

*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 Due Process Hearing Officer Final Decision and Order**

### **Closed Hearing**

#### **ODR File Number**

24265-2021

#### **Child's Name**

[M.T.]

#### **Date of Birth**

[redacted]

#### **Parent**

[redacted]

#### **Counsel for Parent**

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#### **Hearing Officer**

Michael J. McElligott, Esquire

#### **Date of Decision**

06/08/2021

## Introduction

This special education due process hearing concerns the educational rights of M.T. ("student"), a student in young adulthood who resides in the Octorara Area School District ("District").<sup>1</sup> The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")<sup>2</sup> as a student with multiple disabilities, including cerebral palsy, deafness, autism, and intellectual disability. The parties disagree over the student's educational programming, specifically the placement where the student should receive services.

Since 2015, as recommended and agreed-to by the school district where the family resided at that time, the student has attended a specialized residential placement at an approved private school for students who [have] deafness/hearing-impairment who also present with additional disability profiles such as emotional disturbance, autism or behavior needs. The student's family resides in eastern Pennsylvania; the residential placement is located in western Pennsylvania, and so attendance at the placement involves a significant transportation component.

In August 2020, the student's parent moved from that neighboring school district into the District and sought to maintain the student's placement at the residential placement. The District sought to change the

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<sup>1</sup> The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

<sup>2</sup> It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. See *also* 22 PA Code §§14.101-14.162 ("Chapter 14").

student's placement to a program operated by the local intermediate unit ("IU"). An interim pendency ruling issued by the undersigned hearing officer maintained the student's placement at the residential program.

Parent's special education due process complaint asserts that the District has denied the student a free appropriate public education ("FAPE") through various acts and omissions in the fall of the 2020-2021 school year related to the District's handling of the student's placement. Analogously, the parent asserts these denial-of-FAPE claims under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").<sup>3</sup> Furthermore, the parent claims that the District acted with deliberate indifference toward the student's needs and, therefore, makes a claim for disability discrimination under Section 504.

The District counters that at all times it met its obligations to the student under IDEIA and Section 504, generally and specifically in terms of the placement dispute between the parties. Accordingly, the District argues that the parent is not entitled to any remedy.

For reasons set forth below, I find that the student's placement should be maintained at the residential placement. Additionally, the student will be awarded compensatory education. There will also be a fact-based finding that the District treated the student with deliberate indifference in its handling of certain matters related to the student in the fall of 2020.

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<sup>3</sup> It is this hearing officer's preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. See *also* 22 PA Code §§15.1-15.11 ("Chapter 15").

## **Issues**

1. What is the appropriate placement for the student?
2. Did the District provide FAPE to the student in the 2020-2021 school year?
3. If the foregoing question is answered in the negative, what remedy is owed to the student?
4. Did the District treat the student with deliberate indifference?

## **Findings of Fact**

All evidence in the record, both exhibits and testimony, were considered. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

### **Education History Prior to 2020**

1. The student has long qualified as a student in need of special education. (Parent Exhibit ["P"]-1, P-2; Notes of Testimony ["NT"] at 524-604).
2. The student has myriad needs, having been diagnosed with cerebral palsy, deafness, autism, and intellectual disability. Under the IDEIA,

the student has been identified as a student with multiple disabilities. (P-1, P-2; School District Exhibit [“S”]-2; NT at 524-604.)

3. The student employs American Sign Language (“ASL”) and gesture as the primary means of expressive and receptive communication. (P-1, P-2, P-13, P-14, P-17, P-21, P-23; S-2, S-3; NT at 285-322, 326-351, 355-393, 398-478, 483-511, 524-604).<sup>4</sup>
4. In the spring of 2015, the student was attending a residential program at an approved private school for students with deafness/hearing-impairment. As a result of the student’s behavior at the school, the family was informed that the school felt it could not appropriately program for the student. (P-4; NT at 524-604).
5. The student’s family, and the school district where the student then resided, pursued alternative placements. Multiple potential placements could not accommodate the student. By September 2015, the private residential placement where the student currently attends, also an approved private school, (“current residential placement”) accepted the student. (P-3, P-5, P-7, p-9, P-10; S-1; NT at 398-478, 524-604).
6. Because the student was attending approved private schools, with financial support from the Bureau of Special Education, the student’s enrollment was always approved through the Bureau. (P-8; NT at 398-478).
7. The student has attended the current residential placement since September 2015. (P-7, P-8, P-10; S-1; NT at 524-604).
8. The student’s individualized education programs (“IEPs”) at the current residential placement have always included an ASL goal, to increase

