

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 Hearing Officer

Final Decision and Order

CLOSED HEARING

ODR File Number:

24462-20-21

Child's Name:

A.T.

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer:

Charles W. Jelley, Esq

Date of Decision:

12.03.2021

INTRODUCTION

This matter arises regarding a [redacted] Student enrolled in the Williamsport Area School District (District). The Parties agree the Student is a person with Autism and a speech and language impairment. Each disability requires the District to provide the Student specially-designed instruction (SDI) through an individual education program (IEP).¹ The Parent seeks an Order finding that the Student was denied free appropriate public education (FAPE) under each statute. To remedy these alleged violations, the Parent seeks an Order for multiple forms of appropriate equitable relief. The Parent, in their opening statement, waived all discrimination claims. (NT pp.205-206). Finally, the Parent seeks exhaustion of claims under 42 US Section 1983 for other violations beyond my jurisdiction's scope. Therefore, I now find the Section 1983 claim is exhausted.² The District denies it failed to provide a FAPE. After a careful fact-intensive review, I now find in part for the District and in part for the Parent. An Order granting appropriate relief follows.

¹ The federal implementing the IDEA are found at 34 CFR §300.1 *et. seq.* Individuals with Disabilities Act, (IDEA) 20 U.S.C. §§ 1400-1482, and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, (Section 504) and State law provisions (Chapter 14 and Chapter 15 of the PA Code) FAPE violations. Parent further alleges that the District has violated the Students right under 42 U.S.C. § 1983; and for discrimination under 29 U.S.C. § 794(a) (§504 of the Rehabilitation Act of 1973). Parents request a ruling on the Section 1983 civil rights violations for purposes of exhaustion. The Section 1983 claims are exhausted.

² The Decision Due Date was extended for a good cause, upon written motion of the Parties. After the action was filed Parent's counsel was replaced by another member of the law firm. The DDD was also extended due to schedule conflicts and then again on several occasions when the Parents retained an expert who needed time to complete an independent evaluation and prepare the report. References to the record throughout this decision will be to the Notes of Testimony (NT. p.), Parent Exhibits (P-#) followed by the exhibit number, School District Exhibits (S-#) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number.

PROCEDURAL RULINGS DEFINING THE SCOPE OF THE CLAIMS

On June 4, 2021, after holding an evidentiary hearing, this Hearing Officer ruled that the Parent either knew or should have known of the action that forms the basis of her Complaint in October 2018. Applying the IDEA statute of limitation, this hearing officer found the Parent should have filed her claims on or before October 18, 2020.

The Parent filed her Complaint on January 4, 2021, seeking a finding that the Student was denied a FAPE for the 2017-2018, 2018-2019, 2019-2020, 2020-2021 school years. On January 13, 2021, the District filed its Response, raising the affirmative defense of statute of limitations. The Parent filed this action on January 4, 2021, more than two years from when she either knew or should have known of the action that forms the basis of the Complaint. On February 1, 2021, the Parents filed a Reply asserting that February 6, 2020, was the knew or should have known date. Parent next asserts based on the February 6, 2020, date, the Complaint is timely; therefore, she insists the entire period from 2017-2018 to the present is actionable.

GL v. Ligonier Valley, SD, 802 F.3d 601, 625 (3rd Cir. 2015) tells us that parents have two years to file a complaint from the date they either knew or should have known about the action that forms the basis of the Complaint. *GL* establishes that the knew or should have known date occurs when an ordinary prudent parent acting, with due diligence, would have identified the alleged violation and action that forms the basis of the Complaint. After which, the parent has two (2) years from the knew or should have known date to file a Complaint.

On October 31, 2018, the Student was assessed at the local pediatric neurodevelopmental hospital, which then issued a report; that report is found at School District Exhibit 6. The report provided the Parents with independent information about the Student's speech and language abilities. The report suggests that the District provides applied behavioral analysis instruction, sometimes referred to as ABA. The report acknowledges that the Parent was dissatisfied with the Student's education, including concerns that the Student's program was too easy or not a good fit. The neurodevelopmental hospital report was then provided to the District.

After that and continuing to the present, the Parent participated in various IEP and face-to-face meetings that discussed and reviewed the report. The testimony and exhibits include documentation that on April 14, April 18, 2018, that the Parent sought additional OT and speech. On April 28, 2018, the Parent repeated her displeasure with the Student's IEPs. On October 29, 2018, the Parent again repeated her disagreements. In November 2018 and again in February 2019, [Parent] stated that the Student needs more ABA instruction. The record includes 18 plus e-mails from the Parent to the school about not getting enough help in kindergarten in 2017. These communications document disagreements about alleged violations about the level of OT, ABA instruction, and speech. These communications also now form the basis when the Parent either knew or should have known she could file a Complaint. The record is preponderant that the Parent worked with an educational advocate, participated in a mediation session and worked with several outside behavioral health agencies to advance her belief about the alleged violations.

A parent's inquiry and use of advocates or retention of legal services may influence the KOSHK date.³ Parent's statements and actions are the kinds of

³ See, e.g., *Bd. of Educ. of N. Rockland Cent. Sch. Dist. v. C.M.*, No. 16-cv- 3924, 2017 WL 2656253, at *10 (S.D.N.Y. June 20, 2017) (discussing how certain acts bearing on the timeliness of the due process complaint and noting, that Parent "engaged the services" of an education advocate and "consulted with a special education attorney"), *aff'd*, 744 F. App'x 7 (2d Cir. 2018).

communications and knowledge that demonstrate the Parent's full awareness of the alleged violations and actions that give rise to the KOSHK date.⁴ The record as a whole reflects that in early October 2018, she possessed knowledge of the alleged violations. The record is also preponderant that she acted on the belief and yet chose not to file a due process Complaint. Accordingly, I now find that the Parent either knew or should have known about the action that forms the basis of the Complaint as early as October 2018 or as late as December 2018. This initial on the record Ruling on the District's Motion is found in Volume II of the transcripts. Accordingly, claims arising from October 2018 through October 2020 are time-barred. This finding does not end the analysis of the District's Motion.

