

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

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

CLOSED HEARING

ODR No. 27804-22-23

Child's Name:

N.G.

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer:

Charles W. Jelley Esq.

Decision Date:

November 3, 2023

OVERVIEW OF THE DISPUTE

The Parent filed the pending Due Process Hearing Complaint alleging failures to provide a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act (504).¹ The Parents contend that under either Act, the District failed to evaluate and educate the Student in the least restrictive setting. Parents seek an Order directing the District to educate the Student in a regular education classroom with Learning Support, related services, and supplementary aids and services. The Parents also seek an award of compensatory education and an independent educational evaluation.

On the other hand, the District seeks a declaratory ruling that, at all times relevant, they procedurally and substantively complied with each Act during each school year. The District next seeks an Order affirming the proposed placement in a Life Skills classroom, with time in regular education, in a different elementary school is otherwise appropriate.

For all the reasons that follow, I now find in favor of the Parents. I further find that the record includes sufficient proof to craft an equitable award of compensatory education. This relief will return the Student to the right path. Finally, the District is Ordered to pay for an independent educational evaluation to remedy the tainted reevaluation.

¹ All references to the Student and the family are confidential. Certain portions of this Decision will be redacted to protect the Student's privacy. The Parent's claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). The federal regulation implementing Section 504, 29 U.S.C. § 794 and 794a are set forth at 34 C.F.R. 104, *et seq.* The state regulation implementing Chapter 15 are found at 22 Pa. Code Chapter 15, *et seq.*

STATEMENT OF THE ISSUES

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

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

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

3. Was each Individual Education Program (IEP) offered from April 2021 to April 2023 reasonably calculated to allow the Student to be educated in the regular education classroom and make meaningful progress in light of their circumstances? If not, is the Student entitled to compensatory education?

At the close of the hearing, the Parties requested, and the hearing officer agreed, to extend the decision due date to allow time to file closing statements.²

FINDINGS OF FACT

1. The Student is [an elementary student] who attends the neighborhood school. (S-2).
2. The Student is diagnosed as a person with [redacted] (S-2).
3. In early 2020, the District evaluated the Student [redacted]. (S-2).
4. The District's first Reevaluation Report included a brief cognitive assessment, a social skills assessment, an adaptive behavior assessment, a speech and language evaluation, an occupational therapy assessment, and a classroom

² The Parties filed post hearing statements which addressed the statement of the issues at NT pp.15-21.

observation. (S-1).

5. The evaluation team concluded that the Student qualified for school-age services with a primary disability of Other Health Impairment (OHI) and a secondary disability of Speech or Language Impairment. (S-1).
6. On April 6, 2020, the District held an individual education program (IEP) meeting and proposed Itinerant Learning Support in the District's half-day [redacted]. (S-2, pp.81-82). The team considered one placement, the half-day [redacted], with virtual speech services. (S-2; NT pp.29-31; NT pp.42-43).
7. The District's half-day [redacted] operates for 2 ½ hours a day. (S-2).

THE 2020-2021 [redacted] SCHOOL YEAR

8. The Student attended the morning session of [redacted], beginning at 8:45 a.m. and leaving before lunch. (NT p.32).
9. For the first month of the school year, the Student received instruction from the Autistic Support teacher. On or about October 1, 2023, the Student moved to the agreed-on Learning Support class. During the first few weeks of school, all students received virtual instruction. Due to the unavailability of the Speech Therapist due to fears of COVID exposure, the Student was assigned to virtual instruction for Speech and Language. (NT p.42; NT pp.29-31; S-2). No evaluations were conducted to determine if the half-day option or virtual speech was appropriate. (*passim*)
10. On September 29, 2020, in-person instruction began. (S-2, p.11).
11. Throughout the Student's [redacted] year, the teachers worked on getting the Student to follow directions, attend to the tasks, transition between activities, and listen to directions. (NT p.31).
12. The special education teacher, in October 2020, scheduled a phone conference with Parents to discuss the Student's behavior. (S-2). The

behaviors of concern included getting out of the chair, laying on the floor, and walking around the classroom. (NT p.33). The Parties agreed to try an incentive chart. (S-2, p.11; NT pp.10-11).

13. Incentives included a smiley or frowny face. (NT p.444). The chart was sent home daily to Parents. (NT p.34).
14. After a few weeks of utilizing the incentive chart, the teachers believed that some out-of-seat behaviors resulted from frustration with the classroom work. (S-2).
15. In October 2020, a full-time Personal Care Assistant ("PCA") was hired and assigned to assist the Student. (NT p.286-287).
16. Once the Student settled into the school routine, the PCA assisted the Student in the regular education classroom. The PCA also assisted the special education teacher in providing "pushed-in" support in the classroom. (NT p.38).
17. On November 13, 2020, the Parties met to discuss the Student's work avoidance. The District agreed to provide one-to-one direct instruction in the Learning Support classroom for prerequisite reading, writing, and math skills one to two times a day for 15-20 minutes each session. (S-2, p.12, p.75). The one-on-one instruction also targeted working on identifying numbers, letters, and name writing. (NT p.36).
18. The Learning Support teacher used the Orton-Gillingham method to teach reading. (NT pp.39-41).
19. The Learning Support teacher used the District's regular education math curriculum, "Math in Focus." (NT p.41).
20. The Learning Support teacher noted that the Student's work stamina and time on task slightly improved during one-to-one instruction. (NT 60).
21. A meeting was held on February 10, 2021, to address how the Student's

out-of-seat and time on task impacted learning and progress. (S-2; NT pp.41-42). During the second trimester, the Student's progress decreased. (S-2). The school team proposed, and the Parents agreed to a Functional Behavior Assessment ("FBA"). (NT p.42).

22. On February 26, 2021, the District determined that the Student qualified for extended school year services (ESY) (S-2, p.8, p.77). Due to the Family vacation schedule, the Student did not attend ESY. *Id.*

23. On March 31, 2021, the District completed the FBA. The team revised the IEP to include a positive behavior support plan (PBSP). (S-3, p.6).

24. The team believed that the function of the out-of-seat and time-on-task behaviors was related to escape or avoidance of academic demands, challenging tasks, and non-preferred tasks. (S-3; NT p.44).

25. On April 6, 2021, a new IEP was developed for the remainder of the [redacted] school year and the [redacted] Grade. (S-4). The April 2021 IEP included academic goals, speech services, occupational therapy, physical therapy, and a positive behavior support plan (PBSP). (S-4).