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<sup>4</sup> Early on, the student received cochlear implants. Due to sensory needs, the student abandoned the implants and has never utilized the implants as part of communication receptive communication. (NT at 524-604).

the use of signs. The IEPs also include goals in academic areas, behavior, and related-services therapies (occupational therapy, physical therapy). (P-14, P-17; S-3).

9. The communication plan in the IEPs have always included ASL, finger spelling, and gestures as the student's primary language and communication modes. (P-14, P-17; S-3).
10. The student's individualized service plans at the current residential placement have always included addressing increased use of ASL in the home environment (through training with the student's mother). (P-13, P-21).

### **Current Residential Placement**

11. The current residential placement is an approved private school operating "a comprehensive educational and residential program for deaf students with severe emotional disturbance. To be eligible..., students aged 6 years to 21 years must have a functional hearing loss that significantly interferes with their ability to learn as well as significant emotional and behavioral problems...". (P-58; NT at 398-478).
12. The current residential placement offers day-school and residential programming. (P-58).
13. As of the current 2020-2021 school year, the current residential placement has 13 students, approximately half in the day-school and half in the residential program. (NT at 285-322).
14. In the student's classroom, all students have 1:1 aides in addition to the classroom teacher and a classroom behavior specialist.

The student has a 1:1 aide throughout the entirety of the day, an academic aide from 8 AM – 3 PM and a residential aide from 3 PM throughout the late afternoon, evening, and overnight until 8 AM. The student needs assistance with activities of daily living, including a transition goal in independent living. (NT at 355-393, 483-511).

15. Staff at the current residential placement, including administrators, teachers, staff, and aides are all fluent in ASL. (NT at 285-320, 326-351, 355-393, 398-478, 483-511).
16. The student is integrated into life at the current educational placement, including social relationships with peers and engagement with adults. (S-4; NT at 285-322398-478, 483-511).
17. The current educational placement does not include weekend residence. The student has always been transported from home in eastern Pennsylvania on Sunday and arrives at the current residential placement in western Pennsylvania on Sunday evening. The student resides at the placement through the week and is transported from the placement to home on Friday evening. The student is also transported to/from the placement when the current residential placement is closed for summer and holiday breaks. (NT at 398-478, 524-604).
18. The current residential placement operates year-round. Its operational calendar begins in July, when students return to the placement in the midst of summer for approximately one month of programming before a late summer break in August. In September, students begin the academic year through June, with holiday breaks and a spring break within the year. There is an early summer break in June until the students return to the placement for the July programming. (P-25; NT at 398-478, 524-604).

### **2020-2021 School Year**

19. As a result of the COVID-19 pandemic, and as a consequence of the school closure throughout the Commonwealth, the current residential placement closed on March 13, 2020. Online learning was employed with the student, but this did not prove to be effective. (NT at 326-351, 524-604).
20. The placement resumed in-person instruction in July 2020 with its July programming sequence. (NT at 285-322).
21. The student attended the in-person July 2020 programming at the current residential placement. At the same time, the student's family moved to the District from the school district where the family had been residing for many years. On August 7, 2020, the student's mother registered the student and the student's siblings with the District. (P-26; S-6; NT at 524-604).
22. In mid-August 2020, the District had the student's enrollment completed and had been provided with records transferred from the school district which the student had previously attended. The current residential placement had also provided the District with over 150 pages of educational records for the student. Emails at this time show that the District's special education administration had been advised of the student's enrollment and disability profile. (P-25, P-28, P-29).<sup>5</sup>
23. In mid-August 2020, the Bureau was informed by the student's previous school district of residence that the student had relocated and that the District was now responsible for the approved private school enrollment. The District was unaware of the process for engaging with

