

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

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

ODR No. 28186-22-23

Closed Hearing

Child's Name:

C.B.

Date Of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date Of Decision:

11/30/2023

INTRODUCTION AND PROCEDURAL HISTORY

The student, C.B. (Student),¹ is an early elementary school-aged student residing in the Nazareth Area School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² as a child with a disability based on an Autism and Speech/Language Impairment classification, and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.³

In June 2023, the Parents filed a Due Process Complaint against the District under the IDEA, challenging the programming implemented for Student over the 2021-22 and 2022-23 school years prior to Student's enrollment in a charter school. The matter proceeded to a due process hearing convening over several sessions.⁴ The Parents sought to establish that the District's program was flawed in several respects on both procedural and substantive grounds, including failing to appropriately address Student's communication and behavior needs as well as proposing an overly restrictive placement; they demanded compensatory education as a remedy. The District responded by defending its programming and contending that the

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 References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibit 1 (HO-1). References to Parents in the plural will be made where it appears that one was acting on behalf of both.

data in the record did not support the Parents' claims, and that no relief is 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.

ISSUES

1. Whether the District provided Student with an appropriate educational program, both procedurally and substantively, over the 2021-22 and 2022-23 school years; and
2. If the District failed to provide an appropriate program for Student over the 2021-22 and/or 2022-23 school years, is Student entitled to compensatory education?

FINDINGS OF FACT

1. Student is an early elementary-school aged student residing in the District. Student is eligible for special education under the IDEA and attended District schools over the entire 2021-22 school year and the 2022-23 school year through May 2023. (N.T. 52-53.)
2. Student was diagnosed before the age of two years with Autism Spectrum Disorder, childhood apraxia of speech, dyspraxia, and sensory processing disorder. Student was also diagnosed with Attention Deficit Hyperactivity Disorder at a later time. (N.T. 55-56.)
3. Student has been provided private occupational, physical, and speech/language therapy in addition to behavioral health services. (N.T. 56-57; S-1 at 4; S-3 at 2.)

Early Educational History

4. Student received early intervention services as an infant/toddler where attention, play skills, and communication skill development were addressed. (S-1 at 4.)
5. Student continued with early intervention services provided by the local Intermediate Unit (IU) beginning at age 3. Student received special education instruction, occupational therapy, and speech/language therapy through the IU. (S-1 at 4.)
6. The IU completed a reevaluation of Student in early 2021. Assessment of Student's development (Developmental Assessment of Young Children) reflected delays across most domains (cognitive; communication (expressive and receptive language); social/emotional; and adaptive) but with age-appropriate physical development. Student also exhibited weaknesses with fine motor and sensory processing skills. (S-1.)

General Findings

7. Student's expressive communication skills are limited especially compared to receptive language, and Student uses an augmentative and alternative communication (AAC) device. Student does use some verbal speech, so the AAC device is assistive. Student needs to use both verbal speech and an AAC device, with the latter when Student lacks the oral language. Student has yet not become a functional communicator. (N.T. 58, 208-09, 211, 219-20, 235-36, 251, 613-14, 692-93, 710, 715, 747, 824.)
8. A child's communication skills can impact the child's behavior because behavior is communication. (N.T. 549-50, 613.)
9. Student's private speech/language therapist provides modeling for Student using the AAC device. The modeling involves her direct use

of the device, which may be faded to more general prompting. When Student uses verbal speech, the device would be modeled to expand on the length of the utterance. That type of modeling should be provided throughout the day across activities and communication partners beyond the child having access to the AAC device. (N.T. 222-26, 235, 240-41, 262, 292-93, 745-46.)

10. Student needs language stimulation throughout the day with opportunities to interact with various communication partners. The District did implement some strategies during the school day to stimulate Student's use of language. (N.T. 234-36, 693-96, 760-61.)
11. The private and District speech/language therapists have agreed that Student need to have access to core words on the AAC device. They differed on the number of those core words that should be available for access. (N.T. 246-48.)
12. The District speech/language therapist would "mask" words on Student's AAC device so that Student could focus on the icon for a specific core word without the distraction of other icons. She agreed to have those icons masked only when drilling core words with Student due to concerns of the private speech/language therapist. (N.T. 700-02, 711-12, 713.)
13. Student's private behavior specialist observed Student at school three hours weekly over the 2021-22 and 2022-23 school years. During the 2021-22 school year, that specialist's services at school were reduced to none before resuming in the fall of 2022. (N.T. 398-400.)
14. The District BCBA conducted regular observations of Student at school and consulted with the IEP team throughout the school years in question. A number of District staff members collected behavior data. (N.T. 522-23, 558-59, 606, 625-26.)