26. The District offered and the Parents approved the April 6, 2021, Notice of Recommended Educational Placement (NOREP), placing the Student in the regular education classroom for 65% of the school day along with Itinerant Learning Support for 35% of the day. (S-4, pp.110-112). The Parents did not express any concerns at the IEP meeting. (S-4, p. 26).

27. The IEP included four speech and language goals (S-4, pp. 39-49), one physical therapy goal, five academic goals, one social skills goal, a work stamina goal, a PBSP, and three occupational therapy goals. (S-4, pp. 50-91).

28. Because there was not enough time during the [redacted] school day, some specially-designed instruction (SDI) started immediately; others were scheduled to start in September 2021, when the Student moved on to full-

day [redacted] Grade. (NT p.48; S-4 pp.95-99; S-4 p.107; NT p.50).

29. The [redacted] Grade SDIs called for "direct, systematic, small group instruction in Reading, Writing, and Math" called for an average of 300 minutes weekly in Reading and Writing and 100 minutes weekly in instruction." (S-4 p.98). The SDI time averages 60 minutes daily for reading and writing and 20 minutes daily for Math. (S-4).
30. Even though a social skills annual goal was added to the IEP in April 2021, the beginning date for direct instruction in social skills was put off until August 30, 2021, of [redacted] Grade, rather than April 6, 2021, [redacted]. (S-4, p.98).
31. The [redacted] Grade IEP included related services for in-person Speech and Language, PCA support to assist with toileting, Occupational Therapy, and Physical Therapy. (S-4, p.100).
32. For the remainder of the [redacted] year, the Student participated in the general education setting for all academic areas with one-on-one support from the PCA. (S-4, p.107). The Student also received small one-on-one direct instruction in the Learning Support classroom for prerequisite skills like reading, writing, and math, one to two times per day for 15-20 minutes each session. (S-4, p.107).
33. As the [redacted] year ended, the Student showed "slow progress" in all academics, social skills, stamina, and Speech and Language therapy. (S-4; NT p. 37, p.80, p.99, p.102). The Student also qualified for extended school year summer services. (S-4)
34. By the end of [redacted], the Student learned how to sit in a chair, transition between activities, and follow directions. (NT p.54).

VIRTUAL SPEECH AND LANGUAGE DURING [redacted]

35. On November 10, 2020, during a [redacted] parent-teacher meeting, the

Parents expressed concern regarding the virtual Speech and Language therapy. (P-2, p.1). As the therapist was home due to COVID-19 concerns, no other Speech options were considered, like providing in-person Speech therapy. (NT p.352). No other actions were taken to address the Parents' input. (*Passim*).

THE 2021-2022 GRADE SCHOOL YEAR

36. [Redacted] students are expected to know 30 sight words at the end of the [redacted] year. Although the Student received Orton Gillingham instruction throughout the [redacted] year, the Student learned one sight word before the beginning of [redacted] Grade. (NT pp.83-84).
37. Regular education [redacted] students are expected to know all letter sounds at the end of the year. (NT p.84). The Student did not know all the alphabet letters at the end of [redacted]. *Id.*
38. On September 12, 2021, the team revised the IEP "Penn Data" section and the specially designed instruction portions of the IEP to account for participation for the full 6.5-hour school day. (S-4, pp.9-10, p.98, p.109). At the same time, the District extended the PCA's time to match the length of the school day. Parents also approved the NOREP change from Itinerant to Supplemental Learning Support and the IEP revisions dated September 20, 2021. (S-4, pp. 118-120). The NOREP goes on to state that "Itinerant Learning Support Level of service is not sufficient to meet [redacted] needs." (S-4 p.119 Box 4).
39. On September 20, 2021, the [Redacted] Grade special education repeated the [redacted] Foundations reading instruction. (P-25, p.1; NT p.88). No other evidence-based reading interventions were trialed during the [redacted] Grade school year. (NT p.92; S-4).
40. In [redacted] Grade, the teacher continued to use the [redacted] regular education "Math in Focus" curriculum. (NT p.95; NT p.41).

41. The teacher worked with the Occupational Therapist on tracing and letter formation. (NT p.98). No other specific evidence-based writing interventions were trialed. (NT p.98).
42. In Math, when [redacted] Grade began, the Student was still working on [redacted] level number identification skills, while regular education students were working on addition and subtraction. (NT p.96).
43. The [redacted] Grade progress reports indicate the Student was making "slow progress." (S-4, pp.7-9; pp.69-81; NT p.99; S-5).
44. In December 2021, the special education teacher asked, and the Parent agreed to revise the IEP due to the Student's "slow" rate of progress. (NT p.111). The teacher suggested, and the Parents agreed to revise the goals. (NT p.99). Due to the lack of progress, the IEP team removed the writing and spelling goals. (NT p.101). Seven other IEP goals were revised, and each goal's mastery level of success was decreased. (NT pp.100-102). At the same time, the reading goal was revised, and the teacher now listed short-term instructional objectives, typically found in an "autistic support" class. (NT pp.107-108). The teacher commented that the Student made progress in "[redacted] own way." (NT pp.108-109). The team agreed to revise the IEP goals "... so each goal is achievable before [redacted] current IEP year comes to an end." *Id.*
45. On February 7, 2022, the District determined that the Student was eligible for ESY services. (S-4, p.102). Due to their summer plans, the Parents decided not to send the Student to the 2022 ESY experience. (NT p.126).
46. In all areas of unique need, the data indicates the Student made "slow progress" from April 6, 2021, to March 24, 2022. (S-4, pp.69- 91).