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<sup>5</sup> To be precise, on August 14<sup>th</sup> the current residential placement faxed 176 pages of educational records to the District, as evidenced by the fax header on certain exhibits (*see, e.g.*, P-25). (NT at 398-478).



the Bureau to assume responsibility for the student's approved private school enrollment. (P-27; NT at 53-115, 120-193).

24. Not having heard anything from the District, in early September 2020 the home-community liaison from the current residential placement reached out to the District to facilitate the student's continuing attendance at the placement, including transportation and looking ahead to November 2020 for the student's annual IEP meeting. (P-30, P-31).
25. At that time, in early September, the District was sharing emails with the current residential placement but no one had yet contacted the family about the student's enrollment with the District or the student's placement. The student's mother initiated contact by telephone with the District's special education administration. After an exchange of voicemails, the student's mother eventually spoke with a District special education administrator in the first week in September. (P-32; NT at 53-115, 524-604).
26. In early September, as the local education agency now responsible for the student's placement, the District communicated with the transportation company about the arrangements that would need to be made to transport the student to the current residential placement and solicited a formal bid for continuing to provide the service. (P-35, P-36).
27. Throughout September 2020, the current residential placement emailed the District to make sure that the District had worked with the Bureau to assume responsibility for the student's enrollment status at an approved private school, to inquire about transportation, and to facilitate the student's return to the placement for in-person instruction, with little substantive response from the District. (P-34; NT at 53-115, 120-193, 398-478).

28. The student participated in online instruction with the current residential placement, which continued to prove ineffective. In September 2020, the student engaged in four ½ hour sessions of learning. (NT at 398-478, 524-604).
29. In mid-September 2020, not having heard from the District, the transportation company followed up. Toward the end of September, the company was informed that a decision on transportation had not yet been made. By the end of September, the District ceased to communicate with the transportation company. (P-39; 53-115, 120-193).
30. At some point in September 2020, it appears that the District held some type of meeting with individuals from the current private placement that did not include the student’s mother. This finding is not based on definitive recollections. No witness could recall with specificity the exact date or nature of the meeting between the school entities; often it was conflated with a recollection of a second September meeting, an IEP meeting for the student (see finding of fact immediately below) where the student’s mother was included. Instead, this finding is based on a preponderance of the record from a mosaic of testimony. (NT at 53-115, 120-193, 355-393, 398-478, 524-604).
31. At the end of September 2020, the student’s IEP team met to discuss the student’s IEP and placement. (P-40; S-7; NT at 53-115, 120-193, 398-478, 524-604).
32. The IEP team discussed the student’s IEP and placement at the current residential placement. The student’s mother and the educators from the placement shared that the online learning was ineffective and that transportation needed to be arranged to allow the student to return to the placement. The District shared that it was continuing to

explore 'resources' for the student's education. There was no discussion of alternative placements, or any indication that the student would not be returning to the placement. (NT at 53-115, 120-193, 355-393, 398-478, 524-604).

33. The day after the September 2020 IEP meeting, without the knowledge of the parent, the District contacted two other placements to begin a review process for the student's potential enrollment with those programs. In the email exchange with one placement, when the placement requested permission to speak with the family, the District informed the placement that contact with the family should not take place. (P-41, P-42).
34. Notwithstanding the one-sided nature of these communications, neither placement was able to work with the student given the student's ASL language needs and/or behavior needs. (P-41; NT at 53-115, 120-193, 524-604).
35. A few days after the September 2020 IEP meeting, in the first days of October, the District also contacted the local IU to begin a review process for enrollment in a specialized program at the IU. (P-44; NT at 53-115, 120-193, 201-243).
36. By early October 2020, the District had still not assumed responsibility for the student's approved private school placement through the Bureau. Multiple individuals from the current residential placement reached out to the District to provide explanation and instruction on facilitating this process. The District did not contact the Bureau or begin to navigate the process for assuming responsibility for the student's approved private school placement. (P-46; NT at 398-478).

