

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

ODR No. 27518-22-23

Open Hearing

Child's Name:

A.H.

Date Of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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Local Education Agency:

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date Of Decision:

10/31/2023

INTRODUCTION AND PROCEDURAL HISTORY

The student, A.H. (Student),¹ is a mid-elementary school-aged student who formerly resided and attended school in the Garnet Valley School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² under the multiple disability classification, and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.³

A prior due process proceeding involving the parties was concluded with a hearing officer decision on January 5, 2022. Among the relief awarded, the prior hearing officer ordered the IEP team to reconvene a meeting of the Individualize Education Program (IEP) team and revise that IEP consistent with specific directives.

In January 2023, the Parents filed a Due Process Complaint against the District under the IDEA and Section 504, which was followed by an Amended Complaint in April 2023 pursuant to an order by this hearing officer.⁴ A number of prehearing and interim rulings have been necessary in this matter, which the previous hearing officer aptly described in early 2022

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

⁴ Hearing Officer Exhibit (HO)-4.

as “extremely sad,”⁵ a characterization that remains true today. This case similarly proceeded to a due process hearing.⁶

The Parents sought to establish that the District denied Student a free, appropriate public education (FAPE) on both procedural and substantive grounds over the period of time beginning in January 2022 and continuing through Student’s placement in a private school in February 2023; a claim of discriminatory retaliation against the Parents was also asserted. The District countered that it did not deny Student FAPE on any basis or engage in discriminatory retaliation, and that no relief was due.

Following review of the record and for all of the reasons set forth below, the claims of the Parents must be granted in part and denied in part, with an equitable remedy for the issues on which they prevailed.

ISSUES

1. Whether the District denied Student a free, appropriate public education on procedural and/or substantive grounds between the date of the prior hearing officer’s decision in January 2022 and the date that Student began

⁵ *A.H. v. Garnet Valley School District*, 25203-2122KE (Gerl, J., January 5, 2022) at 20. A number of varied administrative and judicial actions have been pursued by the parties, during which they have made rather (and unnecessarily) complicated as described in one of those matters (HO-18 at 7-8). This hearing was similarly made overly complex in the same manner. Nevertheless, the resulting complete evidentiary record in its entirety was efficient and relatively concise.

⁶ Other references to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. S-3 was never made available, was apparently never referenced, and does not appear to have any relevance to this matter, so it is excluded from evidence; nonetheless, at least a portion of its content appears to be part of the Parents exhibits (and those older documents were reviewed but generally not expressly cited herein for the same reason). The decision referenced in n.5, *supra*, shall hereafter be to S-1.

attending a private school by agreement in February 2023;

2. Whether the District engaged in discrimination and retaliation against the Parents as a result of their advocacy for Student and Student's disability; and
3. If the District did deny Student a free, appropriate public education, whether and to what extent Student is entitled to compensatory education?⁷

FINDINGS OF FACT

Student is a child who has been diagnosed with Autism Spectrum Disorder, Trisomy 21, blindness, Gastroesophageal Reflux Disease for which Student requires a feeding tube, and other significant medical conditions. Student is essentially nonverbal and, despite a number of relative strengths, has profound cognitive impairment. Student has been determined to be eligible for special education under the IDEA as a child with Multiple Disabilities and an Intellectual Disability. (N.T. 645; S-4; S-8; S-14.)

Among Student's identified strengths are persistent communication attempts, development of independence in walking, increased active participation in group activities, and learning to understand expectations and routines. Student enjoys and is highly motivated by music and dance, and the insertion of music into Student's daily activities has been recommended by the District in the fall of 2022 and spring of 2023. (S-14 at 6, 17, 33; S-20; S-28 at 29, 42.)

⁷ One issue presented relating to the District's obligations should Student return to the District is clearly moot at this juncture.

Student was adopted as a very young child from a European country, where Student reportedly was kept under sedation and severely neglected. (N.T. 640-44; S-14 at 4-5.)

Student's blindness is a result of retinal injury that was reportedly caused by self-injurious behavior. Student requires consistent orientation and mobility training that combines tactile and auditory support and cues. Consistency in the environment, such as where a child's desk is physically located, is critical for students with visual impairments. (N.T. 800-04; S-14.)

When Student is restrained, Student loses necessary feedback in exploring and navigating the environment, and Student's ability to communicate is negatively impacted. Student also exhibits low muscle tone that requires the opportunity for varied movements over short periods of time, and movement may be self-soothing for Student. Use of a harness that limits mobility when seated is difficult for Student. (N.T. 682, 801-02, 860-61, 893; S-20 at 12.)