THE [redacted] TO [redacted]-GRADE IEP

47. The [redacted] Grade to [redacted] Grade IEP meeting was held on **April 6, 2021**. (S-5; NT p.163).

48. The [redacted]-Grade special education teacher continued providing direct instruction using Foundations Reading and the regular "Math in Focus" materials. (NT pp.92-95).
49. The IEP team did not discuss changing the Student's eligibility, identification, level of support, or placement. (NT p.111; NT p.112).
50. The IEP team developed goal statements for the end of the [redacted]-Grade year and the start of [redacted] Grade. (S-5).
51. The Student's prior school year reading goals were consolidated into one reading task goal that measured multiple needs, including identifying sight words, identifying sounds of letters, and answering WH questions. (S-5, p. 34).
52. The Student's prior school year math goals were reduced to one math goal statement, and the criterion for success was reduced. (S-5, p. 42).
53. The IEP included a social skills goal in structured and unstructured settings. The IEP also included another social skills goal to improve conversational exchanges with peers about social skills needs. (S-5, p. 47).
54. The IEP continued to offer Occupational therapy, Speech and Language, and Physical Therapy goals. (S-5, pp. 49-66). The IEP continued to include a Positive Behavior Support Plan. (S-5, pp.67-69).
55. The March 2022 SDIs included direct, systematic, small group instruction in reading and writing for 135 minutes a day, 5 days a week; direct, systematic, small group instruction in math for 60 minutes a day, 5 times a week; direct instruction in social skills for 2 times per week for 30 minutes each session. (S-5, p.73). A daily communication log remained in the IEP to facilitate communication between home and school. (S-5, p.74). The SDIs noted that the communication log would continue into [redacted] Grade. *Id.*

56. Despite the "slow" progress, the related services remained the same from the previous IEP. The IEP called for the Student to receive Speech and Language therapy two (2) times per week for 30-minute sessions, paraprofessional support for 6.5 hours daily to assist academics, traveling to and from classes, assistance with toileting, along with individual and consultative services, physical therapy, and occupational therapy. (S-5, p. 75).
57. With one-on-one support from the PCA, the Student participated in the general education classroom for calendar math, the whole group read-aloud, science, social studies, lunch, recess, specials, and all non-instructional school activities and utilizing specially designed instruction. (S-5, p.77). The Student's placement remained Supplemental Learning Support at the neighborhood school. (S-5, p.83). The Student participated in the regular education classroom for 41% of the school day. (S-5, p.84).

THE [redacted]-GRADE SCHOOL YEAR

58. The regular education [redacted] grade teacher, the [redacted] Grade, and [redacted] grade special education teachers "met briefly" before the start of [redacted] Grade to review the Student's IEP goals, SDIs, and the daily incentive chart. (NT p.112).
59. When [redacted] Grade began, the special education teacher used the regular education curriculum "My View " reading materials and parts of Foundations to teach reading. Later, in [redacted] Grade, the teacher returned to Foundations, the only [redacted] and [redacted] Grade curriculum ever trailed. (NT p.179, p.183; p.190).
60. While the special education teacher believed that "elements" of Foundations were successful, after two school years, the Student did not advance from the initial picture visuals prompt to produce the correct answer. (NT p.274). As the school year went on, the Student never learned how to read. (*passim*)

61. On September 30, 2022, the [redacted] Grade Learning Support teacher reported the Student's "slow progress" to the Special Education Learning Support Supervisor. (P-8 p.1; NT pp.187-188; NT p.598). The Supervisor directed the teacher to continue implementing the IEP without changes. (NT p.188; NT pp.599-600; NT p.188).
62. The Student was pulled from reading to participate in Occupational Therapy during the reading block. (NT pp.191-192).
63. The [redacted] Grade teacher continued to use "Math in Focus," the regular education curriculum, to teach math. (NT p.190; NT p.210). At the end of [redacted] Grade, the Student was working on number identification and could not add or subtract numbers. (*passim*)
64. During the one-on-one Learning Support time, the [redacted]-grade special education teacher directed the PCA to focus on other students. (NT p.241; p.289).
65. Before a December 12, 2022, Parent-teacher conference, the [redacted]-grade regular education teacher emailed the special education teacher about the Student's lack of full participation within the classroom. (P-9, p.1). The teachers did not tell the Parents about the Student's lack of full participation. (NT pp.461- 462).
66. The [redacted]-grade special education teacher contacted the school psychologist about sending out an "early" permission to reevaluate. Due to the team's concern about the Student's "slow progress," the permission was issued one month early. (S-6, p. 34; NT p.215; NT p. 455; NT p.494; NT p.511; NT p.601; NT p.605.).
67. The school psychologist emailed the Parents the permission, which they returned on December 6, 2022. (S-6, p.43 NT p.463). The District received the permission on December 8, 2022. (S-5).

THE JANUARY 6, 2023, STAFF-ONLY MEETING

68. On January 6, 2023, before the completion of the Reevaluation Report, the school psychologist sent a reply email to the speech therapist that stated she would likely change the disability category from Other Health Impairment ("OHI") to Intellectual Disability ("ID"). P-12 at 1; P-14 at 1; NT p.578-581).
69. On January 26, 2023, the special education teacher sent an email to the Supervisor, the Principal, and the school psychologist asking to discuss the Student's evaluation and "focus of [redacted] IEP." (P-11 p.1).
70. On January 30, 2023, the Supervisor scheduled a meeting with the special education teacher, school psychologist, and principal to discuss the Student's education. (P-13, p.3). Parents were not informed or invited to this meeting. NT 197-198. The related service team, including the physical, occupational, and speech therapists, were also not invited to this meeting. (P-13 p.3; NT p.197-198; NT pp.579-580; NT pp.634-635).
71. The special education teacher remembers discussing the Student's slow progress and concerns throughout the school year with the team. (NT p.198).
72. On February 1, 2023, before providing a copy of the reevaluation to the Parents, the evaluation team, and the IEP team, the school psychologist emailed the related service providers, asking them to enter their information into the report. Without input from the related service providers, the classroom teachers, or the special education teacher, the psychologists recommend changing the Student's disability category to intellectual disability (ID). The psychologist also recommended changing the Student's level of educational support from Learning Support to Life Skills. Finally, the psychologist continued to recommend that the Student was also a person with an Other Health Impairment, and Speech and Language Impairment were also maintained. (P-14).