15. The District speech/language therapist for Student provided training to staff working with Student when she modeled use of the AAC device and aided language stimulation. Aided language stimulation at school involved modeling use of the device and eliciting language from Student. Student was either prompted to use the device or a communication partner would model its use, but modeling did not occur throughout the school day. (N.T. 248, 686, 692-96, 706, 824; S-27.)
16. At various times over the 2021-22 and 2022-23 school years, the Parents and District discussed accommodations for, adaptations to, and modifications of Student's work. The District explained to the Parents that providing modifications would impact Student's grades because they were standards-based. (N.T. 96, 990-92, 1030.)
17. The Parents and District staff working with Student were in regular communication over the school years in question. (P-2; S-33; S-39; S-47.)

Enrollment in District Prior to 2021-22 School Year

18. Student enrolled in the District for the start of the 2021-22 school year when Student [redacted]. (N.T. 60-61.)
19. The District sought and obtained permission to conduct a reevaluation of Student in the spring of 2021 for the transition to [redacted] programming. (N.T. 847-49; S-2.)
20. The District's Reevaluation Report (RR) was completed in early June 2021. This RR incorporated input from the Parents indicating mastery of early learning skills (the alphabet, numbers, colors); and weaknesses in the areas of communication, behavior, and social/emotional regulation. Sensory-seeking behaviors and difficulty sitting still were also referenced. (S-3 at 2-4.)

21. The June 2021 RR incorporated results of the early intervention reevaluation and Student's Individualized Education Program (IEP) there. Goals in that IEP were for expressive and receptive communication skills and following directions at home and at preschool. The IU teacher noted strengths in communication development especially with use of an AAC device, recommending a structured program and interaction with same-age peers for social skills/social language development. A remote observation of Student by a District Board Certified Behavior Analyst (BCBA) was also reported. (S-3 at 4-8.)
22. Speech/language assessment was conducted for the June 2021 RR, reflecting limited spontaneous verbal language. Student's use of the AAC device was noted although Student did not have it for the evaluation; having the device available to Student at all times with modeling on the device by a communication partner was recommended. Assessment of articulation could not be completed. (S-3 at 9-12.)
23. Occupational therapy evaluation for the June 2021 RR identified areas of strength (functional fine motor skills) and weakness (visual-motor integration skills, sensory processing). (S-3 at 12-14.)
24. The District obtained a rating scale from the Parents for the June 2021 RR (Behavior Assessment System for Children – Third Edition); the teacher did not return that version of the scale. The Parents endorsed clinically significant concerns with attention problems, social skills, and functional communication; and at-risk concern with atypicality. Behaviors of concern at home included hyperactivity, aggression, adaptability, and activities of daily living. (S-3 at 14-15.)

25. The Parents also completed the Vineland Adaptive Behavior Scales – Third Edition for the June 2021 RR. Results reflected skills well below expectations overall and in the communication, daily living, and socialization domains; an average-range score on the motor skills domain was an area of strength. (S-3 at 15-16.)
26. The District identified Student as eligible for special education following the June 2021 RR based on Autism and a Speech/Language Impairment. Identified needs were for development of communication (including functional communication), socialization, and daily living skills; expanding use of the AAC device; intelligibility of speech; and attention and distractibility. Recommendations to the IEP team included: supports beyond regular education (special education setting with a low staff:student ratio, intense verbal instruction, planning for adaptive skills); speech/language therapy; modeling of verbal speech; language facilitation; multisensory presentation of directions (visual and verbal); use of the AAC device with core words and motor planning across settings with modeling by communication partners; and occupational therapy. Other suggestions in the RR were for a highly structured class setting; preferential seating with a visual schedule; consistent routine and structure; monitoring of academic skills with small group instruction as needed; multisensory instruction; repetition and practice; sensory input/breaks; modeling of behavior and social skills; test accommodations; social stories and social skills; positive reinforcement; a personal care assistant; and home-school collaboration. (S-3 at 16-20.)
27. The District school psychologist reviewed the June 2021 RR with the Parents. (N.T. 849.)

