

*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 No. 27339-22-23**

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

S.F.

#### **Date of Birth**

[redacted]

#### **Parents**

[redacted]

#### **Counsel for Parents**

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#### **Hearing Officer**

Michael J. McElligott, Esquire

#### **Date of Decision**

04/18/2023

## Introduction

This special education due process hearing concerns the educational program and placement of S.F. ("student"), a student who resides in the East Allegheny 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 identified with a specific learning disability in reading.

Parents claim that the District, in general, failed to provide the student with programming designed to provide a free appropriate public education ("FAPE") under IDEIA. Specifically, parents assert that the District's programming failed to provide appropriate instruction and supports in reading to allow the student to benefit from significant learning. Parents claim that the District denied them an opportunity to participate meaningfully in the design and implementation of the student's programming. Parents also bring a discrimination claim under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").<sup>3</sup>

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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").

<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").

The parents seek a compensatory education remedy for alleged deprivations of FAPE in the 2020-2021, 2021-2022, and 2022-2023 school years.<sup>4</sup>

The District counters that its programming over the periods of parents' claims, in general and in the specific areas highlighted by the parents, was appropriate for the student and that the student made progress in reading. Therefore, the District argues, parents are not entitled to remedy.

### **Issues**

1. In general, did the District provide FAPE to the student in the 2020-2021 school year (as of November 2020), the 2021-2022 school year, and the 2022-2023 school year (through mid-December 2023)?
2. Did the District discriminate against the student on the basis of the student's disability, acting with deliberate indifference in the student's programming?
3. Did the District's acts and/or omissions deny parents the opportunity to participate meaningfully in the

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<sup>4</sup> Given the procedural history between the parties, and the procedural history of this particular matter, the parents' claims for compensatory education accrued as of November 2020 and continued until mid-December 2022. (See Hearing Officer Exhibit ["HO"]-1; Notes of Testimony ["NT"] at 107-108).

design and implementation of the student's programming?

4. Should compensatory education be awarded to the student?

### **Findings of Fact**

All evidence in the record, both exhibits and testimony, was 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.

#### Prior Evaluations

1. In June 2017, the student was initially evaluated and was identified as student with a specific learning disability in reading and written expression, given identified weaknesses in those areas. (Parents Exhibit ["P"]-3).
2. In April 2019, the student was re-evaluated by a private neuropsychologist who diagnosed the student with "moderately severe" dyslexia and identified needs in phonemic awareness, decoding, and rapid naming. (School District Exhibit ["S"]-11).

#### 2020-2021 School Year / [redacted]

3. In April 2020, the student's individualized education program ("IEP") team met to design the student's programming. (P-5; S-6).

4. The April 2020 IEP identified need in oral reading fluency and contained two reading goals, one in reading fluency/accuracy and one in reading decoding. (P-5 at pages 11, 19-20).
5. The baselines in the reading goals in the April 2020 IEP are not documented in the present levels of academic performance and do not contain the grade-level material on which the accuracy and decoding will be gauged. (P-5 at pages 6-9, 19-20).
6. The April 2020 IEP was in place for the 2020-2021 school year, as of November 2020 IEP when parents' claims accrued.
7. As a result of the COVID-related school closure from the spring of 2020, the District employed remote learning for all students in the beginning of the 2020-2021 school year. (NT at 377-382).
8. Due to the student's struggles with the remote learning environment, the student's teacher ostensibly made arrangements for an instructional aide to provide support to the student, although this support was not made part of the student's IEP. (P-1 at page 1, P-5, P-12, P-19; HO-2; NT at 33-107, 286-369).
9. The progress monitoring data for the second nine weeks in the 2020-2021 school year showed seeming progress in a structured reading curriculum, although the data is not reflective of the student's IEP goals or instruction. (P-2 at pages 1-2, P-5 at pages 19-23).

10. In January 2021, the District employed hybrid instruction, with remote instruction and in-person instruction alternating on a certain schedule. The parents chose to have the student remain at home, receiving remote instruction. (NT at 33-107, 377-382).
11. In February 2021, the student's IEP was revised, adding program modifications regarding volunteering in class, speech-to-text or read-aloud of math word problems, spelling being ungraded, and the schedule for progress monitoring. These revisions were decided unilaterally by the District and did not involve a collaboration with the parents. (P-1 at page 2, P-6; NT at 33-107, 286-369).
12. The support of an instructional aide was not added to the student's February 2021 IEP as part of the revisions. (P-6).
13. The student's progress in reading over the third nine weeks of the 2020-2021 school year was intermittent, at times increasing and at times decreasing. (P-2 at pages 1-4).
14. In April 2021, the student's IEP was revised as part of the IEP team's annual review. (S-5).
15. The reading fluency/accuracy goal was updated with a current baseline (5.6 – 5<sup>th</sup> grade, month 6) but the reading decoding goal remained the same. (S-5 at pages 19-20).
16. There is a list of fluency/accuracy scores in the April 2021 IEP, but it is unclear whether these scores are formal progress monitoring

or some other type of data collection. It is also unclear when this data was collected. (S-5 at page 20).