73. The reevaluation report was sent to Parents on February 3, 2023. (S-6 p.1).
74. The report omitted a classroom observation. (NT p.565).
75. The special education teacher did not complete the teacher recommendations section. (S-6 p.14; NT p.200).
76. The reevaluation did not include standalone social-emotional, executive functioning, or standardized social skills assessments. (S-6).
77. The reevaluation did not include any updated standardized standalone measures of speech, language, or non-verbal ability. (S-6 p.16).
78. No curriculum-based assessment protocols were given to the regular education teacher to complete, and the regular education teacher did not offer any District-wide assessment data. (NT p.573).
79. The Student's full-scale IQ, adaptive behavior, social, and achievement scores decreased (S-1 vs. S-6). The reevaluation report did not explain the substantial change in circumstances. *Id*
80. On February 7, 2023, the reevaluation team met. (NT p.463).
81. After the reevaluation meeting but before the IEP meeting, the Supervisor and special education teacher discussed the special education teacher developing life skills goals for the IEP. The special education teacher did not have experience teaching in a life skills classroom. (NT p.202).
82. On February 15, 2023, before the IEP meeting, the Supervisor called Mother about changing the Student's placement to life skills at a different elementary school. (S-11; NT p.466; p.538; NT pp.600- 601).
83. On February 24, 2023, the Supervisor emailed the Parents to "check-in" about her conversation with the Mother about life skills and offered to have the life skills Supervisor or life skills teacher join the IEP meeting. (S-11). Although the Parents agreed to have the Life Skills teacher and Life Skills Special Education Supervisor attend the IEP meeting, they did not attend the

meeting. (S-11 p.14; S-7).

84. Sometime before the April 2023 IEP meeting, the [redacted] grade special education teacher consulted with the Life Skills teacher about how to write goals for the Life Skills program. (NT p.204-206).
85. The IEP meeting was held on March 2, 2023. (S-7 p.1). Neither the life skills teacher nor the Life Skills Supervisor were present. (S-7 p.3).
86. When it came time during the IEP meeting to discuss the placement, the District proposed to immediately transfer the Student to the Life Skills placement in the other school. The Parents did not agree to the proposed change in the Level of Intervention or the move to another school. (NT pp.207-208). The proposed Life Skills teacher and the Life Skills Special Education Supervisor did not attend the IEP meeting. *Id.*
87. The IEP does not include, and the team did not discuss a transition plan from Learning Support to Life Skills at the IEP meeting. (NT p.208).
88. The Student's Learning Support teacher does not recall discussing what additional supplemental aids and services could be trialed at the current school. (S-7 p.59; NT pp.247-248). The Parent testified that there was no discussion about placement at the current location. (NT pp.469-470).
89. Despite the Parents' concerns, the IEP and NOREP, offering "Life Skills" in the other building, were issued the following day after the IEP meeting on March 3, 2023. (P-17 p.3).
90. The March 2023 Life Skill IEP reduced the Student's specially designed instruction time from 255 minutes of direct instruction in Learning Support to 245 minutes in Life Skills. The 2023-2024 Life Skills IEP discontinued the twice-a-week social skills instruction. (NT p.205-206; S-5 pp.73; S-7 pp.49-51).
91. The special education Learner Support teacher testified that a student's

specially designed instruction time generally increases in minutes as the Student is promoted to the next Grade. Although the Student was promoted to the next Grade, the [redacted] Grade teacher could not explain why the 2023-2024 specially designed instruction time decreased compared to the 2022 IEP. (NT p.231; S-5 p.73; S-7 p.51).

92. On March 8, 2023, the Parents returned the NOREP and disapproved the change from Learning Support to Life Skills in another building. The returned NOREP also requested mediation. (P-17 p1; S-7 p.66).
93. On March 10, 2023, Parents agreed to attend a meeting with the Life Skills staff to see the classroom at the proposed school. Although the Life Skills Supervisor and the Life Skills teacher attended the meeting, the Family, due to District policy, was not permitted to visit the classroom when students were present. (NT pp.530-531; NT pp.606-607; NT pp.620-621; NT pp.541-542).
94. At the building-level meeting, Parents were told that the Life Skills class would offer instruction with children "like [redacted]." (NT p.476).
95. There are three life skills classes offered at the proposed new school. The Life Skills classes serve students in Kindergarten through Second Grade, Second Grade through Third Grade, and Fourth Grade through Sixth Grade. (NT p.368).
96. The suggested Life Skills teacher regularly schedules several 20-minute blocks of one-on-one time daily for math, fine motor/writing, and reading. In addition to the one-on-one time with the special education teacher, the classroom structure also provides time for independent work, depending on the number of students each school year. (NT p.369; NT p.371; NT pp.421-422). The Life Skills teacher acknowledges that the way the class schedule is constructed, she could not implement all of the specially designed instructional time stated in the March 2023 IEP for math and reading. (P-28;

NT p.371). The Life Skills teacher never reviewed the Student's proposed Life Skills IEP before testifying at the hearing. (NT p.282; pp.629-630).

97. The Life Skills Supervisor stated that there were four Life Skills classes at the new school. The Life Skills supervisor explained that the fourth class includes a "floating life skills teacher." (NT p.638).
98. The suggested Life Skills teacher and the Student's current Learning Support Supervisor stated that the specially designed instruction offered in the Life Skills IEP could be implemented in the current Learning Support classroom at the Learning Support class. (NT p.282; pp.629-630).

THE FAPE WAIVER

99. On March 8, 2023, after the Parents visited the Life Skills class, aware that the Parents disagreed with the move, the Learning Support Special Education Supervisor sent the Parents a "Settlement Agreement and Release" (hereinafter "FAPE Waiver") (P-17, p.1). The FAPE Waiver would have permitted the Student to stay in the Learning Support class for the remainder of the 2022-2023 school year, provided that the Parents waived and released all claims against the District for the past alleged violations. The FAPE Waiver also asked the Parent to agree that the services during the current school year and for the remainder of the school year was a FAPE. (P-17).
100. The Agreement next stated that "the March 24, 2022, IEP attached as Exhibit 1 hereto shall remain in effect for the duration of the 2022-2023 school year, except that the District would not be expected to provide IEP progress report for the Third Trimester."
101. The Agreement goes on to state that the "5. The Parties further agreed that the IEP team should meet on or before June 25, 2023, to determine the Student's placement for the 2023-2024 school year. 6. The District shall offer an IEP for Student for the 2023-2024 school year." (P-17 pp.5-11). No litigation was pending when the Supervisor sent the Waiver. (**passim**)

102. Other than Parents signing a "FAPE waiver," there was no discussion or consideration by the IEP team about other supplemental aids or services at the current neighborhood school in the Learning Support classroom. (NT p.622).

GENERAL LEGAL PRINCIPLES

BURDEN OF PROOF AND CREDIBILITY

Generally, the burden of proof consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. In this case, the Parents are the party seeking relief and must bear the burden of persuasion.³

During a due process hearing, the hearing officer makes "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses."⁴ Explicit credibility determinations give courts the information that they need in the event of a judicial review. While no one-factor controls, a combination of factors causes me to pause and comment on the particular testimony of several witnesses.⁵

On the Parents' side, I found the Mother open, thoughtful, and candid in acknowledging what she knew and did not know. The Mother took ownership of

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

⁴ *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).