28. A District IEP was developed in July 2021. At that time, Student was not noted to exhibit behaviors impeding Student's learning or that of others. This IEP incorporated information from the June 2021 RR including parental input. Needs were identified with respect to fine and visual motor skills; following instructions and attending to tasks independently; receptive language skills; and early mathematics skills. (S-4.)
29. Annual goals in the July 2021 IEP addressed fine and visual motor skill development through legible handwriting (not currently exhibited); independence following directions and attending to tasks (minimally exhibited); receptive language (identifying objects) (minimally exhibited); expressive language through verbal speech, the AAC device, or signs (for pragmatic purposes such as requesting help) (minimally exhibited); and counting to ten with 1:1 correspondence (minimally exhibited). (S-4 at 21-25.)
30. Program modifications and items of specially designed instruction in the July 2021 IEP were for errorless teaching with fading prompts; intensive teaching (1:1 instruction for basic skills); faded most- to least-assistance prompts; variations of tasks and targets; variations of degree of difficulty of targets; a visual schedule; use of the AAC device and access in all settings; verbal and visual prompts and cues for expressive language (verbal or using the device); language stimulation techniques; cues for expressive language; directions broken down to individual steps; a reinforcement system with differential reinforcement and pairing with reinforcement; a classroom behavior support plan; an intervention plan for unsafe behavior; personal care assistance; and data collection. (S-4 at 26-33.)
31. The July 2021 IEP provided for speech/language (two thirty-minute small group sessions per week) and occupational (one thirty-minute

group session per week) therapy; adaptive physical education; and specialized transportation. Student would not participate in regular education for content area subjects but would receive specialized instruction through a program of full-time autistic support. Student would participate with regular education peers for lunch, recess, and school assemblies. (S-4.)

32. The Parents did not approve the Notice of Recommended Educational Placement (NOREP) accompanying the July 2021 IEP. (S-5.)
33. Another IEP meeting convened in August 2021. The Parents had provided additional information in July 2021 that was incorporated into the document, including their belief that Student was ready for a regular education classroom with support rather than the proposed placement. (S-6; S-7.)
34. The August 2021 IEP added a goal for identifying all lowercase letters of the alphabet (not exhibited). The section on program modifications and items of specially designed instruction was significantly revised, containing the following: a structured environment with a consistent routine; a visual schedule; use of the AAC device and access in all settings; language stimulation techniques; verbal and visual cues for expressive language (verbally or with the device); directions broken down to individual steps; clarified and repeated directions; personal care assistance; redirection and cues for attention; practice with previously taught skills with opportunities for generalization; adapted tests and assignments; and a home/school communication book. (S-7 at 27-29.)
35. The August 2021 IEP removed adaptive physical education and revised speech/language therapy to provide for one thirty-minute session in a small group and one thirty-minute individual session in

the classroom. Student's program was one of learning and speech/language support at an itinerant level, with Student participating in regular education for all content area classes and all specially designed instruction in that environment. The Parents approved the accompanying NOREP. (S-7; S-8.)

2021-22 School Year

36. Student's IEP was revised in December 2021 to reflect mastery of the goals for lowercase letter identification and counting to ten. Needs at that time were: fine and visual motor skills; following instructions and attending to tasks independently; receptive language skills; and identifying opposites. The mastered goals were removed, and two new goals were added: completing two-step academic directions with limited prompts; and identifying (matching pictures with) opposite actions, objects, or time. (S-9.)
37. Progress reporting in January 2022 reflected Student's abilities at that time on the goals for fine and visual motor skills and following directions and attending to task; progress on the goals for receptive language goal was inconsistent in part because of task refusal. Progress on expressive language is unclear from the graphs provided. (S-9.)
38. Student's IEP met again in early March 2022 and decided to have a Functional Behavior Assessment (FBA) completed for Student by the BCBA because Student's behaviors had increased since the start of the school year. (N.T. 529-30, 598-99, 790; S-10 at 6.)
39. The identified behaviors of concern for the FBA were making non-word vocalizations with a neutral expression; making non-word vocalizations with an agitated expression; making verbal "no" statements; dropping body to floor; and using fist to contact surfaces.

These behaviors were noted to occur whenever less-preferred tasks were presented, and particularly during mathematics lessons, centers, and carpet time. (S-11 at 1-2.)

40. The FBA noted use of two behavioral strategies not in Student's IEP: a first-then chart, and two scheduled movement breaks during the school day. The first-then chart was used with a timer for preferred activities after complying with expectations. The FBA included direct observations throughout the school day with data collection; Student exhibited only the first three of the five identified behaviors of concern during the observations. (S-11 at 5-9.)
41. The hypothesized functions of the behaviors were determined to be postponement/avoidance of a non-preferred activity or a transition (saying "no," making non-word vocalizations with agitated expression); and escape from stimuli when demands were presented without individual attention (making non-word vocalizations with neutral expression). (S-11 at 9.)
42. A new IEP was developed in May 2022 following the FBA. At that time, Student was noted to exhibit behaviors impeding Student's learning or that of others. By that time, Student was inconsistently completing two-step academic directions, but was making some progress on the goal for identifying opposites of actions, objections, or time. The expressive and receptive language goals were to continue from newly reported present levels. Student reportedly was not using the device even when encouraged and/or prompted through verbal and visual cues. (S-11.)
43. Parent input into the May 2022 IEP included their desire for Student identifying staff and peers; school counseling when needed; and a

sight word reading program. They also asked for recommendations for Student's behavior. (S-11 at 36-37.)