From September 30, 2019, through February 18, 2020, the Student was enrolled in a charter school; therefore, the District was not the local educational agency otherwise responsible for providing a FAPE. Accordingly, the District Motion to exclude claims from is September 30, 2019, through February 18, 2020, are granted.

Therefore, I now find the scope of the hearing is limited to IDEA and Section 504 FAPE claims from January 4, 2019, through September 29, 2019, before enrolling in the charter are actionable. The Parent's claims begin again on February 19, 2020, when the Student returned to the District through the end of the 2020-21 school year. An analysis of facts and law in dispute follows.

Here Parent explicitly noted various problems with the Student's IEP often making comments like complaining about the District's handling of the Student's speech, OT and behavior. See also, *McLean v. Easthampton School District*, 2020 WL 728816, at *4 ("Easthampton proposed an IEP and classifications for T.P., which Plaintiff rejected).

⁴ *N.J. v. N.Y.C. Dep't of Educ.*, No. 18-CV-6173, 2021 WL 965323, at *9 (S.D.N.Y. Mar. 15, 2021) ("robust record of [the parent's] dissatisfaction with the ways in which [the student's] disabilities were being . . . accommodated.").

STATEMENT OF THE ISSUE

Whether the Parent was denied meaningful participation in the Student's education? If yes, whether the district should be required to provide the Student with compensatory education or other equitable relief?

Whether the District failed to timely and adequately evaluate the Student's behavioral, academic, and communication needs? If yes, whether the district should be required to fund independent evaluations?

Whether the District should be required to provide additional staff training or support for personnel to implement the Student's IEPs? If, yes what appropriate relief is warranted?

Whether the District failed to provide the Student with a FAPE from January 4, 2019, through September 29, 2019, and then from February 19, 2020, through the end of the 2020-21 school year? If yes, whether the district should be required to provide the Student with compensatory education or other equitable relief?

FINDINGS OF FACT

1. The Student [redacted]. The Parties agree the Student is a person with the IDEA disability of Autism and a Speech and Language Impairment. The Parties agree the Student is eligible for special education services as a student with Autism and a secondary disability of speech and language impairment. (S-6, p. 4).
2. As of January 2019, the Student was a first-grader at a local elementary school in the District. (S-6, p. 1).
3. The Student left the District, then enrolled in a charter school on October 14, 2019. From October 14, 2019, through February 14, 2020, the Student attended [redacted] a public cyber charter school. The Student's education was provided in the home setting with assigned certified teachers via the internet,

webmail, live and guided classroom sessions, phone calls, and curriculum/textbooks. The Student's cyber program included a learning coach four (4) hours per day, five (5) days per week, throughout the school day. (S-27 p.8, S-27 p.28, S-22, S-29).

THE STUDENT REENROLLED IN THE DISTRICT AND THE AUTISTIC SUPPORT CLASSROOM

4. On or about February 18, 2020, the Student transferred from the charter and reenrolled in the District. Upon enrollment in the District, the Student was placed in the same Autistic Support classroom previously attended during the first part of second grade, now third grade, with the same teacher. (Tr. 444). The record notes the Student engages in PICA, meaning the Student will ingest ineligible objects, has difficulty staying on task, and engages in self-stimulatory behaviors like hand biting. (P-12, p. 15; S-29, pg. 8). The record reflects that the behaviors before and upon re-enrollment did not significantly impair learning. (NT. *passim*).
5. The record and the Exhibits do not identify if or when the District, after re-enrollment, held an IEP meeting to identify what comparable services it would provide until such time it could offer a new IEP. (NT. *passim*).
6. Parent never observed the Student at school within the District. (NT. p.215; 487-88, 670, 717-18; S-32, p. 1).
7. During 2nd and 3rd grade, the Student's class had seven to eight students, with a teacher and three paraprofessionals. (NT p.445, NT.p.448, 734). The Student never engaged in aggressive behaviors, like hitting, kicking or biting others and has never tried to elope from the school or classroom. (NT. p.448). Teachers and staff report the Student is pleasant. (NT *passim*).
8. The Student requires specially-designed instruction, including prompting to remain on task and focused on schoolwork throughout the day. (NT. p.448).
9. The Student is easily redirected with verbal and visual prompts. (NT. p.462).

10. At various times the District collected data on the redirection, SDIs and reinforcements that were otherwise effective for the Student learning replacement behaviors. (NT. pp.461-62).
11. The classroom aide accompanied the Student in the general and special education classes. (NT. pp.452-53, p.734).
12. The Student's classroom schedule included daily instruction in life skills. (NT. p.467).
13. The Student is somewhat verbal, communicates needs, can ask and answer simple questions. (S-8; Tr. 306-07, 386-87, 447, 640).

THE PRIVATE SPEECH AND LANGUAGE ASSESSMENT

14. On January 30, 2019, the Student was evaluated by a Speech-Language Pathologist (SLP) at the community Autism and Developmental Medicine Institute.
15. The SLP evaluation confirmed that the Student can use verbal language to answer simple questions and speaks in simple sentences. (S-8, p.1).
16. The SLP evaluator concluded that the Student has "mildly impaired receptive and expressive language skills" and more severely impaired social/pragmatic language skills. (S-8, p.3).
17. The SLP recommended continued speech therapy and did not recommend assistive technology for communication. (S-8, p.3-4).
18. A private psychologist from the community Autism and Developmental Center, who had previously evaluated the Student, recommended speech therapy "at the highest intensity possibly [sic] (a minimum of 2-3 times a week is recommended." (P-11, p. 4).
19. Initially, the District provided the Student with two 30-minute speech therapy sessions per week, one individual session and one group session; (S-6, p. 26; S-22, p. 26, NT. pp.641-42).

20. In February 2021, the District added an additional thirty-minute session of individual speech therapy. (NT. pp.664-45; S-29, p.31).
21. When school is in face-to-face instruction, the District's speech therapist is in the Student's classroom every day. The therapist focuses on each student's speech and language skillsets during the in-class time. (NT. pp.644-45, p.492).