⁵ The fact finder's determination of witness credibility is based on many factors. Clearly, the substance of the testimony, including the detailed description of the relevant events, consistency /corroboration with others recollection, the accuracy of recall of past events when contrasted with written documents, played some part in my credibility determination. Furthermore, when the witness contradicts him or herself or is contradicted by the testimony of other witnesses can play a part in the credibility determination. Finally, non-verbal observable actions factors like constantly adjusting body movement, eye contact, feigned confusion, and whether the responses are direct or appear to be either evasive, unresponsive or incomplete are important in determining persuasiveness.

her statements and actions. She was otherwise credible in describing the sequence of events leading up to the Family's opposition to the proposed change in placement.

I found the testimony of several of the District's witnesses was not otherwise clear, cogent, or persuasive in describing the in-house staff-only meetings leading up to the March 2023 IEP meeting.

The proposed Life Skills teacher never observed the Student, reviewed the existing data, or reviewed the proposed IEP. These omissions decreased the persuasiveness of her testimony. Therefore, her testimony about what she could do to individualize instruction was speculative.

The Learning Support Special Education Supervisor curiously did not recall the in-house staff-only meeting that put in place the plan to change the Student's placement to the Life Skills classroom. This evasion reduced the persuasive of her testimony. The Supervisor's testimony about the offer to observe the Life Skills class was sometimes confusing and oddly self-contradictory. For example, although she stated that the Mother would have to "see" the Life Skills class to "understand" what the class offered, she knew that the District's policy would not allow the Parents to see a class. The refusal to allow the observation did not foster Parental participation or understanding of the surrounding circumstances.

I also found her testimony discussing what might occur if the Student enrolled in Life Skills and how the IEP would be implemented or modified beyond the four corners of the IEP speculative. Finally, although the witness inferred that other options were considered in each NOREP, no one from the District testified persuasively that the IEP team discussed the "other" options in the presence of the Parents. Therefore, I gave her testimony about the NOREPs and the IEPs limited to no persuasive weight.

On the other hand, the Student's Learning Support teacher was candid and

helpful in describing how she went to the Learning Support Supervisor early on to help the Student. She was candid and direct about being invited to a meeting to discuss the "Life Skills" option. She was thoughtful and responsive in her description of the Learning Support Supervisor's directions on how to write the "Life Skill" IEP. The teacher corroborated other testimony that the staff-only meeting occurred before the reevaluation was completed. She also corroborated statements that the Parents were unaware of the internal discussion to change the Student's IDEA eligibility, level of support, and school building. The record is also clear that the Learning Support teacher lacked personal knowledge about the proposed "Life Skills" classroom routine, learning activities, curriculum, instructional materials, class, or building schedule.

Although the psychologist did not recall the staff-only meeting, the reevaluation report curiously states that the regular education staff recommended the "Life Skills" placement. This testimony is problematic for two reasons. First, the psychologist did not explain, and the report does not describe how or why the regular education teachers proposed the "Life Skills" option. When asked who suggested "Life Skills," the psychologist could not recall which teacher made the recommendation. Finally, she was non-responsive when asked to review segments of the report about the circumstances surrounding the decrease in the Student's adaptive behavior, classroom performance, social skills, and ability scores. My direct observation is that the witness displayed an overall uneasiness in describing the events leading up to the reevaluation, the preparation of the report, and interactions with the Family. This observed uneasiness reduced the persuasiveness of her overall testimony.

THE IDEA PROVIDES STUDENTS WITH A FREE APPROPRIATE PUBLIC EDUCATION IN THE LEAST RESTRICTIVE ENVIRONMENT

The IDEA is a "comprehensive scheme of federal legislation designed to meet the special educational needs of children with disabilities."⁶ In

⁶ *M.A. ex rel E.S. v. State-Operated Sch. Dist.*, 344 F.3d 335, 338 (3d Cir. 2003).

exchange for federal funding, states pledge to comply with several substantive and procedural conditions in providing educational services to qualifying disabled students.⁷ In turn, state recipients then apportion federal funds to Local Educational Agencies ("LEAs") - school districts - responsible for providing day-to-day educational services in compliance with the IDEA.⁸

The IDEA includes a mandate that eligible students are provided with a "free appropriate public education" ("FAPE") in the least restrictive setting.⁹

The IDEA makes clear that a FAPE consists of "specially-designed instruction," "supplemental services," and "related services, along with "accommodations" that meet the Student's needs and circumstances.¹⁰ The IDEA also includes a "least restrictive environment" promise.¹¹ The "least restrictive environment" provision guarantees that the Student's instruction must "to the greatest extent possible, satisfactorily educate disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled."¹²

THE IEP PROCESS REQUIRES PARENT AND TEACHER INPUT

The "centerpiece" of the IDEA is the "individualized education program" ("IEP"), which serves as the "primary vehicle" by which states provide students with a FAPE. ¹³ "An IEP is a written statement, 'developed,

⁷ *T.R. v. Sch. Dist. of Philadelphia*, 4 F.4th 179, 182-83 (3d Cir. 2021).

⁸ See 20 U.S.C. §§ 1401(19), §1412-1414.

⁹ *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 390, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017) (citing 20 U.S.C. § 1412(a)(1)).

¹⁰ *Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. V. Rowley*, 458 U.S. 176, 188-89, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982) (citing 20 U.S.C. §§ 1401(26), (29)).

¹¹ *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 390 (3d Cir. 2006).