44. Needs in the May 2022 were identified with respect to fine and visual motor skills; following instructions and attending to tasks independently; receptive and expressive language skills (including expressive identification of actions and expressive/receptive identification of prepositions); and reading sight words. (S-11 at 40.)
45. Annual goals in the May 2022 IEP addressed fine and visual motor skill development through legible handwriting; expressing yes/no through verbal speech or the AAC device; requesting objects with two-word phrases using verbal speech or the AAC device; expressing functions of an object using verbal speech or the AAC device; expressively identifying actions; receptively identifying functions of objects; following academic directions; receptively and expressively identifying prepositions; following directions to transition between academic tasks; and reading sight words. (S-11 at 52-77.)
46. Program modifications and items of specially designed instruction in the May 2022 IEP were for a structured environment with a consistent routine; a visual schedule; use of the AAC device and access in all settings based on core words and motor planning; language stimulation techniques; verbal and visual prompts and cues for expressive language (verbal or using the device); a word-recognition reading program; directions broken down to individual steps; an adult to guide/assist Student; clarified and repeated directions; redirection and cues for attention; practice with previously taught skills with opportunities for generalization; social stories; a First/Then chart; ongoing functional behavior assessment (biweekly review of behavior data); use of a timer to end activities or transition; edible

reinforcements; adapted tests and assignments; and a home/school communication book. (S-11 at 80-83.)

47. The IEP team determined that a Positive Behavior Support Plan (PBSP) should be included in the May 2022 IEP. Although there is no separate PBSP, the IEP itself contains a summary of the FBA, several of the goals are related to behavior, and a number of antecedent strategies and consequences of behavior were set forth to address the behaviors. (N.T. 531-33; S-11.)
48. The May 2022 IEP provided for speech/language (two thirty-minute small group sessions per week) and occupational (one thirty-minute group session per week) therapy. Student would participate in regular education for content area subjects with accommodations and modifications, and specialized direct instruction outside that environment. Student's program provided for learning and speech/language support at an itinerant level. (S-11 at 85-88.)
49. The May 2022 IEP included an attachment entitled "Guide to AAC Device Programming and Use." This guide provided instructions for adding, showing, and hiding buttons, and specific directives to have the device available to Student at all times with encouragement to use it along with verbal speech. It did not include modeling of the device. (S-11 at 90.)
50. Academically, Student performed well over the 2021-22 school year, exhibiting early foundational skills expected of students of that age and grade level. Student's behaviors were also not of significant concern. (N.T. 69-70, 80, 148, 886-67.)
51. The IEP team reviewed behavior data regularly to confirm that the functions of Student's behaviors had not changed and determine

whether the strategies in the PBSP remained effective. (N.T. 534-35, 542-42.)

2022-23 School Year

52. At the start of the 2022-23 school year, Student's problematic behaviors had increased over the prior year with new behaviors occurring (getting out of seat; leaning body against staff; rubbing body parts on floor); Student was also not exhibiting skills performed in the prior school year. A meeting of Student's IEP team convened at that time to discuss the behaviors and strategies to address them; sensory breaks; adapted assignments; parental concerns for social skills and sensory needs; and monthly team meetings. (N.T. 84-85, 887-88, 894-96, 921-23; S-11 at 24, 37; S-12; S-39 at 66.)
53. Student's special education teacher worked directly with Student outside of the regular classroom for thirty minutes each school day during the 2022-23 school year. (N.T. 816-17, 825-26.)
54. When Student did not complete work during the school day, the District sent the work home with a note that Student did not complete it. (N.T. 92, 919; P-1 at 32.)
55. Student's IEP team met several more times in the fall of 2022. In early November 2022, the team discussed Student's behaviors including safety at school (aggression toward a sibling, unsafe movements with potential for self-injury) as well as academic concerns. Student required a high rate of reinforcement at that time. In December 2022, following an evaluation for adaptive physical education, that related service was added for thirty minutes each week. (S-11; S-12; S-13.)
56. Student's private behavior specialist frequently made recommendations on strategies to address Student's problem

behaviors. The District generally responded by convening a team meeting and considering data before making changes to the PBSP, and did not always accept the suggestions, such as ignoring behavior that posed a safety risk to others. (N.T. 404-07, 419-20, 451-52, 480, 487-88, 523-25, 561-64, 566-67, 581-82.)