THE PARENTS INPUT INTO THE IEP AND THE DISTRICT'S RESPONSE

22. At various times before leaving and after returning to the District, the Parent expressed concerns about the Student eloping from school. The Student never eloped from school, never attempted to elope from school property, and never eloped from the classroom. (NT. p.419, p.506, NT. p.507, NT. pp.668-669, S-6, p.11; S-11; S-22, p.9).
23. On October 7, 2020, the teacher agreed to take baseline data on the Student's touching. (P-6c, p.119; P-6d, p.9).
24. The data indicate that touching others in school is a low-frequency, low-intensity behavior that is easily redirected and does not interfere with the Student's education. (NT. p.459, p.310, S-17, S-20, S-22, S-25, S-26, S-27).
25. The March 2021 data indicates the Student touching behavior escalated and biting fingers increased. (Tr. 412, 507).
26. The teacher noticed that the Student was more sensitive, more impulsive, prone to cry, become upset and was also more lethargic. (Tr. 495-96, 507).
27. At first, the teacher responded to the uptick in behavioral changes with more frequent redirection and cuing. (Tr. 738-741). When those strategies did not work, the District proposed a Functional Behavior Assessment (FBA). (Tr. 435).
28. On May 3, 2021, the District completed an FBA. The FBA focused on the two

specific behaviors raised as concerns by the Parent, (1) the Student's hand hitting; and (2) the Student's touching of others "in a way that is not considered socially acceptable". (S-28, p. 2).

29. The FBA considered the antecedent factors that may be contributing to the behaviors and the consequences of the behaviors. The FBA included data of the frequency, location, antecedent and consequence of the behaviors over ten school days. (S-28).
30. The FBA hypothesized that the behavior might be calming or may also meet a sensory need. (S-28, p. 11-12).
31. Based upon the information from the FBA, the Student's 2021 IEP was revised to include a Positive Behavior Support Plan (PBSP). The PBSP included prevention strategies, replacement behaviors, and reinforcement for the Student to use sensory items rather than engaging in the touching and biting behaviors. (S-29, p. 29).

THE ALLEGATION OF STAFF ABUSE

32. When the Parent made allegations that a District employee grabbed and yelled at the Student, the District initiated an internal investigation. (P-6a, p.84).
33. When Parent made a formal complaint against a staff person, the District referred the matter to the Human Resources office, which completed a full investigation. (S-32, p.24).
34. The building principal investigated the Complaint, including interviewing the accused District staff person, and the person from an outside agency reported the alleged incident to the Parent. (NT. pp.718-728). Each interviewed individual confirmed that the staff did not forcefully grab the Student, yell, or shake the Student. (NT. pp.721-728).
35. The building principal and school counsel reported the investigation findings

to the Parent during a telephone call. (NT. p.724).

36. The District provided frequent communication to the Parent regarding the Student's day. (P-6a, P-6b, P-6c, P-6d; P-7).
37. Numerous IEP meetings seeking Parental input were held at Parent's request (NT. p.227).
38. Parent attended all of the Student's IEP meetings. (NT. p.228).
39. The District listened to, weighed, and responded to the Parent's concerns and took action based upon her concerns when needed. (NT. pp.489-90, pp.655-56, p.715).

THE AUTISTIC SUPPORT CLASSROOM AND THE MAY 2020 IEP

40. The Student receives all academics in the Autistic Support classroom. The Student is included in the general education classroom for up to 30 minutes daily, Gym, Art, Music, Recess and Lunch.
41. After the IEP team met, the District agreed to provide the Student with up to 240 minutes a month of speech and language and up to 120 minutes a month of OT. (S-22 pp.5).
42. The Student recognizes all letters. The Student can say the sounds associated with each letter with 100% accuracy. In May 2020, the Student could read 55 plus words. The Student can recognize the days of the week and months of the year. (S-22 pp.3-6).
43. The Student participates in classroom calendar activities every day during circle time. (S-22 pp.3-6).
44. The Student needs a lot of repetition of skills to retain the information. (S-22 pp.3-6).
45. The Student needs consistent prompting when answering questions about details from a book. (S-22 pp.3-6).

46. When asked a question, the Student will repeat the question that was asked. (S-22 pp.3-6).
47. Student met the goal of recognizing the letters in their name and putting them in the correct order with 80% accuracy. (S-22 pp.3-6).
48. During data collection probes, it isn't easy to keep Student on task and focused. (S-22 pp.3-6).
49. The reading goal includes a notation that staff uses ABA sessions and one-to-one instruction. (S-22 pp.3-6).
50. Student met the sight word reading goal of reading 20 words fluently. The Student earned the following scores, 5/13-20 words, 5/27-18 words, 9/9-20 words, 9/23-25 words, 2/26-25 words, 3/2-23 words. (S-22 pp.3-6).
51. The Student math goal targets addition facts with numbers 1-20 using manipulatives a number grid with 80% accuracy. The Student also uses a number grid to answer problems independently. (S-22 pp.3-6).
52. The IEP team added a goal to identify four coins by name and give the amount with 90% accuracy. (S-22 pp.3-6).
53. The Student enjoys math time and working with real coins; the Student likes to sing money songs during circle time. (S-22 pp.3-6).
54. To develop functional skills, the Student works on Menu Math. Menu Math is a restaurant menu that has food items on it. The Student uses the Menu Math to solve problems based on how much the items cost. (S-22 pp.2-6).
55. The Student knows all colors and shapes. The Student can describe shapes as well. (S-22 pp.2-6).
56. The Student can say simple phrases like, "A triangle has 3 sides", "A circle has no sides.", "An octagon has 8 sides". (S-22 pp.2-6). The Student has difficulty with concepts like greater than, less than, and equal to. (S-22 pp.2-6).