¹² *S.H. v. State-Operated Sch. Dist. of City of Newark*, 336 F.3d 260, 265 (3d Cir. 2003) (citing 20 U.S.C. § 1412(a)(5)(A)) (internal quotation marks omitted); see also *Oberti by Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1213-14 (3d Cir. 1993)

¹³ *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988); 20 U.S.C. § 1412(a)(4).

reviewed, and revised' by [an] 'IEP Team'—a group of school officials and the parents of the Student—that spells out how a school will meet an individual disabled student's educational needs."¹⁴ In addition, an IEP sets forth the Student's "present levels of academic achievement, offers measurable annual goals to enable the child to . . . make progress in the general educational curriculum, and describes supplementary aids and services . . . provided to the child to meet those goals." *Id.*¹⁵ Hearing officers analyze the appropriateness of the IEP at the time it was issued, not at some later date.¹⁶

THE IDEA AUTHORIZES APPROPRIATE RELIEF

The type and measure of appropriate relief awarded depends on the scope of the proven harms. Parents who allege a substantive violation—such as a denial of a FAPE—may seek compensatory relief.¹⁷ Parents may also seek prospective injunctive or declaratory relief for procedural violations independent of any resulting deprivation of a FAPE. *Id.*

ANALYSIS AND CONCLUSIONS OF LAW

THE STUDENT'S IEPS WERE PROCEDURALLY AND SUBSTANTIVELY FLAWED

After carefully reviewing the record, I now reach the following legal conclusions. When the [redacted] team failed to consider whether the Student needed a full or a half-day [redacted] program, they predetermined the Student's program and placement. When the team placed the Student into a virtual speech program absent discussion, they, too, predetermined the Student's program and placement. When the Learning Support

¹⁴ *Y.B. ex rel. S.B. v. Howell Twp. Bd. of Educ.*, 4 F.4th 196, 198 (3d Cir. 2021) (quoting 20 U.S.C. §§ 1414(d)(1)(A), (B)).

¹⁵ 20 U.S.C. §§ 1414(d)(1)(A)(i)(I).

¹⁶ *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 564- 65 (3d Cir. 2010).

¹⁷ *G.L. v. Ligonier Valley Sch. Auth.*, 802 F.3d 601, 322 Ed.Law Rep. 633 (3d Cir. 2015). (citing, *M.C v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389 (3d Cir. 1996)).

Supervisor held the staff-only meeting and predetermined the Student's placement, they violated the IDEA's parent participation and predetermination restrictions. The spillover effect of the predetermination violations tainted the reevaluation report. Finally, predetermination violation interfered with developing the [redacted] to [redacted] Grade IEPs.

The [redacted] Grade staff-only meeting put in place a plan to move the Student into the "Life Skills" class. The proposed "Life Skills" move ultimately resulted in the IEP team changing the Student's placement, eligibility, and the nature of the Student's annual goals. The District's defense that the Student made "slow progress" and, therefore, received a FAPE benefit is misplaced. Third Circuit case law applying *Endrew F.* requires that IEPs offer the opportunity to achieve "significant learning" and make "meaningful benefit."¹⁸ The record here is preponderant that after [redacted] years of schooling, the Student has yet to receive a "meaningful benefit." These legal conclusions collectively or individually now require me find that the [redacted] and [redacted] Grade IEPs were substantively flawed a crafted award "appropriate relief" follows.

THE PREDETERMINATION VIOLATIONS

The FAPE analysis for the [redacted] IEP starts with the Supreme Court's requirements in *Rowley*.¹⁹ A FAPE offer requires that the district comply with the IDEA's procedural and substantive requirements. *Id.* Parental participation, transparency, and collaboration appear throughout the IDEA's procedural and substantive requirements.

The over-arching question is whether the IEPs at issue included "ambitious goals" that were "reasonably calculated to enable [the Student] to make

¹⁸ Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982); *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 999 (2017).

¹⁹ 20 U.S.C. § 1415(f)(3)(E)(ii) (requiring specified harm to the student or parent); see also *id.* § 1415(f)(3)(E)(iii) (providing in the absence of such loss that hearing officers still have authority to order prospective procedural relief).

progress appropriate in light of [his/her] circumstances."²⁰ The fundamental flaw with the District's argument is its confusion over the legal requirements of when an IEP is "reasonably calculated," what is "meaningful progress," and when a "predetermination" violation causes a substantive denial of a FAPE.

The "reasonably calculated" standard makes good the requirement that crafting an appropriate IEP requires an "individualized" prospective decision by the IEP team that the overall offer of a FAPE is appropriate. Neither the IDEA nor courts require that the IEP is "ideal" or that the Student gets the best. *Id. Endrew F.* requires that the team make an "individualized determination" of how much "progress [is] appropriate under the child's circumstances." The District's successive IEPs, from [redacted] to [redacted] Grade, failed to comply with the "individualized determination" component, the "reasonably calculated" component, and ran afoul of the "predetermination" and "parental participation" protections.

A predetermination violation occurs when a District's actions violate the requirements for "meaningful" parental participation in the formulation of the IEP or the evaluation. When these conditions come together, a fundamental IEP construction error occurs. The District's actions here significantly impeded the Parents' opportunity to participate in the FAPE decision-making process. Furthermore, the team members' actions reflect a closed mindset that interfered with developing the Student's IEP.

The record clearly establishes that the Student's initial placement into the half-day [redacted] was not based on an "individualized" approach and was instead based on administrative convenience. First, neither the evaluation team nor the IEP team discussed or considered if the Student needed a full-day [redacted] placement.

²⁰ *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 999 (2017).

Second, all of the District's witnesses agreed that the online-only speech model was related to the therapist's decision to avoid the risk of COVID-19. These two violations evidence a failure to "individualize" the FAPE offer.

This same flawed decision-making model reoccurred when the Student moved from [redacted] to [redacted] Grade, except in that instance, since the therapist was in person, the Student's speech was in person. Therefore, I now find the record is preponderant that administrative convenience, not "individualization," was the driving force. The team all but ignored the Student's "circumstances."

Third, although the Student's initial standardized testing was in the borderline average range, and the effects of the [redacted] diagnosis were known, rather than "individualize" the program, the IEP team accepted the one-size-fits-all half-day [redacted] model. Based on this Student's profile, at the time of the FAPE offer, the team's refusal or omission to consider a full-day program was a substantive standalone material FAPE error. Based on the progress monitoring data and the ESY data eligibility, the teacher and the Supervisor knew that the Student was not learning, yet they failed to take meaningful action.

Given the circumstances, the April 2021 [redacted] to [redacted] Grade IEP offer of 30 to 40 minutes a day of individualization in [redacted] Grade was not "reasonably calculated to provide meaningful benefit. At the end of [redacted], the Student knew one word, while the peer group knew 30 words; the Student was not counting to 10, identifying letters, and could not print their name. The testimony that 30 to 40 minutes of individualized time was appropriate was not persuasive. Moreover, given the number of school days left in the school year, the District's response to the data did not align with the circumstances. The District either knew or should have known in February 2021 when they labeled the Student's progress as "slow," along with the ESY determination that the Student was not learning. A "reasonably

calculated" and "individualized" response was needed. The "predetermination violation" and the "reasonably calculated" violation are fundamental errors that either individually or collectively caused a substantive FAPE loss.