17. The structured reading program listed in the April 2020 IEP, upon which progress monitoring in the second and third nine weeks was based, was removed from the April 2021 IEP. (P-5; S-5).
18. The student's special education teacher in the 2020-2021 school year did not testify. The type, nature, and delivery of special education in reading over the school year is unclear. (HO-2).
19. Neither the April 2020 IEP, nor the February 2021 revisions, nor the April 2021 IEP contained any identified need in, or goal for, written expression. There were some program modifications regarding written expression—text-to-speech and reduced spelling requirements. (P-5, P-6; S-5).
20. Over the period June 2020 – August 2021, the student in private instruction in a sequential, structured, multi-sensory reading program. The student made progress in the program. (P-22; NT at 33-107, 391-436).

2021-2022 School Year / [redacted]

21. The student returned to in-person instruction in the 2021-2022 school year. (NT at 33-107, 377-382).

22. In September 2021, at the outset of the 2021-2022 school year, the District unilaterally revised the student's IEP. (P-8, P-9; S-4; NT at 33-107, 158-221).
23. The September 2021 IEP re-set the annual implementation period from April-to-April to September-to-September. (P-9 at page 1; S-5 at page 1).
24. The September 2021 IEP identified the student's need as reading fluency. (P-9 at page 9).
25. The September 2021 IEP updated the baseline in the student's reading fluency goal and removed the decoding goal. (P-9 at pages 17-18).
26. The reading fluency goal in the September 2021 IEP went from an instructional grade level of 5.6 to grade level 7. The [redacted] special education teacher testified that she regularly re-assessed and re-configured goals at the outset of school years, rather than working within the framework of ongoing goal progress from the previous school year. (P-9 at page 17; NT at 158-221).
27. In September 2021, the parents approved the implementation of the September 2021 IEP. (S-2).
28. The testimony of the [redacted] special education teacher could not be credited in terms of the nature of the reading instruction the student received in the 2021-2022 school year. While not being judged



as disingenuous, it simply lacked any concrete sense of how the student was taught reading, generally, and the reading curriculum used, specifically, for instruction. (NT at 158-221).

29. The progress monitoring data from the 2021-2022 school year appears to show progress across multiple probes of reading fluency/accuracy. This conclusion can be drawn in the context of the testimony of the [redacted] special education teacher; the progress monitoring on its own, however, as presented contemporaneously to the family, and any outside reader without the context provided by the [redacted] teacher, does not present a clear picture of the progress on the reading fluency goal. The student's reading fluency goal was written for a 7<sup>th</sup> grade instructional level, but most of the progress monitoring was done at the 5<sup>th</sup> and 6<sup>th</sup> grade levels (P-2 at pages 5-15; NT at 158-221).
30. The September 2021 IEP did not contain any identified need in, or goal for, written expression. The program modifications regarding written expression—text-to-speech and reduced spelling requirements—remained as part of the IEP. (P-9 at pages 18-19).
31. In February 2022, an independent educational evaluator issued an independent educational evaluation ("IEE"). (P-11; S-17).
32. The February 2022 IEE concluded that the student exhibited significant weakness in basic reading, reading fluency, and reading

comprehension. The student also demonstrated needs in written expression (spelling and essay composition). (P-11 at pages 23-24).

33. In the February 2022 IEE, the evaluator made multiple recommendations for reading instruction and instruction/supports in writing. (P-11 at page 24).

34. The District did not revise the student's September 2021 IEP in light of the content or recommendations of the February 2022 IEE. (P-9; P-11).

35. Following the issuance of the February 2022 IEE, the District undertook its own re-evaluation of the student. (NT at 158-221).

36. In April 2022, the [redacted] special education teacher drafted a re-evaluation report but the District never issued it for consideration by a multi-disciplinary team. (S-20; NT at 158-221).

#### 2022-2023 School Year / [redacted]

37. In September 2022, at the outset of the school year, the student's IEP was unilaterally revised by the District. (S-3; NT at 227-276).

38. The September 2022 IEP contained levels of present academic performance from the private sequential, structured, multi-sensory reading program. On District curriculum-based assessment, the student was reading at grade level 5.3 (5<sup>th</sup> grade, month 3). (S-3 at pages 9-10).