57. The Student does well with patterns and choosing what comes next. (S-22 pp.2-6).
58. The Student can count to 70 with some prompting and redirection. (S-22 pp.2-6).
59. The Student gets off task very quickly and forgets at times when counting. (S-22 pp.3-6).
60. The Student likes using the calculator when working with numbers and is learning how to check answers on addition and subtraction problems. (S-22 pp.3-6).
61. Learning to write is challenging; often, the Student responds by saying, "you do it." The OT continues to work on developing a pencil grasp. At times the Student will write with either hand. (S-22 pp.3-6).
62. After an IEP revision, the Student's speech was increased up to 240 minutes of speech and language therapy, 120 minutes in small group and 120 minutes of individual language tasks. Expressively, the Student's speech sound skills are age-appropriate. (S-22 pp.3-6).
63. The Student consistently produces jargon, words, phrases, and utterances, heard when watching shows, and appropriately commenting on items and activities. At times the Student will often get off the bus producing scripted jargon. When cued and provided with a verbal model, the Student will often imitate the therapist's model to greet adults and peers correctly. (S-22 pp.3-6).
64. The Student can follow one and two-step directions throughout speech and language sessions. (S-22 p.5-7).
65. The Student labels items when looking at pictures, playing with items and even playing games. The Student points to items based on concepts including quality, quantity, negation and Order. Because the Student

answers simple "wh" questions with ease, the team expanded instruction on developing functional "wh" questions, for example: "who is your teacher, where do you go when you are sick?" (S-22 pp.6-7).

66. The Student's peer interactions provide verbal and visual models, cues. Verbal prompting encourages the Student to appropriately engage with and interact with peers throughout speech and language sessions. The Student does not consistently or independently comment on items with the peer, initiate interactions or even take turns independently without direct cueing from the staff. (S-22 p.7).
67. Despite several toileting accidents, the Student is able, for the most part, to do all aspects of the bathroom routine without prompting. (S-22 p.7).
68. The Student learns when tasks are broken down into small segments, and staff reinforces each segment's completion. Reinforcement can be a high five or a quick squeeze. (S-22 p.10).
69. The Student can copy upper and lowercase letters. Uppercase letters were written accurately for 23/26 letters (P, R were written illegibly, and N was reversed). Lowercase letters were written accurately for 17/26 letters (a, b, e, g, q, r and z were illegible, and f and k were reversed). (S-22 p.10).
70. The IEP includes sensory interventions, verbal directives, redirection and fidgets movement break. The OT sensory room is used for very short periods. If the Student is in there too long, it becomes overstimulating and makes the Student more hyper instead of being a calm place. (S-22 p.10).
71. The IEP includes goals for reading, identifying a set of four coins, completing worksheets, answering questions, maintaining conversations, taking turns, answering "who," "where," "when" questions, copying letters, an OT goal to improve fine motor skills and a behavioral goal not to touch others. Each goal statement includes measurable short-term instructional objectives. (S-22, S-27, S-29).

72. The May 2020 IEP included multiple SDIs, like positive reinforcement, consequences for inappropriate behavioral choices, small group speech and language activities and redirection. (S-22 pp.24-25).
73. The May 2020 IEP includes the following related services, transportation, Occupational Therapy up to 120 minutes a month. (S-22 pp.24-26).
74. The May 2020 IEP states the Student regressed "after there is a gap in instruction." (S-21 p.26). The IEP does not identify what data was reviewed. The IEP does not state when or how the data was collected during the ESY online. The IEP does not identify what IEP was implemented from February 2020 to May 2020. The IEP does not identify what proposed goals or objectives would be worked on during the 2020 ESY time. The IEP does not identify the number of instructional hours the Student will receive each day. The IEP does identify the District would provide 15-minutes per week of OT and speech per week. (S-21 pp.26-27).
75. The 2020 ESY NOREP states the team considered the ESY checklist, a Regression/Recoupment Document, Progress Monitoring and a document called "Mandated school closure in response to the declaration of a global pandemic due to COVID-19 during ESY." (S-23). At the same time, the Director of Special Education testified that the May 2020 IEP and the subsequent progress reports state the District did not collect any instructional OT or speech data during the shutdown. (S-22 pp.1-16, S-20, S-26 pp.26-27 graphs). Instead of implementing the comparable services IEP the Director of Special Education stated the District offered reteaching and enrichment. (NT pp. 396-398m pp.428-432).

THE REEVALUATION IN DECEMBER 2020

76. On December 15, 2020, the speech therapist administered the Clinical Evaluation of Language Fundamentals 5 (CELF-5) to assess the Student's receptive and expressive language abilities. The Student's overall core

language standard score of 53 fell in the well below average range (average=85-115). The Student's receptive and expressive language abilities were at the same standard score of 57. (S-29 pp.6-8).

77. On December 31, 2020, the Student was given the WISC-V as a measure of overall intelligence. The Student's Full-Scale IQ of 63, or overall intelligence, falls in the Very Low range. Working memory and processing speed are the least developed cognitive abilities. The timed test format and the Student's inconsistent focus likely resulted in a low estimate of actual intellectual ability. The Student's ability to deconstruct visual stimuli into three pieces, in other words, choose three correct pieces that go together to form a puzzle, were right on par for a student this age. Compared to a previous cognitive evaluation in 2018, Students scores improved. (S-29).
78. The Student was given the Wide Range Achievement Test -5 (WRAT-5) to measure current academic achievement present levels. The Student's achievement scores varied and ranged from Very Low to Average. The Student's weakest achievement area occurred in Math which fell well below a typical student's age; however, this test was timed and may be a low estimate of the Student's true math abilities due to inconsistent focus. Spelling was the most developed achievement area. (S-29 p.5).
79. Given the low Full-Scale IQ, from the recent reevaluation, the team considered an additional IDEA disability of intellectual disability; based on the Student's overall test profile, the team rejected a finding of an intellectual disability. (S-29 p.8).
80. To determine the Student's present levels in writing, the OT administered the Test of Handwriting Skills-Revised (THS-R). The THS-R is a standardized assessment that can help professionals evaluate neurosensory integration issues manifested in handwriting. When combined with other sources of information, the results contribute to the diagnosis of conditions that may

impede the acquisition of handwriting and other essential literacy skills. The THS-R comprises ten subtests. The Student completed a series of subtests and was scored on the number of letters written in 20 seconds, reversals, spacing, case errors, and overall legibility of individual letters. The Student's raw writing speed score of 7 is a concern. When compared to peers, the Student presents with a high level of reversals and case errors. The THS-R includes ten subtests. The Student's overall percentile of 55% highlights average performance in handwriting at this time. Further examination of speed, reversals, and case errors should be progressed monitored. (S-29 pp.8-9).