When sitting on the floor and in unsupported situations, Student tends to position Student's body such that Student is folded over at the waist or hips with Student's head facing knees or the surface of the seating area. When Student listens to music, Student tends to rock forward and back, sometimes forcefully. (N.T. 463-64, 884-85, 888, 911-12.)

It would not be inappropriate for Student to be in an activity chair for up to fifteen minutes at a time to provide postural support during certain activities. (N.T. 859-60, 882-83, 889.)

Relevant Previous Educational History

Student first attended school in the District over the 2019-20 school year. (N.T. 647; P-3.)

The Parents had Student admitted to a hospital facility in May 2021, which followed their decision in March 2021 to stop sending Student to school. Part of their reasons for ending Student's attendance was their concerns that Student was being improperly restrained by the District. The Parents have made clear in various meetings their disagreement with the use of any restraints for Student. (N.T. 459, 652-54, 673, 682-83; S-1 at 10, ¶¶ 26, 31, 1071-74.)

The May 2021 hospitalization was due to Student's self-injurious behaviors, as well as caregiver burnout. (N.T. 693-94; S-1 at 11, ¶ 34.)

A number of inter-agency meetings, which included the District, have convened since 2021, with Student's profile designated as a complex case by a state agency. (N.T. 507-511; P-18; S-14 at 1.)

The parties participated in a due process hearing in the fall of 2021, with a different hearing officer issuing a decision on January 5, 2022. (S-1.)

Second Half of 2021-22 School Year

Following the prior hearing officer's January 2022 decision and order, Student remained hospitalized through June of 2022. Prior to the discharge, the hospital staff and the Parents worked to secure sufficient resources 24 hours a day for Student's care and safety. (N.T. 524, 535, 659, 1090; P-25; S-4 at 10.)

An IEP meeting convened in January 2022 in compliance with the recent hearing officer decision. This IEP included a significant amount of information from an October 2021 evaluation including a Functional Behavior Assessment (FBA). (N.T. 530-31; S-4.)

The IEP developed in January 2022 noted a number of strengths for Student, including learning routines quickly, attempting communication persistently, better-developed independence in walking, increased active participation in group activities, and learning to understand expectations.

This IEP also identified the following needs: 1:1 paraprofessional support with BCBA training; intensive behavior support; intensive instruction across all domains; nursing services; speech/language, occupational, and physical therapy; vision support; participation in social and leisure activities; specialized transportation; and coordination of services and service providers. (S-4 at 52.)

The January 2022 IEP reflected Student's need to learn and generalize academic, functional, and adaptive behavioral skills across multiple settings. (S-4 at 63.)

Annual goals in the January 2022 IEP addressed occupational therapy (defined participation in structured sessions with tactile, verbal, and proprioceptive input; participation in activities of daily living; fine motor skill participation); speech/language therapy (discriminating between icons to express wants and needs); physical therapy (participation in gross motor play activities; walking with assistance); following one-step directions; participation in leisure activities; and behavior (using replacement behaviors without self-injurious behavior when access to preferred activities/items was restricted or when transitioning to new activities); and vision support (verbal and tactile prompts for exploration). (S-4 at 66-83.)

A Positive Behavior Support Plan (PBSP) was included in the January 2022 IEP. At that time, the behaviors of concern were identified as head punching, eye pressing, biting phone, and biting self; head punching was described as the most frequent with its hypothesized functions determined to be access to tangibles and adult attention. The PBSP included antecedent strategies, replacement behaviors, and consequences for performing behaviors of concern. (S-4 at 84-85.)

Program modifications and items of specially designed instruction in the January 2022 IEP addressed: a 1:1 paraprofessional trained in

behavioral interventions; a bus paraprofessional trained by the BCBA; academic support in all areas; multisensory instruction with demonstration and manipulatives; auditory/physical cues for visual presentations; small group reinforcement of social skills; a structured classroom with clear expectations; explicit instruction in and support for adaptive and self-care skills; support for alternative means of communication across environments; sensory strategies; a PBSP with a plan for titration of the helmet; a tactile schedule; a home-school communication log; and test, assignment, task, and direction accommodations including wait time. (S-4 at 87-90.)

The January 2022 IEP also provided for related services, including speech/language therapy (individual); occupational therapy (individual); physical therapy (individual); vision support (individual and consult); BCBA consultation; a full-time 1:1 paraprofessional with training in behavioral interventions; a paraprofessional for transportation on an accessible vehicle; and nursing services. (S-4 at 91-92.)

Student's placement in the January 2022 IEP was for full-time multiple disabilities support without access to the regular education setting or curriculum. Student was also determined to be eligible for Extended School Year (ESY) services. (S-4 at 94-97.)