37. In mid-October 2020, the IU began to prepare a draft IEP for the student at the specialized IU program. (P-45, P-50; S-9; NT at 201-243).
38. The IU removed the student's ASL goal and recommended that the student undergo a functional hearing evaluation and that the student work with other communication modalities outside of ASL. (P-50; S-9; NT at 201-243).
39. District special educator administrators and the IU program witness testified that these changes came from the IU program witness, who drafted the IEP. Documentary evidence, however, contradicts these recollections and support a finding that changes to the IEP related to ASL and the student's communication needs originated with the District. In mid-October, the IU program witness emailed a colleague to say: the "(District) has asked me to help formulate some language for the IEP draft that will be proposed, to include a hearing/audiology evaluation and any additional information regarding transitioning from ASL to a more generalizable communication modality". (P-48 at page 4; NT at 53-115, 120-193, 201-243).
40. As part of its interest in exploring resources instead of continuing the student's current residential placement, the District arranged an interagency meeting to bring together various agencies to coordinate services where appropriate. In mid-October 2020, the interagency meeting took place. (P-43, P-47; NT at 53-115, 120-193, 201-243, 524-604).
41. The testimony of the student's mother is credited that an educator from the IU was in attendance at the interagency meeting and that the meeting centered predominantly on discussion of the IU program. Educators from the current residential placement were not

invited to the interagency meeting, although they expected to be. (P-43, P-46 at page 3; NT at 53-115, 120-193, 398-478, 524-604).

42. The student's mother was deeply dissatisfied with the mid-October 2020 interagency meeting and the focus on the IU specialized program. (NT at 524-604).
43. Following the interagency meeting in mid-October 2020, the IU finalized its IEP and, in the latter half of October 2020, the District met with the student's mother. At the meeting, the District formally recommended, through the issuance of a notice of recommended educational placement ("NOREP"), the IEP for implementation at the IU specialized program. This was not an IEP meeting, as no educators from the IU and/or the current residential placement were at the meeting; the only attendees were District special education administration and the student's mother. (P-48, P-49, P-50, P-51; S-9; NT at 201-243).
44. Approximately one week after the District issued its NOREP, in late October 2020, the student's parent filed a *pro se* special education due process complaint that led to these proceedings. (Hearing Officer Exhibit ["HO"]-1).
45. Since early October 2020, the current residential placement had been contacting the District about scheduling the student's annual IEP meeting, due in November 2020. The District was focused on financial information for the cost of the student's attendance at the current residential placement. In mid-October, however, almost contemporaneously with the interagency meeting, the District confirmed a date in mid-November to hold the student's IEP meeting with the current residential placement. (P-46 at pages 1-2, 4-5).
46. The student received no educational programming in October 2020.

47. Just prior to the mid-November IEP meeting with the current residential placement, the District contacted a specialized school for students with deafness/hearing-impairment to explore potential enrollment in that school. Ultimately, the school declined to enroll the student as it could not meet the student's needs. (P-53).
48. In mid-November, matters between the parties moved quickly.
49. On November 13<sup>th</sup>, the parent, through counsel, filed a pendency motion asserting stay-put protection for the student in the current residential placement. The District filed a response to the motion, asserting that since the student's family had relocated within the state, and the District was, in its view, offering comparable services to the student, IDEIA and an unpublished appellate opinion, provided guidance that stay-put protections did not apply, and the student's pendent placement was the IU program. (HO-2, HO-3).
50. The IEP meeting with the current specialized placement was scheduled for Thursday, November 19<sup>th</sup>. On Monday, November 16<sup>th</sup>, the District initiated enrollment of the student in the IU program but did not inform the parent or the current specialized placement. The current specialized placement sent a videoconference link for the IEP meeting on Tuesday, November 17<sup>th</sup>. On Wednesday, November 18<sup>th</sup>, the District's special education administration emailed the current residential placement, indicating that "we are complying with the intrastate transfer regulations and have offered comparable services in (the student's) IEP through (the IU program) on October 20, 2020....Therefore, this IEP meeting conducted by (the current residential placement) is not necessary." The District did not participate in the IEP meeting. (P-46 at page 1, P-55 at page 1, P-56; NT at 120-193, 398-478).