THE FEBRUARY 25, 2021, IEP

81. The present levels state that when a story is read aloud, the Student intraverbally responds by recalling three (3) story details with 100% accuracy for three (3) consecutive biweekly sessions. The Student earned the following scores, 9/3=1 detail, 9/15=2 details, 10/01=2 details, 10/19=2 details, 10/29= 2 details,11/12=2 details, 12/01=2 details, 12/15= 2 details, 1/04=-= 3 details, 1/18= 2 details, 2/2= 3 details. The Student attempts to sound out unknown words. The Student's reading fluency appears to be improving. (S-29 pp.4-5).
82. The Student spelling list consists of 10 out of 20 words from the grade-level content. At the time of the IEP, the Student completed three (3) spelling tests. The Student benefits from reviewing flashcards throughout the week. A set of flashcards are also sent home for review. Drill and practice are used daily to review. (S-19 pp.4-5).
83. When given a set of the four coins, the Student can identify each by name and give the amount with 90% accuracy for 3 consecutive biweekly prompts. (S-29 pp.4-5).
84. The teacher uses touchpoint money and real coins when working on this goal.

The Student does well with a multi-modal approach to learning. The Student is beginning to use a multiplication grid. The Student reached a score of 70% accurate with zero and one multiplication facts.

85. A new multiplication goal was added, including 0's, 1's and 2's. The Student can demonstrate the concept as repeated addition with 80% accuracy for three (3) consecutive bi-weekly probes. (S-29 pp.4-5).
86. The Student is working on writing complete sentences, sometimes with a visual model and sometimes without. The Student is beginning to use spelling words in sentences with help. The Student needs prompting to use capital letters and end of sentence punctuation. With verbal modeling, the Student is beginning to complete sentences. A visual modeling strategy is used when writing down thoughts and words for copying. (S-29 pp.4-5).
87. Throughout the day, the student is provided the following: supplemental supports and services, breaks when needed, a massage chair, joint compression, oral motor exercises, and heavy work activities during sensory breaks. The Fidget Summary of Present Levels notes that the Student presents with performance issues related to fine motor, visual motor, and sensory processing development. The OT will address these performance issues to facilitate improved performance in the academic setting. (S-29 p.12).
88. The IEP includes measurable goals and short-term objectives in the following content areas; speaking and listening, following directions, completing repeated addition problems, and answering "wh" questions. The IEP also includes a writing goal, a behavioral goal not to touch others, a goal to improve writing speed, OT and speech goals. (S-29 pp.19-28).
89. The IEP included 17 SDIs, similar to the previous May 2020 IEP. (S-29 p.30).
90. The IEP includes the following related services, transportation, OT up to 120 minutes a month, speech and language therapy, up to 120 minutes a month

of group instruction, 240 minutes per month of individual therapy and up to 60 minutes of direct group OT. (S-22 pp.24-26).

91. The IEP includes a four (4) week ESY program. The IEP provides for 15-minutes a week of speech, 15-minutes a week of OT and transportation. (S-29 p.32). Neither the IEP nor the NOREP identified the number of hours a day the Student would attend the ESY school day. (S-29 p.32).

THE FUNCTIONAL BEHAVIORAL ASSESSMENT

92. On May 3, 2021, the District completed a Functional Behavioral Assessment (FBA). The May 3, 2021, FBA included a review of medical concerns, antecedent events, skill deficit related to the behavior of concern, social skills, communication skills, participation skills, self-regulation skills, consequence factors related to hand biting and touching others. The FBA included objective data tracking behaviors of concern daily occurrence across environments. The Observation Summary suggested that the low-level interventions like verbal redirection and sensory activities were working. (S-28).
93. The FBA included a working hypothesis, a review of existing data, frequency counts, antecedent, behavior and consequence data, a review of existing academic triggers, a direct observation, and a series of baseline date tracking behaviors by environments. (S-28).

THE PRIVATE INDEPENDENT EDUCATIONAL EVALUATION

94. In July 2021, the Parent obtained an independent education evaluation (IEE) at private expense. After reviewing the District's WICS-IV data, the private examiner chose to administer the Primary Test of Nonverbal Intelligence (PTONI). The PTONI assesses reasoning abilities in young nonverbal children suspected of having a cognitive impairment. The examiner administered the PTONI to clarify s non-verbal abilities given the Student's complex language deficits, which negatively impacts overall

performance on other traditional cognitive assessments. The examiner's reported PTIONI scores are associated with another student's name. The report states the other student's scores fell in the Mildly Impaired range (Quotient Score=68). Due to the naming error, the scores are not otherwise reliable. (P-28).

95. The private examiner administered the Wechsler Individual Achievement 4 (WIAT-4) to assess achievement. The WIAT-4 is a widely used instrument for measuring the development of basic academic skills across reading, mathematics, written language, and oral language. Scores on this instrument are determined by comparing the Student's performances to other same-age children. The Student's Standard Scores (SS) ranged from a low SS of 42 at the 1st percentile on Math Problem Solving to a high SS of 87 in Spelling at the 19th percentile. (P-28).
96. To assess Memory and Auditory Processing skills, the evaluator administered the CTOPP-2. The first sentence of the narrative describing the scores misidentified the Student's gender. (S-29 p.9, paragraph 2, line 1). Given the mislabeling of the Student's gender, I do not find the scores reliable.
97. Due to attention and focusing difficulties, the private examiner could not administer attention or executive functioning assessments. (S-29 p.9).
98. The private examiner used the Behavior Assessment System for Children-3 (BASC-3) to identify the presence of any emotional and behavioral circumstances. On this measure, responses fall into the following scales: Hyperactivity; Aggression; Conduct Problems; Anxiety; Depression; Somatization; Withdrawal; Atypicality, Attention Problems; Adaptability; Social Skills; Leadership. The BASC-3 has two rating levels relevant to psychological functioning: clinically significant range (high level of maladjustment) and an at-risk range. The mother endorsed "clinically

significant" concerns in the areas of Hyperactivity, Atypicality, Withdrawal, Emotional Self-Control, Executive Functioning, and Resiliency. She also endorsed "at-risk" concerns related to Conduct Problems, Depression, and Attention Problems. She also endorsed concerns in Adaptive Functioning. Adaptability, Social Skills, Leadership, Functional Communication, and Activities of Daily Living. The Student also had "Extremely Elevated" ratings in Problem Solving Index and "Elevated" ratings in Attentional Control Index and Overall Executive Functioning Index. Although requested, the current teacher did not provide input. (S-29 p.10).