Student's IEP team met again in April 2022. The IEP was not revised at that time but is identical to the January 2022 IEP except for minor variance in pagination. (S-5.)

Shortly after the April 2022 IEP meeting, the Parents requested an Independent Educational Evaluation (IEE) to include an FBA and a communication assessment. The District denied the IEE request. (S-6; S-7.)

In May 2022, a physician at the hospital where Student remained sent a letter identifying necessary home, community, and educational services for Student. Those included Applied Behavior Analysis (ABA) services. (S-8.)

District staff, including Student's special education teacher, were trained in the Competent Learner Model (CLM), which utilizes principles of ABA. (N.T. 408-09, 411-12, 417, 557-62; HO-8 at 9; S-39.)

Summer 2022

In June 2022, the District sought permission to conduct a reevaluation of Student, and another IEP meeting convened to plan for Student's return to the District for ESY services that summer. (N.T. 437-48, 581-82, 674; S-10; S-11.)

Revisions to the IEP in June 2022 included a recent report from an attending physician at the hospital, noting that Student's self-injurious behaviors had been managed successfully with a 1:1 aide, and recommending that a helmet not be used. Parent concerns at that time reflected Student's needs for vision, orientation, and mobility support; a communication plan; sensory regulation; and adaptive skills. They specifically objected to use of a chair with Student restrained for seated work tasks. The Parents also indicated need for after-school and weekend support for safety and generalization; and requested daily updates by the District as well as an IEE. (S-11.)

The June 2022 IEP reflected the goals to be addressed in ESY, with some updated baselines: occupational therapy (defined participation in structured sessions with tactile, verbal, and proprioceptive input; participation in activities of daily living); speech/language therapy (discriminating between icons to express wants and needs;) physical therapy (participation in gross motor play activities; walking with assistance); following one-step directions; participation in leisure activities; behavior

(using replacement behaviors without self-injurious behavior when access to preferred activities/items was restricted or when transitioning to new activities); and vision support (verbal and tactile prompts for exploration). Student had a 1:1 paraprofessional. The item of specially designed instruction for titration of the helmet was removed, and a new item described the bus Student would use. (S-11 at 69-94, 98-103.)

Additional minor revisions were made to the IEP for ESY 2022 in early July after Student began those services pursuant to the June 2022 IEP: special education instruction; occupational, physical, and speech/language therapy; and vision support. One new support was added for consultation with a local autism network. (S-12.)

The Parents approved in part and disapproved in part the Notice of Recommended Educational Placement (NOREP) for ESY programming and that for the fall of the 2022-23 school year. Of particular note is their disagreement with the District's rejection of services in the home following Student's discharge from the hospital because of "significant improvement" (S-13 at 2) and the availability of such services through other sources. (S-13.)

Student was admitted to the neurobehavioral unit of an inpatient facility with intensive behavior support (Institute) in late July 2022 for a period of four months. The purpose of the admission was assessment and treatment of severe behaviors, including self-injury, aggression, and non-compliance. (N.T. 675; S-20 at 1.)

Student attended sixteen days of ESY in 2022, three hours each day, before the admission to the Institute. (N.T. 582-83, 585, 674.)

Fall of 2022-23 School Year

The District conducted a reevaluation and issued a report (RR) in late October 2022. This RR summarized input from various sources, including

the Parents, and incorporated previous evaluation results and reports. (S-14.)

The October 2022 RR provided information on Student's participation in ESY 2022, which was initially focused on establishing a routine and participating in activities in the program. A classroom observation by a District school psychologist toward the end of the ESY program was also provided. (S-14 at 64-72, 77-78.)

The October 2022 RR determined that Student remained eligible for special education on the bases of Intellectual Disability and Multiple Disabilities. Strengths identified mirrored those in the most recent IEPs, with the needs encompassing academic support in all areas, full-time 1:1 support; vision and mobility services; social skills group participation; speech/language, occupational, and physical therapy; nursing services; and specialized transportation. The summary of Student's present levels was copied from a 2021 reevaluation because of the minimal new data obtained; the RR could not be completed because of the new admission to the Institute. (S-14 at 78-80.)

A new IEP was developed in November and December 2022 that contained little new information from the prior IEPs. The document indicated that the PBSP would be replaced by a protocol established by the Institute once finalized, but is not materially different from the summer 2022 IEPs, except that Student would attend a different District elementary school with opportunities to participate in the general education setting. The Parents approved the NOREP as an interim placement pending referrals to private schools that they requested be considered. (S-15; S-16; S-17.)