THE [redacted] AND [redacted]-GRADE IEPS WERE FLAWED

In September 2021, - [redacted] Grade year - the IEP team increased the PCA's time, and the District revised the NOREP, reflecting that the Student was now a full-day student. The IEP and NOREP changed the Student's Level of Services from "Itinerant" to "Supplemental" Learning Support. The Learning Support teacher, however, continued to use the same reading and math programs and materials that did not work in [redacted]. Although the general rules favor the District's selection of teaching methods and materials, no one from the District cogently explained why the teacher continued to use the same regular education curriculum, absent individualized accommodations, changes, or modifications. This unchecked decision is particularly troublesome because, after two years of targeted instruction, the regular education materials did not promote "significant learning."

By December 2021, the teacher asked, and the Parents agreed to revise the IEP. The revisions turned into a complete redo. The team eliminated the writing and spelling goals. Seven other IEP goal statements were either consolidated or rewritten, and the mastery level of success was decreased. When asked about the reading goal, the teacher remarked that she added short-term instructional objectives, typically found in an "autistic support class." When the teacher discussed the Student's progress, she commented that the Student made progress in "[redacted] own way." I now find that the substantial changes here, like eliminating goals not learned, redoing or combining goal statements, and lowering the percentage accuracy for expected levels of achievement, are implicit evidence that the [redacted]

Grade IEP did not confer or offer the Student meaningful educational benefit.²¹

THE STAFF HAD A CLOSED MINDSET AND PREDETERMINED THE [redacted] TO [redacted] GRADE PLACEMENT

The Learning Support Supervisor, the psychologist, and the special education teacher – the District members of the IEP team- predetermined the Life Skills program and placement. The team's actions and inactions advancing the predetermined placement tainted the reevaluation results. These substantive violations, individually or collectively, interfered with the Parents' participation rights. This combination of violations also denied the Student a FAPE. Finally, the District missed the *Andrew and Rowley* "slow progress" warning signs in advancing the predetermined Life Skills placement.

The Learning Support Supervisor scheduled a staff-only meeting to discuss the Student's mid-year move to the "Life Skills" class. While the record is unclear if the psychologist attended the meeting, the record is clear that she was aware of the Supervisor's mindset to change the placement. The reevaluation report states that the regular education teacher suggested the "Life Skills" placement.

Before the reevaluation report was circulated for review, the Learning Support Supervisor, after the staff-only meeting, directed the [redacted] Grade Learning Support teacher to abandon thinking about how to modify the Learning Support classroom. The Supervisor directed the teacher to prepare a "Life Skills" IEP. To advance the scheme, the Supervisor directed the Learning Support teacher to consult with a preselected "Life Skills" teacher in another building about how to write a "Life Skills" IEP.

At or about the same time, the Supervisor called the Family, suggesting they

²¹ *Penn Trafford Sch. Dist. v. C.F.*, Civil Action No. 04-1395, 2006 U.S. Dist. LEXIS 13581 *23 (W.D. Pa. Mar. 28, 2006)(changing goal statements and lowering the expected level of mastery implies lack of benefit).

visit one specific "Life Skills" classroom. Although the Supervisor stated that the Parents needed to "see" the class to understand "how it could help," District policy prohibits classroom visits during the school day. When the Parents arrived, they were asked if they wanted to see an empty room. The Parents met with the predetermined Life Skills teacher and her Supervisor during the visit. Sadly, neither the teacher nor the Supervisor reviewed the IEP or the existing data. Therefore, little was learned by either side.

Surprisingly, when asked at the hearing, the Life Skills teacher stated she had not reviewed the IEP. After reviewing the IEP, she stated that she could not provide the designated specially-designed instructional time for reading or math in the proposed Life Skills IEP. The Learning Support Supervisor later testified that the Life Skills teacher could change the IEP to match up with the class routine. This statement is tantamount to an admission that had the Parents accepted the Life Skills offer, beginning on day one, the Student would have been denied a FAPE.²² The Supervisor's ongoing actions and omissions, advanced by the other team members, are a textbook example of a closed mindset that interfered with the Parent's participation.²³ I now find that the "Life Skills" placement was unilaterally decided by one person and not by a team of qualified professionals, including the Parents. I further find that the team had a closed mindset that caused a substantive FAPE violation. Assuming *arguendo* that the predetermination violation was procedural, other substantive violations exist.

THE [redacted]-GRADE IEP WHEN OFFERED WAS FLAWED

The [redacted] Grade "Life Skills" IEP reflects an overall inability to offer

²² *Sch. Dist. of Phila. v. Kirsch*, 722 F. App'x 215 (3d Cir. 2018) (failure to IEP "in affect" at the start of the placed caused a denial of a FAPE and an award of compensatory education).

²³ *D.B. ex rel. H.B. v. Gloucester Twp. Sch. Dist.*, 751 F. Supp. 2d 764, 771 (D.N.J. 2010) ("predetermination of an IEP can be grounds for finding a violation of the IDEA, in particular because predetermination can serve to exclude parents from meaningfully participating in the decision[-]making process."); See *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 259 (4th Cir. 1988); *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 857-58 (6th Cir. 2004).

individualized "ambitious" or "challenging" goals and instruction.

"Reasonable calculation" and "individualization" are key FAPE factors.²⁴ While the Student's rate of progress was recognizably "slow," non-linear, and borders on maddening, the District's insufficient response is even more maddening.²⁵ In this instance, the IEP team, led by the Supervisor – the local agency representative - failed to use the existing data set to redesign the IEP. Appropriate progress monitoring systems incorporate frequently collected objective numerical data that is graphed, analyzed, and then used to make instructional decisions. The team's collective response to this Student's lack of success was to eliminate goal statements – *i.e.*, the writing and spelling goals and, simultaneously, watered-down seven other goal statements, with easier goal statements with short-term objectives, often used in "autistic support" classes. The District's response to this Student's "slow progress" was not "individualized" and lacked a real-time understanding of the Student's needs, circumstances, and the lack of meaningful progress. Simply put, the team's reaction to the data was not consistent or responsive to the Student's specific "circumstances." The record does not establish, and it cannot be said, that the District made "every effort" to meet its substantive FAPE obligations to educate the Student in the Learning Support classroom.²⁶ Accordingly, I now find the District denied the Student a FAPE in the least restrictive setting.