51. On November 20<sup>th</sup>, parent's counsel filed a complaint. This hearing officer informed the parties that he would treat this complaint as an amendment of the parent's *pro se* complaint. (HO-4, HO-5).
52. The student received no educational programming in November 2020.
53. In early December 2020, after being informed by the District that it did not feel it needed to maintain the current residential placement, the placement communicated with the District that it still had not undertaken the procedural necessities with the Bureau related to the student's enrollment at an approved private school and facilitated those procedural necessities for the District. (P-55 at pages 2-4).
54. On December 9<sup>th</sup>, the District finally complied with the procedural requirements to coordinate with the Bureau as the local education agency responsible for the student's enrollment at an approved private school. (P-27).
55. In mid-December 2020, this hearing officer issued a pendency ruling, ordering that the student's placement was to be maintained at the current residential placement pending issuance of this final decision. (HO-6).
56. Following the pendency ruling, the student's IEP team began to work on returning the student to the current residential placement, including arranging for a transportation provider. (NT at 53-115, 120-193, 398-478, 524-604).
57. The student received no educational programming in December 2021.
58. In January 2021, the student's IEP team, including educators from the current residential placement, met to revise the student's IEP. (P-61).

59. The student received no educational programming in January 2021.
60. Due to issues with arranging transportation, the student did not return to the current residential placement until the evening of February 21, 2021.

### **Witness Credibility**

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. The testimony of the student's mother was found to be especially credible and was accorded very heavy weight. The testimony of the speech and language therapist from the residential placement, as well as the director of the program at the residential placement and the residence coordinator, were all found to be credible and was accorded heavy weight.

### **Discussion**

#### **IDEIA/Denial-of-FAPE**

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. (Board of Education v.



Rowley, 458 U.S. 176, 187-204 (1982)). 'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis* or minimal education progress. (Andrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); Dunn v. Downingtown Area School District, 904 F.3d 208 (3d Cir. 2018)).

Here, the District denied the student FAPE by not supporting the current residential placement as an approved private school placement, in coordination with the Bureau, by mid-October 2020. The District knew in early August 2020 that the student was newly enrolled and had complex needs, and by mid-August, over a 150 pages of detailed educational records had been provided to the District. Yet the District took no action to contact the parent or to begin arranging services for the student. It is clear from the record that the District was unfamiliar with the process for arranging an approved private school placement in coordination with the Bureau and so, early on, the District was failing to comply with the requirements to maintain the current residential placement.

Only in early September 2020, a month after being enrolled at the District, and only when the current residential placement reached out to the District about the student's status, did the District begin to communicate with the family and to understand the student's programming needs. At that point, the necessary communication about transportation for the student (communication which should have been taking place already) began with the transportation company. But no arrangements were made and by the end of September, the transportation company was no longer receiving communications from the District.

And, again, throughout September 2020 the current residential placement was communicating with the District regarding coordination with the Bureau to assume responsibility for the student's enrollment status at an

approved private school, to inquire about transportation, and to facilitate the student's return to the placement for in-person instruction. Only at the very end of September 2020, at the first IEP meeting with the parent and educators from the current residential placement, did the District proactively engage the issue of how and when the student would return to placement.

Through all of this, the District's approach to the student's educational programming was imperfect—there were delays in bringing the student into the universe of the District's special education department, the District's lack of knowledge about liaising with the Bureau on placements with an approved private school, and the slow pace of the back-and-forth regarding an intricate transportation contract. These things could have, and should have, been done with more alacrity, and the opportunity to more perfectly work through these issues was available. Still, these things will not be held against the District in weighing FAPE considerations, as it was tasked with continuing the educational programming of a student with highly intricate and complex needs in the context of a very singular placement dynamic reliant on unique transportation needs.