A preliminary behavior plan for Student developed in December 2022 identified the primary target behaviors as self-injury to head; self-injury to body other than head; aggression in the vicinity of other persons; and

disruption involving objects. Responses to the behaviors included planned ignoring; modified prompting (least to most); and interruption and redirection for safety. Other interventions addressed availability of functional communication for specific activities, a structured schedule, and emergency procedures. (S-18.)

Recommendations by the Institute for Student's discharge included a highly supportive learning environment with both individual instruction and small group activities, and implementation of its behavior plan. A high level of consistent adult supervision was also noted as necessary. In addition, the Institute noted Student's need to learn to manage behavior across settings and caregivers. (S-20 at 14, 98, 100.)

The protocol developed by the Institute identified eight target behaviors, each of which was operationally defined: self-injury to head; self-injury to body other than head; aggression in the vicinity of others; disruption; head-banging; biting others; self-biting; and [redacted]. The protocol provided treatment materials, as well as descriptions of the various interventions: planned ignoring; prompting procedures; functional communication of signaled availability of tangibles; a structured schedule; and response interruption and redirection for self-injury to head and [redacted]. Other guidance including for Student's transitions was also included. The protocol explicitly referenced an adaptive stroller for work activities, transitions, and feedings; use of foot orthotics and leg straps was specified for when the stroller was mobile. (S-19.)

A sample schedule for both the school day and other hours was included in the Institute protocol. Times of day designated for work time and feeding in the adaptive stroller was limited to fifteen minutes in duration or less. (S-19 at 28.)

Representatives of the Institute participated in the inter-agency meetings when Student was in its care, and the District was aware in advance of approximately when Student would be discharged. (N.T. 509-11.)

Spring of 2022-23 School Year

In mid-November 2022, at the request of the Parents, the District made a referral to a private school. (N.T. 594.)

In conjunction with Student's discharge from the Institute, a number of complex case meetings were held. The District was advised that it should implement the Institute behavior plan rather than its own PBSP. (N.T. 471, 586-87, 675-76.)

Student returned to the District again in early January 2023, attending school for thirty-three full days of six and one half hours each. Student was dismissed to return home shortly after 2:40 p.m. each day. (N.T. 439, 583, 591-92, 999-1000.)

Before Student's January 2023 return to the District, staff were provided with training by the Institute staff both remotely and in-person on Student's behavior plan and the home-school protocol that had been developed. The training included Student's transfer into and out of an adaptive stroller. (N.T. 439, 441-43, 445, 585-86, 914, 915, 1181-82; HO-8 at 10 ¶¶ 16, 17; S-20 at 19.)

A District BCBA trained other District staff on the Institute behavior plan for Student. (N.T. 415-16.)

The District found it necessary to revise the Institute schedule slightly to accommodate related service schedules and time periods such as recess, and communicated with the Institute staff about those adjustments. The IEP team did not discuss those adjustments or changes. (N.T. 447-48, 480-82, 484, 492-93, 586-87, 1189-90.)

The District staff understood that the Parents were in process of procuring an activity chair for Student for use at school through their insurance. (N.T. 386, 400, 929-30, 1189.)

When Institute staff were advised by the District that it did not yet have the ordered activity chair available, District staff believed that the Institute personnel agreed to its use of the Rifton activity chair in the meantime. (N.T. 391-93, 548-49, 950-51.)

A District-contracted physical therapist on approximately January 20, 2023 examined the Rifton activity chair that the District had available for and had already been used for Student. That physical therapist assessed the fit of the chair for Student with Student present, including seat depth, seat height, foot plate angles, and all areas that could be adjusted. The necessary adjustments were made to support Student's positioning in the chair, and it was not used by other children when Student was in the District. (N.T. 907, 912-13, 936-39, 959, 976-77.)

The District Rifton activity chair was functionally similar to the adaptive stroller used by the Institute. The District chair did have a pelvic harness necessary to prevent Student from using a folded seating position during work activities and feedings; whereas the Institute stroller had a lap belt rather than a pelvic harness. (N.T. 915-17, 948-450.)

The District implemented the Institute plan following Student's transition to the District, and attempted to follow the schedule for and duration of time Student would be in an activity chair. (N.T. 370-71, 384-85, 396-97, 473-74, 1188-89.)

Members of District staff placed Student in a Rifton chair at various times throughout the school day, including going on walks through the building, work time for up to thirty minutes in duration, and feedings. Straps for Student's feet were used when placed in the Rifton chair, limiting

Student's ability to move Student's legs, whether Student and the chair were mobile or stationary. (N.T. 376-77, 380, 384, 399, 479, 1196; HO-11 at 2.)

No one in the District took specific data on when Student used the Rifton activity chair at school. (N.T. 396-98, 489, 942; HO-11 at 1-2.)