COMPENSATORY EDUCATION IS APPROPRIATE RELIEF

Applying *G.L.* and *M.C.*, once the denial of FAPE is established, the hearing officer must determine when the District either knew or should have known of the denial of a FAPE. Once the denial of a FAPE knew or should have

²⁴ Crofts v. Issaquah Sch. Dist., 22 F.4th 1048, 1057 (9th Cir. 2022).

²⁵ K.D. v. Downingtown Area Sch. Dist., 904 F.3d 248, 255 (3d Cir. 2018); D.F. v. Smith, (2019 WL 1427800, at *7 (D. Md. Mar. 28, 2019); E.G. v. Great Valley Sch. Dist., 2017 WL 2260707, at 13 *4 (E.D. Pa. May 23, 2017).

²⁶ Derrick F. v. Red Lion Area Sch. Dist., 586 F. Supp. 2d 282 (M.D. Pa. 2008)

known date is established, I must calculate and exclude the time reasonably required to rectify the violation. The District's decision to put in a complete defense denying all liability negates any reason for me to calculate an equitable reduction period.

The record is preponderant that the first compensatory education knew or should have known date is April 2021, when, after several months, the District failed to correct the first predetermination violation after recommending ESY services. The second compensatory education knew or should have known date occurred in December 2021, of [redacted] Grade, when the District failed to individualize the Student's education when it became apparent the Student was not learning. The third compensatory education knew or should have known date occurred when the staff predetermined the Student placement and failed to individualize the Student's education. All of the above violations caused tangible, substantive losses that now require complete equitable relief.

THE SCOPE OF THE COMPENSATORY EDUCATION AWARD

Due to the lack of preponderant qualitative evidence, I now find the record does not support the strict application of the *G.L.* qualitative "make whole" method. However, based on the extensive record here, applying *M.C.*, in combination with *G.L.* I can craft an award of appropriate relief. The IEP called for the Student to receive specially-designed instruction all day in every class. Therefore, based on the failure to properly prepare each IEP, the Student was denied the chance to receive "significant learning" and "meaningful benefit" each day from April 6, 2021, in [redacted] through the end of the [redacted] Grade school year. Finally, the FAPE violation began again in September 2023 and will continue through June 2024. Therefore, subject to the limitations described herein, the Student is awarded hour-for-hour, day-for-day compensatory education for each year the Student attended school from [redacted] until the end of the 2023-2034 school year.

To remediate the [redacted] predetermination school year violation, I further find the District should have educated the Student for six and one-half hours (6.5) hours a day, not three (3) hours a day. Therefore, the award for the [redacted] year is equitably increased.

The [redacted], [redacted], and [redacted] Grade IEPs state that each school day, specially-designed instruction should have been provided throughout the day. Therefore, the Student is awarded six and a half (6.5) hours a day. The District is further Ordered to provide an additional 120 hours of compensatory education for each ESY summer period, from [redacted] through the summer of 2024. Finally, the District is ordered to fund an independent educational evaluation to remove the predetermination taint surrounding the reevaluation report. The combination of equitable relief will return the Student to the proper education path.

THE USE OF THE COMPENSATORY EDUCATION HOURS

The Student may use the compensatory education for any developmental, corrective, remedial, specially-designed instruction, supplemental aids, or accommodations, including but not limited to tutoring, teaching, transition services, related services, auxiliary aids and services, private evaluations/diagnostic testing, assistive technology supports/devices, or career/vocational counseling as defined in the IDEA or Section 504.²⁷

SELECTION AND PAYMENT OF THE COMPENSATORY EDUCATION PROVIDERS

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

²⁷ *Berks County IU/EI Program*, 117 LRP 9420 (PA 2017) (equal access to IDEA's promise of a free appropriate public education and the parallel promise of a full educational opportunity goal); 34 C.F.R. § 300.109; 20 U.S.C. §1412(a)(2)).

District should reimburse the Parents for all mileage or transportation expenses at the District's rate for travel reimbursement.

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

SUMMARY

The record is preponderant; the Student suffered a loss of a chance to receive a FAPE. The blended equitable relief awarded herein is reasonably calculated to place the Student on the path otherwise disrupted when the District failed to identify, evaluate, and educate the Student in the least restrictive environment. Once the independent evaluation is completed, the District should gather a team of qualified professionals, the Parents, and the independent evaluator and develop a new IEP. The prospective compensatory education award will end once the District issues a new IEP and a NOREP.

FINAL ORDER

AND NOW, this 3rd day of November 2023, the District is now **ORDERED** as follows:

1. The Student's IDEA and Section 504 denial of FAPE claims from **April 2021 through June 2024** are **GRANTED** as stated above.
2. The equitable relief of compensatory education **ORDERED** herein makes the Student whole for any Section 504 or IDEA FAPE violations.
3. The District and the Parents are directed to calculate the number of hours of compensatory education otherwise awarded herein as described above. The District should provide the Parents with the Student attendance records and copies of school calendars for each school year. The Parties are then directed to calculate the total number of compensatory education hours for each school year.

4. The award of compensatory education continues prospectively until the District offers a new IEP and NOREP.
5. To remedy the FAPE violations, the District is now **ORDERED** to fund a bank of compensatory education services as described above.
6. The Parents' request for an Independent Educational Evaluation is **GRANTED**. The Independent Educational Evaluation should be completed within 120 days of this Order. The prospective compensatory education award shall continue accruing if the evaluation is completed within 120 days. The District is further directed to pay the independent evaluator to attend all meetings until the District offers a new IEP and NOREP. Once the evaluation is completed, the IEP team, including the Parents, should review the IEE and craft a new IEP in the least restrictive setting. The Student should remain in the "stay put" Learning Support" placement until a new IEP and NOREP are issued.
7. The Parent or Student can select the individual(s) or the provider(s) for all equitable compensatory education services **ORDERED** herein.
8. The District is **ORDERED** to pay the cost of transportation to and from any compensatory education service, education, transition, or testing provider as described above. This award of appropriate transportation relief is in addition to any relief otherwise awarded herein.
9. The District is Ordered to reimburse the evaluator for all time and travel expenses until the District offers a new NOREP.
10. All other claims for appropriate relief, causes of action, demands, or affirmative defenses not argued for in the Parents' or the District's closing statements and not discussed herein are now dismissed.

Date: November 3, 2023

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

Hearing Officer
ODR FILE 27804-23-24