99. The mother completed the Vineland Adaptive Behavior Scales, 3rd-Edition (VABS-III). Adaptive behavior assessments measure one's actual abilities, not potential capabilities. The Student's VABS-III level of adaptive functioning falls in the Extremely Low range. The Student's overall score is below age-based expectations and consistent with cognitive functioning on the WISC-V. (S-29 p.11).
100. The examiner's report includes nine (9) recommendations, with multiple subparts. The recommendations called for a board-certified behavior analyst (BCBA) to oversee a one-on-one behavior aide who would then implement a full-time in-school and home coordinated ABA program. The BCBA would also coordinate a home and school ABA program. The expert-recommended another FBA, completed by a BCBA, along with a safety plan to address PICA and hand biting. The report also included a series of recommendations for improvements to the academic program, including using Touch Math, Early Literacy Skills, adding Social Emotional Goals, a time management goal, and expanded speech and OT goals. (P-28 pp.12-15).

CONCLUSIONS OF LAW

Based upon the arguments of counsel, all of the evidence in the record, as well as my independent legal research, I make the following Conclusions of Law:

1. A due process complaint filed under the IDEA" must be filed within two years of the date that the parent or agency knew or should have known of the alleged action that forms the basis of the Complaint. *GL by Mr. GL and Mrs. EL v. Ligonier Valley School District Authority*, 802 F.3d 601, 66 IDELR 91 (3d Cir. 2015).

2. Although Section 504 of the Rehabilitation Act does not have its own statute of limitations, the Third Circuit has held that IDEA's two-year statute of limitations applies to claims made under Section 504. *GL by Mr. GL and Mrs. EL v. Ligonier Valley School District Authority*, 802 F.3d 601, 66 IDELR 91 (3d Cir. 2015), *PP ex rel. Michael P v. Westchester Area School District*, 585 F. 3d 727, 53 IDELR 109 (3d Cir. 2009).

3. The US Supreme Court has developed a two-part test for determining whether a school district has provided a free appropriate public education (hereafter sometimes referred to as "FAPE") to a student with a disability. There must be: (1) a determination as to whether a school district has complied with the procedural safeguards as outlined in IDEA, and (2) an analysis of whether the IEP is reasonably calculated to enable the child to make appropriate progress in light of the child's unique circumstances. *Endrew F by Joseph F v. Douglass County School District RE-1*, 580 US ____, 137 S. Ct. 988, 69 IDELR 174 (2017); *Board of Educ., etc. v. Rowley*, 458 US 178, 553 IDELR 656 (1982); *KD by Theresa Dunn and Jonathan Dunn v. Downingtown Area School District*, 904 F. 3d 248, 72 IDELR 261 (3d Cir. 2018).

4. To provide a FAPE, an IEP must be reasonable, not ideal or the best. *KD by Dunn v. Downingtown Area School District*, *supra*.

5. The law does not require a school district to maximize the potential of a student with a disability or to provide the best possible education. A FAPE requires an educational program that provides significant learning and

meaningful benefit. The appropriateness of an IEP is judged when made not later. *Ridley School District v. MR and JR ex rel. ER*, 680 F. 3d 260, 58 IDELR 281 (3d Cir. 2012).

6. For a procedural violation to be actionable under IDEA, the parent must show that the violation results in a loss of educational opportunity for the student, seriously deprives the parents of participation rights, or causes a deprivation of educational benefit. *Ridley School District v. MR and JR ex rel. ER*, supra; IDEA 615(f)(3)(E); 34 C.F.R. § 300.513(a).

7. An evaluation or a reevaluation must be comprehensive and presented to the student's parents within 60 calendar days after the public agency receives written parental consent for the evaluation, not including summer vacation days. 22 PA Code § 14.123(b); 34 C.F.R. § 300.301(c).

8. IDEA requires that a parent of a student with a disability be afforded meaningful participation in the IEP process and in the student's education. 34 CFR § 300.501(b) and (c); *DS and AS ex rel. DS v. Bayonne Board of Education*, supra; *Fuhrmann ex rel. Fuhrmann v. East Hanover Board of Education*, 993 F. 2d 1031, 19 IDELR 1065 (3d Cir. 1993).

9. An IDEA hearing officer has broad equitable powers to issue appropriate remedies when a local education agency violates the Act. All relief under IDEA is equitable relief. *Forest Grove School District v. TA*, 557 US 230, 52 IDELR 151 at n.11 (2009); *Ferren C. v. School District of Philadelphia*, 612 F. 3d 712, 54 IDELR 247 (3d Cir. 2010).

10. Compensatory education is one remedy awarded when a school district denies FAPE". In general, courts, including the Third Circuit, have expressed a preference for a qualitative method of calculating compensatory education awards that address the educational harm done to the student by the denial of FAPE. *GL by Mr. G.L. and Mrs. E.L. v. Ligonier Valley School District Authority*, supra; *Reid ex rel. Reid v. District of Columbia*, supra. At other

times, courts and hearing officers have endorsed a quantitative or "cookie-cutter" method. The "cookie-cutter" approach utilizes one hour or one day of compensatory education for each day of denial of FAPE. The "cookie-cutter" and the qualitative methods have been approved by courts, especially where there is an individualized fact-specific analysis of the denial of FAPE and the nature of the educational loss. See, *Jana K. by Tim K. v. Annville Cleona School District*, 39 F. Supp. 3d 584, 63 IDELR 278 (M.D. Penna. 2014), G.L. *supra*. Courts and hearing officers also employ an equitable approach wherein they craft relief by combining elements of both methods to fashion a child-specific remedy. Zirkel, P. (2020). Compensatory Education: The latest annotated update of the law. *West's Education Law Reporter*, 376(2), 850–863.