The District utilized a home-school communication log sent home to the Parents on a daily basis in 2023. (N.T. 466, 494-95; S-31.)

There is a single reference to a Rifton activity chair in the home-school communication log on January 11, 2023, prior to fitting by the District physical therapist. A majority of the communications in that log are from school to home. (S-31.)

As of the beginning of 2023, Student was able to weight-bear and rise to feet with support. (N.T. 910-11.)

Student had orthotics at the time of Student's return to the District in January 2023. The orthotics were to be used for two hours at a time and were needed for proper foot positioning as well as weight-bearing throughout the school day. The orthotics sometimes needed to be repositioned properly on Student's feet upon arriving at school. (N.T. 923-27, 929.)

A doctoral-level physical therapist determined that Student should use the orthotics for periods longer than two hours at a time at school, which had been a recommendation for consideration by the Institute. No one consulted with the Parents on that decision, but Student was using the orthotics for longer periods at school before the end of January 2023. (N.T. 930-34.)

The District has a policy of calling a parent to pick up his or her child who has a fever of 100.4° or above. (N.T. 607, 610, 1036, 1038, 1061.)

On one occasion in January 2023, the Parents were called to pick up Student who had a fever of 100.7°. The Parents were also called on one or two other occasions around the same time to pick Student up due to illness. (N.T. 990-992, 1101-03.)

It is not safe for one of the Parents to transport Student in a vehicle alone due to Student's self-injurious behaviors. District representatives were expressly made aware of that safety concern on the occasions in early 2023 when the Parents were called. (N.T. 1102-03, 1107-08, 1158-59.)

Student was evaluated by Student's physician on the first business day after the fever incident. The doctor, a physician from Children's Hospital of Philadelphia, wrote a note indicating that Student was medically complex and that any temperature under 100.5° was not a fever for Student. This physician also provided a recommendation for monitoring a temperature between 100.5° and 101.5° before calling the Parents, and further noted the safety risk of one of the Parents transporting Student alone. (N.T. 1103-05; S-23.)

In early February 2023, Student was accepted by a private school that the Parents had asked be considered. (N.T. 817-18; S-16; S-22; S-29.)

An IEP meeting convened on February 8, 2023 to discuss Student's transition to the private school. This IEP provided data on Student's self-injurious behaviors since returning to the District in early January, and noted the use of the Institute protocol. (S-28.)

In the late Friday afternoon on February 10, 2023, the Parents reported to the District that they had noticed marks on Student's legs following Student's return home after the school day. The Parents also sent photographs of those marks. (N.T. 602, 717-18, 740, 996-97; P-31 at 12, 19.)

On the day when the Parents noticed the marks on Student's legs, Student arrived home on the bus at approximately 3:40 p.m. One of the Parents took Student inside the home and into the bathroom, where the marks were noticed immediately after some of Student's clothing was removed for toileting. Both Parents observed the marks. (N.T. 719-24, 739-40, 1113-14.)

The District conducted an investigation after the Parents' report of the marks on Student's legs, including an interview of all staff who had seen or interacted with Student that day. (N.T. 604-05, 998-1000, 1059-60; P-31 at 18)

The Parents were not aware that Student was using a Rifton activity chair at school in 2023 until February and March 2023 after this due process proceeding was underway. (N.T. 677-78, 1115-16, 1140-42.)

The Parents approved the NOREP for Student to attend the private school, and Student did so beginning on February 21, 2023 for the remainder of the spring of 2023. (P-10; P-14.)

By the time the hearing sessions concluded, the family including Student moved out of the District to another state. (N.T. 626-27, 634-35, 1069-70.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

In general, the burden of proof is viewed as comprising two different elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who filed the Complaint that led to administrative

hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, who assume role of fact-finders, have the responsibility for making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be largely credible as to the facts as they recalled them. The contradictions among accounts are attributed to lapse in memory or recall, or to differing perspectives, rather than intentions to mislead. The weight accorded the evidence, however, was not equally placed.

One proposed District witness, Student’s special education teacher throughout the time period in question, declined to testify despite proper service of a subpoena (N.T. 631; HO-10). The Parents contended throughout the hearing that her testimony was critical to their ability to meet their burden of persuasion. The record, however, establishes by at least a preponderance of the evidence that the Parents must prevail on the claims about which this witness would have provided testimony, all related to whether a denial of FAPE occurred. Thus, the testimony of that witness was not necessary.

The private school director and speech/language pathologist was offered as an expert by the Parents with respect to the appropriateness of the District’s Rifton activity chair that Student used. Her opinions on the size of the chair (N.T. 780, 831-32) and what constitutes a “restraint” (N.T. 787-88, 790-92) were rather general as well as speculative, and were therefore not credited as persuasive or based on specific expertise.

