Pages/default.aspx>

Staying Safe While Providing In-Home Services.
Commonwealth In-Home Services Guidelines for Service Providers
https://www.dhs.pa.gov/coronavirus/Documents/COVID%20Professionals%20Guidelines_11_20.pdf

Staying Safe While Receiving In-Home Services
Commonwealth In-Home Services Guidelines for Families and Individuals
https://www.dhs.pa.gov/coronavirus/Documents/COVID%20Family%20Guidelines_11_20.pdf

A student who claims discrimination in violation of the obligations of Section 504 must show deliberate indifference on the part of the school district in its purported acts/omissions. Here, the record does not support a determination that the District acted with deliberate indifference toward this student. Even though the District failed to provide Student with an in-home 1:1, nothing on this record suggests that the District was deliberately indifferent to the student's needs. Accordingly, the District has not discriminated against the student based on the student's disability status.

Compensatory Education

Traditionally, Pennsylvania courts recognized two distinct methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. Under the "hour-for-hour" method, embraced by *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996), a student would receive one hour of compensatory education for each hour that FAPE was denied. The Third Circuit has also endorsed an alternate 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) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014) (accepting the Reid Court's more equitable, discretionary, and individually tailored calculation of this remedy). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). In this case, the denial of FAPE created a harm that permeated the entirety of 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 suitable 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. *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).

Since the denial of FAPE resulted in substantive harm, the Parents will be awarded compensatory education. They seek one hour of compensatory education for every hour of virtual instruction; the District did not provide Student with 1:1 home support. The record evidence in this matter has established that this Student required a full school day 1:1 to meaningfully benefit from the virtual educational programming offered by the District. The lack of this support undoubtedly impacted Student throughout the day, rendering it nearly impossible to participate in much of the offered programming. However, the compensatory education remedy must be equitable under the circumstances. The District urges that should a compensatory education remedy occur, no compensation should be awarded to the family for a FAPE deprivation that may have occurred from November 16, 2020, to February 17, 2021.¹³ Although the Parents did not log Student into special education classes for a period, they did, from time to time, access some of the virtual school day. The days, times, and hours of the Parent's log in with the Student to the District's virtual platform have not been satisfactorily established by the hearing record. The District will be ordered to provide its attendance records to the Parents to clarify the days that Student was logged in for any portion of the school day.

The Student and Parents are awarded 6.15 hours of compensatory education for every school day of virtual instruction that Student logged into the District's online educational platform during the 2020-2021 school year, without an in-home 1:1. The Student shall receive the compensatory education hours until the District provides an in-home 1:1 on days of virtual instruction. Before the assignment of the 1:1, the District must determine whether the placement of a 1:1 in Student's home contravenes the community's prevailing health and safety standards.

¹³ The District maintains that since Student did not log in for special education classes from November 16, 2020 to January 11, 2021, it had to engage in recoupment of lost ground until February 17, 2021. I conclude that assertion to be unsupported by the evidence in this matter.

If the District determines that health and safety standards do not permit the assignment of a 1:1 in Student's home, the District is ordered to continue to provide 6.15 hours of compensatory education for every day of the remainder of the 2020-2021 school year, that Student logs in for virtual instruction.

As for the nature of the compensatory education award, the Parents may decide in their sole discretion how the hours should be spent so long as those hours take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the Student's current or future IEPs or identified educational needs. These hours must be in addition to any then-current IEP and may not be used to supplant an IEP. These hours may be employed after school, on weekends and/or during the summer months, at a time and place convenient for, and through providers who are convenient to the student and the family. Nothing in this paragraph, however, should be read to limit the parties' ability to agree mutually and in writing as to any use of the compensatory education hours.

ORDER

AND NOW, this 12th day of April 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows.

- 1) Within fifteen days of the date of this Order, the District shall determine the number of days Student logged in for virtual education and communicate that information to the Parents.
- 2) Student is awarded 6.15 hours of compensatory education for every school day that Student logged into the District's online educational platform for purposes of virtual instruction during the 2020-2021 school year without an in-home 1:1.
- 3) Student shall receive the compensatory education hours until the District provides an in-home 1:1 on days of virtual instruction. Before the assignment of the 1:1, the District must determine whether placement of a 1:1 in Student's home contravenes the community's prevailing health and safety standards.

- 4) If the District determines that health and safety standards do not permit the assignment of a 1:1 in Student's home, the District is ordered to provide 6.15 hours of compensatory education for everyday of the remainder of the 2020-2021 school year that Student logs in for virtual instruction.

- 5) The Parents may decide in their sole discretion how the hours should be spent so long as those hours take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the Student's current or future IEPs or identified educational needs. These hours must be in addition to any then-current IEP and may not be used to supplant an IEP. These hours may be employed after school, on weekends and/or during the summer months, at a time and place convenient for, and through providers who are convenient to the student and the family.

- 6) Nothing in this Order limits the parties' ability to agree mutually and in writing about any use of the compensatory education hours.

Any claim not specifically addressed in this decision and Order is denied and dismissed.

Joy Waters Fleming, Esq.

Joy Waters Fleming, Esquire
Special Education Hearing Officer

4/12/2021