11. The District has proven that claims asserted in the due process complaint that occurred more than two years before the filing of the Complaint are time-barred. But for the time the Student attended the charter school from September 2019 to February 2020, all other claims within two years before the filing of the Complaint are timely filed.

13. Extended school year services must be provided if a child's IEP team determines, on an individual basis, that the services are necessary for the provision of a free appropriate public education. 34 CFR § 300.106.

15. Extended school year services are only necessary to provide a FAPE when the benefits a disabled child gains during the regular school year will be significantly jeopardized if he or she is not provided with an extended school year program. *LG and EG ex rel. EG v. Wissahickon Sch. Dist.*, 55 IDELR 280 n.3 (E.D. Penna. 2011). See, *MM v. School District of Greenville County*, 37 IDELR 183 (4th Cir. 2002); *In re Student with a Disability*, 108 LRP 25080 (SEA WV 2007).

16. The Pennsylvania extended school year services statute provides:

In addition to the requirements incorporated by reference in 34 CFR 300.106... a school entity shall use the following standards for determining whether a student with disabilities requires ESY as a part of the student's program:

(1) At each IEP meeting for a student with disabilities, the school entity shall determine whether the student is eligible for ESY services and, if so, make subsequent determinations about the services to be provided.

(2) In considering whether a student is eligible for ESY services, the IEP team shall consider the following factors; however, no single factor will be considered determinative:

(i) whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).

(ii) whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).

(iii) whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.

(iv) the extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.

(v) the extent to which a skill or behavior is particularly critical for the student to meet the IEP goals of self-sufficiency and independence from caretakers.

(vi) the extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.

(vii) whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities. 22 Pa. Code § 14.132(a).

16. The ESY program offered for the Summer of 2020 and the Summer of 2021 did not meet the Student's needs, otherwise known when each ESY IEP was offered. An appropriate Order granting equitable hour-for-hour relief follows.

17. The Parent has proven that the Student was not provided a FAPE from March 2020 to June 2020. The Student's May 12, 2020, IEP did not appropriately address the Student's needs and circumstances from September 2020 to December 2020.

18. Given the Student's unique individual circumstances, the December 2021 evaluation was comprehensive.

19. The February 2021 school year IEP was reasonably calculated to provide meaningful benefit. However, the 2021 ESY IEP was not appropriate.

20. The parent has not proven that the school district's special education reevaluation of academic, behavioral, social, OT or speech needs was not timely completed, individualized or comprehensive.

21. The Parent has not proven that the District denied her meaningful participation in developing the Student's education.

22. The Parent did not prove that the District owed the Student a FAPE when the Student was not enrolled in the charter school.

23. The Parent has not proven that the Student requires a one-on-one ABA-trained aide or a BCBA to oversee the full-time ABA program.

24. The Parent has not proven that the District's FBA is flawed, insufficient or incomplete.

25. The Parent has not proven that the staff requires additional training to implement the IEP or a BCBA or one-on-one to implement or oversee the full-time in-home and school-based ABA program.
26. The 504 regulations provide that compliance with the IDEA procedural safeguards is one means, but not the sole means of meeting the requirement of Section 504. See, *CG v. Commonwealth of Pennsylvania Dep't of Educ.*, 62 IDELR 41 (3d Cir. 2013), 34 CFR § 104.31-36.
27. The Parent has proven that District denied the Student a FAPE within the meaning of Section 504. Appropriate relief under the IDEA is a make-whole remedy for all Section 504 FAPE violations. *Molly L. v. Lower Merion Sch. Dist.*, *supra*.
28. The Parent has proven an entitlement to compensatory education. *Reid*, *supra*, *GL supra*. An appropriate Order follows.

GENERAL LEGAL PRINCIPLES

Here the Parent, the party requesting the hearing, shoulders the burden of proof on the denial of FAPE claims.⁵ After the hearing, both parties filed written closing arguments. I now find the testimony and the records presented provide credible evidence about the events in dispute. I also find the testimony and Exhibits permit me to draw inferences and make a fine-grained analysis of the facts necessary to determine if a denial of a FAPE occurred. I also find the testimony and Exhibits permit me to draw inferences and make a fine-grained analysis of the facts necessary to award appropriate relief. Finally, I find for all of the following reasons, the testimony of the District witnesses and the Parent's expert was weighed and fully considered. At times I found the exhibits conflicted

⁵ In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. In the role of fact-finders, special education hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. See, *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).

with the testimony; therefore, as noted below, I gave more persuasive weight to the exhibits that were created in real-time over an individual's recollection or conflicting explanation. All arguments, conclusions, and proposed facts submitted by the parties have been considered. To the extent that the testimony of various witnesses is not in accord with the findings stated herein, it is not credited. The Findings of Fact above and the Discussion and Analysis below constitute the written Findings of Fact and Conclusions of Law required by the IDEA and state law. (20 USC § 1415(h)(4), 22 PA Code Chapter § 14.162).

DISCUSSION ANALYSIS

THE SHUTDOWN, THE HYBRID TIME AND THE ESY LEARNING TIME

The Parents make five standalone FAPE and implementation claims; each targets a different time frame. First, targeting the COVID shutdown, the Parent contends the Student was denied a FAPE from February 2020 through June 2020. Second, she contends the Summer 2020 ESY program was not appropriate. Third, she argues the May 2020 IEP return to school time IEP from September 2020 to December 2020 was inappropriate. Fourth, she contends the December reevaluation was not comprehensive. And, fifth, she contends the February 2021 IEP and ESY offer was not appropriate. I will address each claim separately.