Moreover, these opinions were not consistent with the testimony of the private school occupational therapist (N.T. 858-60) who credibly observed that it would be necessary to see Student seated in the District's Rifton chair to make any determination on its size for Student (N.T. 861-62), which the private school director also was not able to do (N.T. 832).

The testimony of the one Parent about her concerns with transporting Student alone (N.T. 1102-03, 1107-11) was credited over the testimony of the District representatives as to her expressed worries, because the heartfelt testimony of that Parent, Student's mother, was persuasive and, to this hearing officer, forthright and genuine on that topic. However, the testimony of the Parents regarding the specifics of noticing the marks on Student's legs, such as how long they remained visible, was not consistent between them (N.T. 740, 1139) and undermined that claim.

It is troubling that no District witness testified with any certainty as to the conversation someone allegedly had with an Institute representative regarding use of a Rifton activity chair (N.T. 393-94, 423-25, 427-29, 490, 548-50, 950-51, 1185, 1195), casting doubt onto whether that discussion actually occurred and what may have been said or not said. More than one District witness was not forthright in testifying to whether certain matters were discussed with the Parents, such as its use of the Rifton activity chair (*e.g.*, N.T. 399, 430, 969-70), as is addressed more fully below.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

General IDEA Principles: Substantive FAPE

The IDEA requires each of the states to provide a “free appropriate public education” (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE is comprised of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Some years ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with the procedural obligations in the Act.

Through local educational agencies (LEAs), states meet the obligation of providing FAPE to an eligible student through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court has confirmed, an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, 500 U.S. 386, 399 (2017).

Individualization is unmistakably the central consideration for purposes of the IDEA. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Additionally, a proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *see also Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993) (same). “The IEP *must aim* to enable the child to make

progress.” *Dunn v. Downingtown Area School District*, 904 F.3d 248, 255 (3d Cir. 2018) (emphasis in original).

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family including parents have “a significant role in the IEP process.” *Schaffer, supra*, 546 U.S. at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b). Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 565 (3d Cir. 2010).

The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program. Among other things, IDEA requires the IEP Team, which includes the parents as members, to take into account any “concerns” parents have “for enhancing the education of their child” when it formulates the IEP.

Winkelman v. Parma City School District, 550 U.S. 516, 530 (2007).

General IDEA Principles: Compensatory Education

It is well settled that compensatory education may be an appropriate remedy where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has also endorsed an alternate approach, sometimes described as a “make whole”

remedy, where the award of compensatory education is crafted “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

General Section 504 Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). With respect to a retaliation claim, the issue is whether an LEA engaged in retaliation against Student related to Student’s disability and the Parent’s advocacy for Student.

The elements of a retaliation claim require a showing by the filing party (1) that they engaged in a protected activity, (2) that defendants' retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or her rights, and (3) that there was a causal connection between the protected activity and the retaliatory action.

Lauren W. v. DeFlaminis, 480 F.3d 259, 267 (3d Cir. 2007) (citations omitted). To establish the requisite causal connection a plaintiff usually

must prove either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link. *Id.* (citations omitted).

The Parents' Claims

Before turning to the issues presented, it is important to observe that this hearing officer lacks authority to enforce the January 5, 2022 decision of the prior hearing officer. Such responsibility lies with the state. 20 U.S.C. § 1412(a)(11). Some of the Parents' contentions raised tread close to, if not over, the line of enforcement. This decision is based on the jurisdiction of this hearing officer, not on authority that is vested in other entities.

FAPE

The first issue is whether the District denied Student a free, appropriate public education on procedural and/or substantive grounds. This question must be answered in the affirmative on several distinct bases, but not for the first time period at issue.

The claim that the District denied Student FAPE beginning on the day after the prior hearing officer's decision, through and including during ESY 2022, cannot be sustained. Even assuming to be true that the District's revisions to the IEP in January 2022 lacked some components that the Parents suggested were necessary, the Parents' ongoing contention that the District should have offered and provided a residential placement to ensure the safe discharge that the hospital must fail in the circumstances presented. Student was not discharged from the hospital until late spring 2022, based on its determination that Student had made progress behaviorally and no longer needed its inpatient services. That was a decision of the hospital and cannot be attributed to the District. Student attended the ESY program after discharge was secured for only a very brief

period of time, following a hospitalization of more than one year. The evidence is preponderant that Student required reasonable time to become acclimated to the school environment and all of the District staff working with Student over those few weeks. The District revised Student's IEP to remove the provisions regarding the helmet consistent with recommendations of the hospital, and the District implemented the IEP as revised for the ESY program that Student attended. The evidence simply does not support a denial of FAPE for the time period in the late winter, spring, and summer of 2022.