57. Student was ill before the return to school in January 2023 after the winter break, and experienced difficulty transitioning back to school. (N.T. 109-10, 556-67.)
58. Student's IEP team met in January and February 2023. The team discussed Student's use of the AAC device, Student's return to school after the illness, difficulty with transitioning with peers, continuation of behavior strategies, and increased aggressive behaviors including physical contact with adults and hitting self. By February 2023, Student was also struggling academically, and at home especially with mathematics. (N.T. 111; S-11 at 24-25, 38; S-14; S-15.)
59. At the February 2023 IEP meeting, the Parents and District agreed to stop use of the AAC device at school. At that time, use of devices at home was limited and Student was exhibiting an increase in verbal speech. The District then focused on core words and visual supports while encouraging verbal communication. (N.T. 302, 686-87, 691-92; S-15.)
60. At the March 2023 IEP meeting, the team discussed Student's newly exhibited aggressive and other behaviors as well as supplementary aids and services and sensory needs; an autistic support placement was also considered. The Parents asked for a new FBA, but the team merely added the new behaviors to the IEP identifying antecedents to those behaviors, rather than conduct an FBA, because the new behaviors appeared to serve the same function as older behaviors. A

safety plan was discussed as were modifications to Student's work, and the team agreed to resume use of the AAC device. When the Parents asked for consideration of learning support, the team discussed that option as an approach to modifying work for Student, whereby the expectations would be changed; but the Parents did not agree with modifying the curriculum (the expectations on what Student would learn). (N.T. 306-09, 312-13, 376, 542-48, 572-73, 617-19, 623, 797-802, 803, 809, 865, 892, 908-09, 928-29, 935-36; S-11; S-16; S-20 at 27-287.)

61. The Parents did not approve a March 2023 NOREP for learning and speech/language support at a supplemental level because they had concerns with some of the content of the NOREP including an intention to revisit autistic support, and the absence of extended school year services. They asked via email with the returned NOREP a number of questions about the March 2023 meeting, including about their understanding that modifications to work could only be done in autistic support; a number of the questions were answered also via email but not the one about modifications. (N.T. 139-40, 185-86, 309; P-2 at 11-14; S-48.)
62. Progress reporting at the end of the second trimester of the 2022-23 school year reflected progress on the goal for fine and visual motor skill development through legible handwriting with fewer prompts needed; progress on the goal for expressing yes/no; progress through an increase in mean length of utterance on the goal for requesting objects with two-word phrases, preferring verbal speech; inconsistent progress identifying functions on the goals of identifying and expressing functions of an object; steady progress on the goal for expressively identifying actions; slow but inconsistent progress on the goal for following academic directions; some progress on the goal for

receptively and expressively identifying prepositions; inconsistent progress on the goal for following directions to transition between academic tasks; and slow but steady progress on the goal for reading sight words. (S-11.)

63. The District attempted to administer the Verbal Behavior Milestones Assessment and Placement Program for Student in the spring of 2023, but Student's behaviors prevented staff from obtaining results. (N.T. 643, 655-56; S-20 at 26.)

Spring 2023 Proposal and Disenrollment

64. Student's IEP team met in early May 2023 with a facilitator to develop a new IEP. The team again discussed autistic support but did not reach agreement on a new IEP. The meeting was to continue on May 15, 2023 again with the facilitator. (N.T. 856-58; S-17; S-18; S-19.)
65. Shortly after the early May 2023 IEP meeting, the District was informed that Student would be withdrawn from its rolls effective at the end of the 2022-23 school year. After advising the Parents that the May 15, 2023 meeting would still convene, the Parents stated that that meeting was "cancelled" (S-23 at 1). (S-17; S-23.)
66. On May 10, 2023, the Parents notified the District that they were disenrolling Student from its schools and completed a District form to confirm enrollment in a cyber charter school. (P-3; S-22.)
67. The District convened the May 15, 2023 IEP meeting without the Parents or facilitator. (N.T. 834-35, 983; S-20 at 9-10.)
68. An IEP was finalized at the May 15, 2023 meeting. Parent input into the May 2023 IEP from the May 2, 2023 meeting included a desire for modified work in terms of length and language level; use of the AAC device; and behavioral supports including safety and a new FBA. (S-20 at 42-43.)