39. The September 2022 IEP indicated that the student’s reading disability “impedes [the student’s] ability to read independently and gain meaning from grade-level literature and text.” The IEP identified need in basic reading skills. (S-3 at page 12-13).
40. The September 2022 IEP contained two reading goals, both on [redacted] instructional material: one in reading comprehension and one in reading accuracy. (S-3 at pages 21-22).
41. Although listed in the IEP as part of the specially-designed instruction, the [redacted] special education teacher was not implementing the reading program for progress monitoring that was employed in the prior school year. (S-3 at page 23; NT at 227-276).
42. The September 2022 IEP did not contain any identified need in, or goal for, written expression. The program modifications regarding written expression contained in prior IEPs—text-to-speech and reduced spelling requirements—were removed from the September 2022 IEP. (P-9 at pages 18-19).

### **Witness Credibility**

All witnesses testified credibly and a degree of weight was accorded to each witness’s testimony. Based on the witness’s affect and internal inconsistencies in his testimony in light of the record as a whole, the testimony of the District school psychologist/coordinator of special education

was found to be less credible than that of other witnesses and was accorded little weight. The student's [redacted] teachers were not found to be less credible but were accorded a diminished level of weight given the vagueness and uncertainty of the witnesses' work with the student over those two school years.

## **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 a free appropriate public education ("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, with appropriately ambitious programming 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)).

Furthermore, a procedural violation of IDEIA is not, in and of itself, grounds for a finding of a denial-of-FAPE. A procedural violation of IDEIA may be grounds for a finding of denial-of-FAPE only where the procedural violation impeded the student's right to FAPE, or significantly impeded a parent's right to participate in educational decision-making, or caused a deprivation of educational benefit. (34 C.F.R. §300.513(a)(2)).

*Substantive FAPE.* Here, the District consistently denied the student FAPE based on its substantive programming. Over a bit more than two school years at issue in this record—approximately seven months from November 2020–June 2021, the entire nine months of the 2021-2022 school year, and the approximately 3.5 months from September–mid-December 2022— the District's instruction and programming in reading was inappropriately designed in, and implemented through, the IEPs. In short, the parents have established that the instruction in reading was not calculated to provide, and did not result in, significant learning.

The goals in the IEPs for most of the 2020-2021 school year contain no grade-level for the baselines or goal-progress. It is simply impossible to determine, from reading the April 2020 and February 2021 IEPs, on what level the student was reading or how goal-progress was going to be measured in this regard. In the April 2021 IEP, the reading fluency goal contains this level (grade level 5.6), but the progress of the student over the

final nine weeks of the school year is not reported (at least in a form that makes sense to any reader, including the parents.) Thus, over the period November 2020 – June 2021, the District denied the student FAPE in terms of substantive, prejudicial flaws in the student’s IEPs.

Without any sense of progress on the reading goal in the April 2021 IEP, in the September 2021 IEP the student’s grade-level goal was written for [redacted] material. With a more coherent IEP, or effective team of school district educators, perhaps this might be justified— ambitious but potentially justified. On this record, the goal is inappropriate. The student continued to work at mainly the 5<sup>th</sup> grade level, and into the 6<sup>th</sup> grade level, but one does not know exactly what progress looked like, as the progress monitoring over the 2021-2022 school year was unclear. Volumes of probes were given over the course of the school year but one is challenged to make sense of the data represented in dozens and dozens of probes.

Most pointedly, however, in terms of the student’s lack of learning through District programming, and consequent denial-of-FAPE, is the student’s reading level gauged in April 2021 (5.6 grade level) and again in September 2022 (5.3 grade level). In terms of the student’s reading ability, the student’s achievement on grade-level material had stagnated at approximately the middle of 5<sup>th</sup> grade, for a student over those school years moving through [redacted] and into high school studies [redacted].

Too, the student has had a consistent need for support in spelling and, more broadly, written expression. None of the IEPs in this record address these needs through goal-driven instruction, or in conjunction with dyslexia-related reading instruction. Instead of support for spelling geared toward instruction, the District's approach has been to ignore correct spelling in class work or grading.

Accordingly, as set forth below, compensatory education will be awarded.

*Procedural FAPE.* Where a procedural violation of IDEIA has impeded the student's right to FAPE, or significantly impeded a parent's right to participate in educational decision-making, compensatory education may be a remedy available for procedural denial-of-FAPE. Here, this is the case. First, the progress monitoring presented on this record, at P-2, does not allow any reader, whether with the student's aligned IEPs in hand or as stand-alone documents, to gauge the progress (or lack of progress) for the student. Is this student progressing on reading goals? There is no answer in the progress monitoring, which impedes both the student's right to FAPE (as educators would be at a loss to gauge progress) and the parent's right to participate in educational decision-making as the parents were not provided with understandable, contemporaneous measures of progress. Progress-

monitoring need not be perfected, but it must be understandable. That is not the case on this record.