But even given this period, it is the considered opinion of this hearing officer that by mid-October 2020, the District should have communicated regularly with the student's family and the current residential placement, should have finalized the necessary coordination with the Bureau on the student's placement at an approved private school, and should have contracted with a transportation company to allow for the continuation of the student's placement. Specifically, the District's denial of FAPE began when the District was not in a position to transport the student to the current residential placement, and to have those educators work with the student, on the evening of Sunday, October 18, 2020.

As indicated, this work would have been, and should have been, undertaken in August and September 2020, and the record shows that

others—the school district where the student previously attended, the current residential placement, and the transportation company, were all working over this period to provide information, and to receive it, and to offer guidance to the District. Instead, as September wound down and the student’s IEP team met, the District immediately began one-sided communications with other school and programs to work on enrolling the student in another placement.

This set the District on a course to work on educating the child anywhere but the current residential placement. As a result, the student languished at home, without any educational services, for four months (mid-October 2020 through mid-February 2021).

This decision must address the IU placement which the District, ultimately, formally offered through a NOREP. In response to the stay-put protection asserted by the parent, and as explicitly related to the current residential placement when the District refused to participate in the November IEP meeting scheduled by (and agreed-to by) the District, it argues that the IU program offers comparable services to the current residential placement. This is clearly not the case.

The student is in early adulthood and will clearly qualify for special education through the age-21 school year. Since the student was a child, ASL has been the student’s primary language. It is the way the student expressively and receptively communicates and has been, honestly, for years and years. The IU program, with its removal of ASL programming and elevation of other potential communication modalities—at the behest of the District—, is simply not comparable. The student needs to communicate using ASL and needs to receive explicit instruction to improve communication using ASL.

The District argues, or at least intimates, that it is concerned for the student's ability to navigate the world with ASL as the student's language. There are three responses which this hearing officer feels must be brought forward. First, it is only a surmise, but there must be hundreds of thousands of individuals who utilize ASL as a primary, or substantial, means to communicate. We must not do this community a dis-service by treating its language as somehow deficient or ineffective. Second, and this gets to a concrete failure in the IU program, to the extent that the District sees other communication modalities as opening up access for the student, the administrator of the current residential placement testified eloquently to the fact that for individuals like the student, ASL is and has always been how they engage the world. To remove that, or to dampen that, is, in practice, not freeing but instead leads to isolation and a sense of abandonment. (NT at 465-467). When the District worked with the IU to design the IEP for implementation at the IU program, it was not offering comparable services; in fact, it was silencing the student's voice in the world.

Accordingly, the District denied the student FAPE as of October 18, 2020 through February 21, 2021, when the student returned to the current residential placement.

### **Section 504/Denial-of-FAPE**

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1).<sup>6</sup> The provisions of IDEIA/Chapter 14 and related case law, in

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<sup>6</sup> Pennsylvania's Chapter 14, at 22 PA Code §14.101, utilizes the term "student with a disability" for a student who qualifies under IDEIA/Chapter 14. Chapter 15, at 22

regards to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (*See generally P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

Therefore, the foregoing analysis is adopted here— under the terms of the FAPE obligation of Section 504 the District denied the student FAPE as of October 18, 2020 through February 21, 2021, when the student returned to the current residential placement.

### **Section 504/Discrimination**

Additionally, the provisions of Section 504 bar a school district from discriminating against a student on the basis of disability. (34 C.F.R. §104.4). 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 on the basis of 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., id.*).

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PA Code §15.2, utilizes the term “protected handicapped student” for a student who qualifies under Section 504/Chapter 15. For clarity and consistency in the decision, the term “student with a disability” will be used in the discussion of both statutory/regulatory frameworks.

Here, the District acted with deliberate indifference toward the student when as of early October 2020, the District did not coordinate with the Bureau to undertake its obligation to the student as a student then-enrolled in an approved private school.