69. The May 2023 IEP reported progress on the May 2022 goals. Student reportedly had made significant progress on the goal for fine and visual motor skill development through legible handwriting; mastered the goal for expressing yes/no; performed inconsistently based on motivation on the goal for requesting objects with two-word phrases; did not make progress on the goal for expressing functions of an object because Student was still learning to identify objects; mastered the goal for expressively identifying actions; performed inconsistently on the goal for following academic directions; was performing inconsistently on the goal for receptively and expressively identifying prepositions; performed inconsistently on the goal for following directions to transition between academic tasks; and mastered the goal for reading sight words. (S-20.)
70. Needs in the May 2023 IEP were identified with respect to fine and visual motor skills; following instructions and attending to tasks independently; receptive and expressive language skills (including expressive/receptive identification of prepositions); reading sight words; and reading comprehension. (S-20 at 47.)
71. Annual goals in the May 2023 IEP addressed fine and visual motor skill development through legible handwriting; expressing a two-word directive through verbal speech or the AAC device; requesting objects with two-word phrases using verbal speech or the AAC device; expressing functions of an object using verbal speech or the AAC device; receptively and expressively identifying prepositions; following academic directions; following directions to transition between academic tasks; reading sight words; and comprehension of sight words. (S-20 at 59-68.)
72. Program modifications and items of specially designed instruction in the May 2023 IEP were essentially same as in the May 2022 IEP;

speech/language and occupational therapy as well as adaptive physical education remained. (S-20 at 71-75.)

73. The May 2023 IEP provided that Student would not participate in regular education for content area subjects but would receive intensive specially designed instruction in a small group setting with a low student-to-teacher ratio; Student would participate with typical peers for lunch, recess, and assemblies. Student's program in this IEP provided for autistic and speech/language support at a full-time level. (S-20 at 80-82; S-21.)
74. The Parents rejected the NOREP accompanying the May 15, 2023 IEP and enrolled Student in the cyber charter school because they disagreed with the District's recommendation for autistic support. (N.T. 120-22, 124, 136-37, 183-84; S-25.)
75. The IEP team intended to develop a safety plan for Student but did not do so before Student's disenrollment. (N.T. 643, 656-57.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

In general, the burden of proof comprises two 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). The burden of persuasion thus rests with the Parents who filed the Complaint leading to this 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. The Parents also accepted the burden of production.

Special education hearing officers, who assume the role of fact-finders, are also charged with the responsibility of 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 credible as to the facts as they recalled them, without intending to mislead or deceive. There were conflicting accounts between information the District tried to convey to the Parents and what they understood to be shared, which is attributable to their divergent perspectives on Student's needs as impacted by the significant tension that has developed in their relationship. The weight accorded the evidence, however, was not equally placed; the documentary evidence in particular was heavily considered in determining what happened and when. The testimony of the District BCBA was more convincing than that of the Parents' behavior therapist on responding to Student's behaviors outside of the plan in large part because of the safety concerns presented if staff were to ignore behavior that had the potential to harm Student's self or another individual. The testimony of the speech/language therapists, particularly the privately retained professional, was very persuasive on Student's needs in that area.

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.⁵

⁵ The District's closing did not comport with the limitations imposed without objection (N.T. 1046-47), but the Parents did not challenge its closing.

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. “Special education” consists of specially designed instruction and includes related services. 20 U.S.C. § 1401(29); 34 C.F.R. § 300.39(a). “Specially designed instruction” is adapting the content, methodology, or delivery of instruction as appropriate to a child with a disability to meet educational needs and to provide for access to the general education curriculum. 34 C.F.R. § 300.39(b)(3).

Some years ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed the IDEA’s 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: Least Restrictive Environment

The IDEA contains a crucial mandate that eligible students are to be educated in the “least restrictive environment” (LRE) that also satisfies meaningful educational benefit standards.

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.S. § 1412(a)(5)(A); see also *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993).

LEAs are required to have available a “continuum of alternative placements” in order to meet the educational and related service needs of IDEA-eligible children. 34 C.F.R. § 300.115(a); 22 Pa. Code § 14.145. Furthermore, the “continuum” of placements in the law enumerates settings

that grow progressively more restrictive, beginning with regular education classes, before moving first toward special classes and then toward special schools and beyond. 34 C.F.R. § 300.115.

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 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).

Full participation in the IEP process does not mean, however, that parents are the sole decision-makers on the team. *See, e.g., Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) (noting that IDEA "does not require school districts simply to accede to parents' demands without considering any suitable alternatives" and that failure to agree on placement does not constitute a procedural violation of the IDEA). As has previously been explained by the U.S. Department of Education,

The IEP team should work towards a general agreement, but the public agency is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE). It is not appropriate to make IEP decisions based on a majority "vote." If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint.

Letter to Richards, 55 IDELR 107 (OSEP 2010); see also 64 Fed. Reg. 48 at 12472 (1999) (same).