Second, the District engage in unilateral (and ultimately inexplicable) changes to the student's IEPs. In September 2021, after only approximately eight school weeks under the aegis of the April 2021 IEP, the District drafted a new IEP with significant changes and without regard to the prior IEP. One of those changes, un-explained and procedurally fatal, was re-setting the annual IEP chronology, such that progress (or lack of progress) over one chronological year—the standard understanding for gauging progress in an IEP document—was entirely disrupted. The student had moved onto a new school year and so the [redacted] teacher felt, unilaterally, the IEP year should be re-set. It is a clear procedural violation which, again impeded both the provision of FAPE to the student and, by presenting it as a *fait accompli* at the outset of the 2021-2022 school year, the parent's participation in such an important (and unorthodox) IEP matter. Akin to this, the September 2022 IEP was again revised in significant ways without parental input or participation.

In sum, the District engaged in procedural practices which amount to a procedural denial of FAPE. Accordingly, as set forth below, compensatory education will be awarded.



### ***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.*).

Here, the District did not act with deliberate indifference toward the student. This record is replete with confusion, inadequacy, and ineffectiveness on the part of District's educators. But none of those acts/omissions were deliberate. Compensatory education will be awarded to remedy clear denials of FAPE. But the District did not act with deliberate indifference in educating the student.

Accordingly, there will be no finding that the District discriminated against the student on the basis of disability.

### ***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)).

The evidentiary scope of claims, which is not a point of contention in this matter, and the nature of compensatory education awards were addressed in G.L. v. Ligonier Valley School Authority, 801 F.3d 602 (3d Cir. 2015) The G.L. court recognized two methods by which a compensatory education remedy may be calculated. One method, the more prevalent method to devise compensatory education, is the quantitative/hour-for-hour calculation, where, having proven a denial of FAPE, the compensatory education remedy is calculated based on a quantitative calculation given the period of deprivation. In most cases, it is equitable in nature, but the award is a numeric award of hours as remedy. The second method, a rarer method to devise compensatory education, is the qualitative/make-whole calculation, where, having proven a denial of FAPE, the compensatory education remedy is calculated based on a qualitative determination where the compensatory education remedy is gauged to place the student in the place where he/she would have been absent the denial of FAPE. It, too, is equitable in nature, but the award is based on services, or some future accomplishment or goal-mastery by the student, rather than being numeric in nature.

Both calculations are a matter of proof. The quantitative/hour-for-hour approach is normally a matter of evidence based on IEPs or other documentary evidence that provides insight into the quantitative nature of

the proven deprivation. The qualitative/make-whole approach normally requires testimony from someone with expertise to provide evidence as to where the student might have been, or should have been, educationally but for the proven deprivation, often with a sense of what the make-whole services, or future student accomplishment/goal-mastery, might look like from a remedial perspective. In this case, parents seek a quantitative/hour-for-hour award of compensatory education. (HO-1; NT at 18-19).

Here, the District denied the student FAPE for substantive and procedural flaws in its programming. Gauging a compensatory education remedy on a quantitative basis is somewhat nuanced because the denial of FAPE, largely related to flaws in reading instruction and lack of progress in reading, is not easily quantifiable. Indeed, as an expert in reading instruction testified (NT at 391-436), reading fluently and accurately is a critical building block for reading comprehension and moving into more advanced text. It is a fundamental, arguably the fundamental, educational skill; deficits in reading impact many educational endeavors, especially as a student moves into secondary and even post-secondary environments. Thus, there is a critical equitable component involved in a quantitative compensatory education remedy where the denial of FAPE is rooted in deficient reading instruction.

With that consideration in mind, a secondary student is required to receive a minimum of 990 hours of schooling per year, or 5.5 hours per day

over 180 days of instruction; this roughs out to approximately 110 hours of schooling per month (5.5 hours per day over 20 school days in a month). (22 PA Code §11.3(a)). Here, the scope of parents' claim is a bit over two school years— approximately 19.5 months of schooling over November 2020 through mid-December 2022. This amounts to approximately 2145 hours of schooling over that period.

Now, all of those school hours are not uniformly instructional. And, more importantly, not all of those hours involve the need to be a reader improving in fluency through special education. And, importantly in this case, the student showed, through remarkable efforts by the student and private support by the family in the face of these denials of FAPE, that the student has achieved academically. So these equitable factors must be weighed against the deprivation of significant learning in light of this student's unique needs.

Taking all of these factors into consideration, the student will be awarded 400 hours of compensatory education as a result of the District's substantive and procedural denials of FAPE, as set forth in this decision, over the period November 2020 through mid-December 2022.

## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the East Allegheny School District denied the student a free

appropriate public education. The student is awarded 400 hours of compensatory education.

The East Allegheny School District did not discriminate against the student on the basis of disability.

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

04/18/2023