With respect to the relevant time period in early 2023, and substantively, the Parents contend that the District's IEPs for Student were not reasonably calculated to yield meaningful educational benefit in light of Student's circumstances including significant and well-known needs. Their main objection is to the District's use of the Rifton activity chair in early January 2023 that they characterize as a "restraint."

As noted, the testimony of the various District witnesses suggests that that they believed that the Institute provided its imprimatur of the use of that chair for the activities specified for an adaptive stroller. Whether or not such did occur, which cannot be determined on this record, their stance is incongruent with the Parents' ongoing, unequivocal, and explicit objection to use of a chair for Student that could be considered to impede Student's movement in any way. The District's argument that its Rifton activity chair was very similar to the Institute's adaptive stroller misses the point that the Parents, who are members of the IEP team and have the right to participate meaningfully in decision-making regarding their child's program, were not included in any such discussion. A single passing reference to the Rifton activity chair in a daily home-school communication log, which appears to have been made even before the chair was fitted for Student, is not

adequate in this case to apprise the Parents of the use of the chair against their explicit and longstanding wishes.

To the extent that the chair does not meet the definition of a “restraint” pursuant to applicable law, as the District argues, review of the term as defined is instructive, with an exception for “mechanical restraints” such as a seatbelt or harness. 22 Pa. Code § 14.133(b)(iii). Nonetheless, even the use of straps and the like for positioning and physical functioning may be proper “only when specified in an IEP” and “*as agreed to by the Student’s parents.*” 22 Pa. Code § 14.133(d) (emphasis added). Moreover, there is evidence in the record that at least one District professional permitted Student to remain in the Rifton activity chair beyond the recommended duration from the Institute, which has been determined to be inappropriate. Student’s feet were also placed in straps when in the Rifton activity chair contrary to the Institute protocol for their use only when mobile. Such impediments to Student’s ability to move physically interferes with Student’s exploration of and interaction with the environment and need for freedom in positioning. The District’s use of the Rifton activity chair in the manner that it did, and without the knowledge of the Parents, constitutes a denial of FAPE on both substantive and procedural grounds. The same conclusion must be reached on the District’s increased use of Student’s orthotics without any parental participation.

The Parents’ related contention that the District improperly used straps to position Student for the ride home on February 10, 2023, however, has not been established by the record evidence. The accounts of each of the Parents were not consistent on how long the marks that they observed remained visible on Student’s legs, and it would be speculative at best to attribute their presence and any implications therefrom to one or more specific actions of the District some forty-five minutes to an hour before Student arrived home. It is simply unknown whether or how the marks may

have been a result of Student's own unique positioning tendencies and/or other possible factors. This single isolated and unexplained event simply does not support this claim against the District.

The Parents also challenged the District's implementation of its policy to call one of them to pick Student up when Student exhibited a fever over 100.4°. This hearing officer must agree with this contention, and notes that the testimony of one of the Parents about the fever incident (N.T. 1107-11) was not only persuasive but is also irreconcilable with certain statements of some District witnesses (*e.g.*, N.T. 449 L 14 – 450 L 1; 601 LL 6-23). Here, the District was well aware of Student's need for adult support for vehicle transportation because of Student's self-injurious behaviors, without which a serious risk to Student's safety is presented. This is particularly evident in Student's IEPs during the relevant time period that specifically provided for specialized transportation, with paraprofessional support, both to and from school. Student's own physician sent a note to the District recommending a procedure for monitoring Student's temperature before taking the step of requiring one of the Parents to transport Student without the appropriate and necessary arrangements for safety, a recommendation that could easily be accomplished in a particular school setting such as the nurse's office without posing any risk to other students at school. The District's firm adherence to policy at the expense of the safety of Student is questionable at best and far from reasonable in this case. The failure of the District to implement the transportation provision in Student's IEPs based on District-wide accepted procedures rather than on Student's unique circumstances was another substantive denial of FAPE.

Next, the Parents challenged the District's refusal to consider services in the home before and after school as they requested in June 2022. The District refused that request, according to the relevant NOREP, because Student had made gains while hospitalized and because such services were

available through other agencies. Although the District suggested that its position was consistent with the respite care exception to ESY services in the state regulations, 22 Pa. Code § 14.132(c), the Office for Special Education Programs (OSEP) clearly provided its position on the nature of such services under federal law:

[T]here is nothing in [34 C.F.R.] § 300.106 [describing extended school year services] that would limit a public agency from providing ESY services to a child with a disability during times other than the summer, such as before and after regular school hours or during school vacations, if the IEP Team determines that the child requires ESY services during those time periods in order to receive FAPE. The regulations give the IEP Team the flexibility to determine when ESY services are appropriate, depending on the circumstances of the individual child.