The Parents' Claims

The Parents challenge several specific aspects of Student's programming over the school years at issue, with a focus on Student's communication needs and access to and use of the AAC device; Student's behaviors; and appropriate academic adaptations and modifications. They also assert a violation of the LRE requirement. These contentions shall be addressed in turn.

During the 2021-22 school year, the District proposed and implemented an IEP that was directly responsive to Student's needs in most respects. There were few concerns by either the Parents or District about Student's academic and behavioral functioning that year. Rather, the record as a whole suggests that the 2021-22 school year, Student's first in the District, was a positive experience for Student in those respects. Goals that were mastered were replaced with different expectations based on Student's unique abilities and needs. The District proposed and ultimately provided a program of regular education with the exception of speech/language therapy services; even the special education instruction was provided within the regular education environment. Program modifications and items of specially designed instruction generally targeted the identified needs of Student. In sum, the IEP of August 2021 as revised over the course of that school year was clearly reasonably calculated to provide meaningful educational benefit based on Student's unique academic and behavioral presentation. Student made appropriate progress from having early foundational academic skills to meeting grade-level expectations and mastering or making progress toward each of the IEP goals. Behavioral challenges in the spring of 2022 led to an FBA that identified and defined those behaviors, determined their functions, and resulted in a set of

antecedent strategies and consequences to address those concerns in a new IEP in May. That IEP similarly targeted Student's areas of need at the time in most respects. The area of communication over the 2021-22 school year shall be addressed next along with the 2022-23 school year.

The 2022-23 school year began with implementation of the May 2022 IEP, but with a lapse of skills that Student had exhibited the year before and new behaviors emerging. This occurred despite Student's special education teacher providing specialized instruction on a daily basis outside of the regular education environment as provided in the May 2022 IEP. The IEP team continued to meet to consider revisions to the IEP, and the District must be granted a period of reasonable rectification to address these new academic and behavioral concerns. Student's difficulty transitioning back to school in January 2023 is also a factor not attributable to the District (or the Parents or Student) in considering whether FAPE was provided. By early 2023 when the team was meeting regularly to consider Student's changing presentation, the Parents' request for a new FBA was not directly addressed but, instead of performing the careful analysis done nearly one year earlier, the IEP merely noted the new behaviors and observed antecedents. Even so, had a new FBA been conducted that spring, it likely would not have been completed before the May 2023 disenrollment of Student. It was at this time that the District returned to its recommendation for consideration of a much more restrictive placement: from itinerant learning and speech/language support to full-time autistic and speech/language support. The District did nonetheless propose an incremental step along the continuum to supplemental learning support in March 2023, which the Parents rejected but, notably, they did not outright disapprove of learning support. The subsequent May 2023 proposal was a drastic change in the various placement options that should have been available, regardless of the beliefs of the District members of the IEP team.

All of the foregoing leads to the critical discussion of Student's communication needs over both the 2021-22 and 2022-23 school years. There is no dispute that Student's behavior was a form of communication, a significant deficit for Student and one which required access to and modeling of the AAC device across settings and communication partners to supplement Student's limited verbal speech. This need was known to and recognized by the District as early as the June 2021 RR. Although there was evidence that the District did train staff on the AAC device, and generally had the AAC device available to Student throughout the school day, the evidence is preponderant that modeling of the device was not consistently provided; indeed, the IEPs themselves specified several options for encouraging Student to use the device other than modeling, including verbal prompts. The emphasis on verbal speech at school should not have meant that the device would be modeled only sometimes, particularly since Student is not yet a functional communicator. The aided language stimulation that was provided could not have overcome this lack of ongoing modeling that is critical to Student's communication needs. Moreover, whether or not Student used the AAC device in other settings with or without modeling is not relevant to the District's obligations in the school environment, and the brief period in the spring of 2023 when the team agreed to discontinue its use at home and school was simply not a long enough period of time to meaningfully impact Student's communication deficits for purposes of this analysis.

That Student was successful in all other respects over the 2021-22 school year is quite fortunate, and even logical in light of Student's foundational skills that year. Student's academic struggles did not begin to be manifested at school until the fall of 2022, when the curriculum became more difficult and beyond the foundational skills exhibited at that time. It is at that point that Student's special education program unmistakably required

modification to the content of instruction,⁶ as defined by the IDEA. The District's refusal to do so unconditionally is irreconcilable with its obligation to provide a program for Student in the least restrictive environment appropriate, and together with unmet communication needs undoubtedly led to Student's steadily increasing behavioral challenges over the 2022-23 school year. These flaws in the programming for Student's communication and academic needs constitute a substantive denial of FAPE.