Early on in communications with the current residential placement in September 2020, the placement brought to the District's attention the need for it to assume responsibility for the student in coordination with the Bureau, as the student was enrolled in an approved private school. On this record, the District pleads ignorance, at that time, of those necessary procedural requirements. This hearing officer accepts that (and, as outlined above, mitigates the denial-of-FAPE finding accordingly).

By early October 2020, however, the District had still not initiated contact with the Bureau, or followed up for more details from the current residential placement. On October 5<sup>th</sup>, with the procedural necessities still not having been undertaken, the current residential placement reached out to the District's special education administration to see if it could answer any questions the District had, or provide guidance about coordinating with the Bureau.

On October 6<sup>th</sup>, the current residential placement reiterated the offer , and the controller of the placement sent an outstanding and detailed email explanation of how the coordination process with the Bureau works, both procedurally and financially, including web-links for the District to access further information directly from the Bureau. (P-46 at pages 3-7). The District did not act on this information-sharing and guidance, and not until

December 2020 was the student accounted for by the Bureau, as is necessary, as a student placed with an approved private school.<sup>7</sup>

To reiterate, the District's lack of knowledge about this process is not the basis of deliberate indifference. The District exhibited deliberate indifference only when its obligation to the student as a student enrolled in an approved private school—the most complex programming and placements in the Commonwealth, requiring notice to and coordination with the Bureau—was quite literally laid out in detail for it in early October 2020, and the District still refused to coordinate with the Bureau to accurately account for its obligation to the student.

Accordingly, as set forth above, the District acted with the deliberate indifference in this instance. An explicit finding will be made in the order below.

### **Compensatory Education**

Where a school district has denied FAPE to a student under the terms of IDEIA, compensatory education is an equitable remedy that is available to a student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)).

In this case, the student receives academic instruction for the entire day. Thereafter, the student is in the residential program, fully supported by a 1:1 aide and working on skills such as self-help, self-care, homework, communication, and socialization with peers and adults. The student then

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<sup>7</sup> And even this overly tardy coordination with the Bureau came so that the District could step aside from that obligation.

sleeps and, after rising in the morning has a morning routine which again focuses on skills such as motivation, organization, self-help, self-care, and communication. The student could engage in none of this learning from mid-October 2020 through mid-February 2021.

Therefore, the student will be awarded 16 hours per day for every day the current residential placement was in session for instruction of students from October 18, 2020 through February 21, 2021.

As for the nature of the compensatory education award, the parent may decide in her 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 otherwise as to any use of the compensatory education hours.

Additionally, given the deep complexity of the student's needs and the significance of the deprivation and the testimony of witnesses from the current residential placement that they saw substantial regression in the student's ability to utilize ASL (especially expressively) as a result of the student's absence from programming, the compensatory education shall be available to the student through the student's 25<sup>th</sup> birthday.

As an aside, this hearing officer notes that parent training to "(help) parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP" is a related service available under IDEIA. (34 C.F.R. §300.34(c)(8)(iii)). The family may wish to consider



utilizing compensatory education to fund training in ASL skills for family members to allow for richer communication with the student.

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## **ORDER**

In accord with the findings of fact and conclusions of law set forth above, the student's placement shall remain at the current residential placement which the student has attended since 2015, including as a related service the transportation arrangements to allow the student to fully participate in the programming of the placement whenever that programming is operative.

As set forth above, the Octorara Area School District denied the student a free appropriate public education. The student is awarded 16 hours of compensatory education, as outlined in the decision, for every day the current residential placement was providing instruction to students from October 18, 2020 through February 21, 2021.

As set forth above, the Octorara Area School District discriminated against the student on the basis of the student's disabilities by treating the student with deliberate indifference in not coordinating with the Bureau of Special Education in the Pennsylvania Department of Education, as of mid-October 2020, to undertake the school district's procedural obligations to assume responsibility for the student's enrollment in an approved private school.

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

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire  
Special Education Hearing Officer

06/08/2021