71 Fed. Reg. No. 156, 46582 (August 14, 2006). Student's ongoing and well-documented need to learn to generalize skills in all domains across settings and across caregivers establishes, in this particular case, that the District's failure to give meaningful consideration to this request of the Parents denied Student FAPE both substantively and procedurally. The remedy awarded is intended to related in part to this specific violation.

Finally, the Parents assert that the District failed to provide the ABA training to its staff that the prior hearing officer concluded was necessary. Viewing this claim from a FAPE, rather than enforcement, perspective, the evidence is more than preponderant that District staff were trained in ABA principles. ABA as a science encompasses a broad umbrella of services, some of which may be known by other names such as CLM. The fact that a staff member may not understand that a program such as CLM is, in fact, based on ABA principles does not lead to the suggested conclusion that the

District denied FAPE to Student by neglecting to provide necessary training. This claim must fail.

Retaliation

The next issue is whether the District engaged in retaliation against the Parents for their advocacy for Student. Despite the conclusions above regarding the calls to the Parents when Student exhibited a fever, the evidence of any real retaliation against them that is within the jurisdiction of this hearing officer is not preponderant. Although the Parents' feelings on this claim are undoubtedly genuine, they have failed to establish retaliatory actions including the requisite causal connection necessary to succeed on this claim, and it must be denied.

Having reached the conclusions above regarding FAPE under the IDEA, the same determinations are made under Section 504 and for the same reasons. Section 504 need not be further separately addressed.

Remedies

As discussed above, the considered conclusion of this hearing officer is that the District did substantively and procedurally deny FAPE to Student over the a portion of the relevant time period; thus, Student is entitled to compensatory education. The Parents seek a qualitative remedy, about which there was no evidence presented; notably, the Parents posit that the loss is "impossible to quantify" (Parents' closing at unnumbered 24). Compensatory education is equitable in nature but must be based on some rationale. Accordingly, with no alternative, a quantitative approach must form the basis for the compensatory education remedy that is warranted.

The period of time equates to 33 days of 6.5 hours each. Applying equitable principles to the varied needs of this complex child, whose educational experience was necessarily impacted by each and every instance of inappropriate programming and significant impediment to meaningful

participation by the Parents, full days of compensatory education shall be awarded for the entirety of that time period, or 214.5 hours. The award shall be rounded up to 250 hours to provide an additional conservative estimate of an additional hour beyond each of those school days when Student was undoubtedly still impacted by the various denial.

This award is subject to the following conditions and limitations, which are individualized to Student's unique circumstances. Student's Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related services needs in the home, school, or community. These needs specifically include, without regard to any specific label, the generalization of skills across settings and among multiple caregivers; occupational, physical, and speech/language therapy services; orientation and mobility services and training; music therapy; communication, including augmentative and alternative communication; social skills; and transportation support.

The compensatory education may not be used for products or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress should Student return to the District. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age eighteen (18). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents; and by paraprofessionals or other non-family caregivers selected by the Parents for purposes of generalization

of skills as describe above. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

Finally, the Parents asked that, should Student return to the District, it should be required to provide an IEE at public expense. There is nothing in this record that suggests such a return is even possible much less likely, and even should that occur, it is unknown what Student's age or needs might be. This hearing officer declines to order such speculative relief.

CONCLUSIONS OF LAW

The District denied FAPE to Student both procedurally and substantively under the IDEA and Section 504 in January and February 2023, but not in 2022. Student is entitled to compensatory education to remedy the denial of FAPE in 2023.

The District did not engage in discriminatory retaliation against the Parents contrary to Section 504.

ORDER

AND NOW, this 31st day of October, 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not deny Student FAPE on any grounds in 2022.
2. The District denied Student FAPE on procedural and substantive grounds in January and February 2023 under the IDEA and Section 504.
3. Student is entitled to 250 hours of compensatory education, subject to the following limitations and conditions.
 - a. Student's Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related services needs in the home, school, or community. These needs specifically include, without regard to any specific label, the generalization of skills across settings and among multiple caregivers; occupational, physical, and speech/language therapy services; orientation and mobility services and training; music therapy; communication, including augmentative and alternative communication; social skills; and transportation support.
 - b. The compensatory education may not be used for products or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services

that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress should Student return to the District. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age eighteen (18). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents; and by paraprofessionals or other non-family caregivers selected by the Parents for purposes of generalization of skills as describe above. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

4. The District did not engage in discriminatory retaliation against the Parents under Section 504.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 27518-22-23