The Parents also point to instances that they claim amount to procedural violations of the IDEA. They strongly challenge the District's decision to convene the May 15, 2023 IEP meeting without them, a meeting to which the team had agreed and about which they had ample notice. Setting aside the issue of whether the District was still the LEA on that date, it is unclear how one IEP team member can "cancel" a meeting that is typically held following an LEA invitation as part of its notice obligation. 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503. Still, the IEP and NOREP that followed that meeting are not controlling even if Student should return to the District, in light of the IDEA provisions for intrastate transfers, 20 U.S.C. § 1414(d)(2)(C); 34 C.F.R. § 300.323(e). Thus, to the extent one can conclude this meeting constitutes a procedural violation without the Parents' meaningful participation, the documents that followed are without effect.

The Parents also contend that the District's use of graphs to represent data collection and progress (or lack thereof) on behavior deprived them of the ability to understand Student's performance over the relevant time

⁶ The Parents understandably did not have a special education expert's understanding of modifications, adaptations, and accommodations, and appeared to use the terms interchangeably. They were at times asking for actual modifications of the expectations of Student's learning, particularly where Student was struggling. This is not surprising, and the fact that a child may need to have content of an area modified for some period of time does not mean that he or she will not be capable of returning to the grade-based regular curriculum in the future, particularly when doing so would permit the child to gain important foundational skills that will permit later growth alongside peers.

period. As noted, this hearing officer has found that Student's at least one of the graphs of Student's progress is difficult to decipher, and the lack of consistency over the 2022-23 school year certainly complicates a true understanding of Student's growth. Nonetheless, Student's behavior has been addressed in terms of communication, with which it is clearly intertwined, and the procedural contention is essentially part of the substantive. The discussion that follows on compensatory education encompasses both.

Remedies

Having concluded that the District did deny Student FAPE above, the Parents seek an award of compensatory education. There is no record evidence that would support a qualitative award, and the Parents suggest that a quantitative award would be equitable. They contend that full days of compensatory education is merited for the entire time period. The District, for its part, denies that any remedy is warranted.

Full days of compensatory education may be appropriate in some cases. *See Keystone Central School District v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education, affirming an award of full days). However, the remedy must be equitable under all circumstances. Here, the failure to appropriately address Student's communication needs had a different impact on Student's educational program over the 2021-22 year and the 2022-23 school year.

Student made overall progress on IEP goals during the 2021-22 school year, despite the failure to appropriately address communication deficits. Those deficits almost certainly were a significant factor in the behavioral challenges that began in early March 2022. Although the District responded

appropriately with an FBA and PBSP, the continued lack of adequate communication support over the course of that school year is cumulative and warrants a remedy. Allowing for a reasonable rectification period of thirty school days, one hour per day of compensatory education for this failure shall be awarded for each day that school was in session over the 2021-22 school year beginning with the thirty-first school day.

For the 2022-23 school year, Student almost immediately began to exhibit academic difficulties and increasing behavioral challenges as a result of communication deficits. For that school year, the failure to program appropriately for communication needs clearly pervaded Student's entire school day. The District's resistance to providing appropriately modified work for Student that year is intertwined with, and included in, this remedy. Providing another reasonable rectification period of thirty school days for that year, Student shall be awarded full days (five hours per day)⁷ of compensatory education for each day that school was in session beginning with the thirty-first school day of the 2022-23 school year through May 10, 2023 when Student was disenrolled.

The award of compensatory education is subject to the following conditions and limitations. 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 area of communication and peer engagement. The compensatory education may not be used for services, 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

⁷ 22 Pa. Code §§ 11.1, 11.3.

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 sixteen (16). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. 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.

This hearing officer does suggest, if the Parents consider returning Student to the District, that the parties put this dispute behind them and resume the cooperative and collaborative relationship that they shared prior to May 2023.

CONCLUSIONS OF LAW

1. The District denied Student FAPE on substantive grounds over the 2021-22 and 2022-23 school year for failure to program appropriately for Student's needs in the areas of communication and academic specially designed instruction.
2. Student is entitled to compensatory education to remedy the denial of FAPE.

ORDER

AND NOW, this 30th day of November, 2023 in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's special education program for Student over the 2020-21 and 2021 school years was appropriate in all respects other than addressing needs in the area of communication and academic specially designed instruction.
2. Student is awarded one hour of compensatory education for each day that school was in session beginning with the thirty-first school day of the 2021-22 school year through the end of that school year. Student is awarded five hours per day of compensatory education for each school day beginning with the thirty-first school day of the 2022-23 school year through May 10, 2023. All of the conditions and limitations on that award set forth above are expressly made a part hereof as though set forth at length.
3. Nothing in this Order should be read to preclude the parties from mutually agreeing to alter any of its terms.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
Hearing Officer
ODR File No. 28186-22-23