THE MARCH 2020 TO JUNE 2020 SHUTDOWN CLAIM

In February 2020, the Student transferred back to the District from the online cyber charter school. Districts are required to offer transfer student's comparable services "until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements" a new IEP.⁶ The

⁶ 20 U.S.C. §1441(d)(2)(C)(i)(I) says: "In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with

record reflects that before an IEP meeting could occur, the in-person school year ended by Order of the governor. The shutdown time and the May 2020 IEP are intertwined; therefore, I will combine the February 2020 to June 2020 and the May 2020 FAPE analysis.

Mid-March 2020 schools closed, and in early April 2020, instruction for all students shifted to an online platform. The April 2020 online learning platform took on a variety of formats, including live teaching, video lessons, work packets and limited one-on-one instruction. The documents developed before, during and after the shutdown do not support the testimony about the present level statements or the goal statements found in the May 2020 IEP, which indicate the District implemented an IEP. Let me explain.

First, the record does not include any documentation that the District held an IEP meeting or issued a NOREP describing what comparable services or FAPE services the District would provide when the Student reenrolled. The lack of an IEP meeting or a NOREP created the following series of procedural and substantive errors. Second, neither the teachers nor the District Special Education Director could cogently identify what IEP was in effect - the cyber school IEP or some other IEP document during the shutdown. Therefore, I now find the record is preponderant that no one can say what IEP goals were implemented and monitored during the shutdown. Third, the record is unclear about the duration of the online school day and the Student's participation. The mother says the Student received 10-minutes, whereas the Director states they followed the time in the IEP. While a NOREP would have resolved the dispute, it is not found. Fourth, while the Director of Special Education testified that the teachers worked on "enrichment activities," the May 2020 IEP present levels read as if the teachers implemented an IEP and collected continuous progress monitoring data. These contrary statements cannot be reconciled. Fifth, the

record is, however, preponderant that the graphed progress monitoring exhibits provided to the Parent do not include any March to June 2020 data points corroborating the Director's testimony. The data collected, graphed and provided to the Parents begins in September-October 2020. Sixth, like the May 2020 IEP, the ESY NOREP does not correct the omissions describing the length and nature of the online school day. While the ESY NOREP states regression and recoupment data was collected, the exhibits and the testimony do not support such a finding. Seventh, the District staff could not cogently explain how they decided that 15-minutes a week of OT and speech was appropriate when the May school year IEP offered 120 to 160 minutes a month. Eighth, the May 2020 ESY segment of the IEP fails to list what goals or objectives would be worked on during ESY or how regression and recoupment ESY data would be collected. The omission of the ESY goals/objectives, the lack of progress monitoring, and the unexplained allocation of OT and speech time are fundamental ESY flaws. Given the inconsistencies between the testimony and the written exhibits, I now find the District failed to provide a FAPE or comparable services from March 2020 to June 2020. I also find the May 2020 IEP and the ESY IEP, including the ESY related services, were not reasonably calculated to provide a FAPE.

THE RETURN TO IN-PERSON INSTRUCTION CLAIM

When school reopened in the Fall of 2020, the District first offered remote online services then hybrid in-person services. For the first three weeks of the school year, the Student received hybrid in-person services. Hybrid services provided two full school days of face-to-face instruction and two days of remote online instruction. At the beginning of the fourth week of the school year, the District offered, and the Parent accepted, four full school days a week of in-person instruction. By Christmas, the length of the school day returned to the traditional five days week of complete in-person instruction. This changing delivery of the instruction model conflicts with the May 2020 IEP offer of 6.5 hours of in-school instruction each day. I fully understand that the return to

school time was hectic, and safety became the driving factor. Therefore, while I now find a denial of a FAPE, I will equitably adjust the award of compensatory education to account for the turbulent return to school Fall to December time frame.

For the first time, in her closing statement, the Parent argues the return to school instructional model was discriminatory and violated Section 504. The record reflects that Parent's counsel waived any discrimination claims in her opening statement.⁷ Therefore, I now find the school closing and return to school discrimination claims are denied.

THE DECEMBER 2020 EVALUATION AND THE FEBRUARY 2021 IEP

The December 2020 evaluation and the February 2021 IEP reflect an offer of a FAPE. The evaluation includes a variety of assessments that provide helpful information about the Student's needs, strengths, weaknesses and circumstances. The OT and speech data provide valuable starting points to develop goals. The ability and achievement data also provide clear benchmarks about what the Student can and cannot do. The February 2021 goals and objectives are measurable. The increase in OT and speech reflect a clear commitment to address otherwise agreed-upon needs. The SDIs offer helpful strategies to enable learning. The provided progress reports indicate a steady upward trend in learning. The May 2021 FBA clarified which SDIs needed revisions and otherwise documents a reasonably calculated strategy to address the problem behaviors. Therefore, I now find that the February 2021 school year IEP was appropriate. However, this finding does not end the analysis of the 2021 ESY offer of a FAPE.

⁷ HEARING OFFICER JELLEY: On the Section 504 claims, are they FAPE claims or discrimination claims? ATTORNEY SWANSON: It's a FAPE. (NT pp.204-205).

THE 2021 ESY IEP CLAIM

When offered, the February 2021 ESY IEP failed to identify the number of ESY in-person or online hours of instruction each day. Again, the District offered the same 2020 ESY offer of 15-minutes of OT and speech without explanation. The cyclical repetition of the 15-minutes of ESY OT runs contrary to the team's February's 2021 decision to increase OT time from 120 minutes to a combined total of 180 minutes a month. Likewise, the staff failed to cogently explain why speech during the school year increased from 240 minutes to a total of 360 minutes a month, yet the summer ESY time stayed the same. This mechanical allocation of time, coupled with the omission of the length of the ESY school day, at best reflects a lack of individualization at worst smacks of administrative convenience. The District had ample time to correct the omissions, issue prior written notice and/or a NOREP describing the full program; it did not. An appropriate Order granting limited ESY appropriate relief follows.

THE PARENTS REQUEST FOR A FULL-TIME ABA ONLY PROGRAM

The IDEA requires an IEP to include "a statement of the special education, related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child." 34 CFR §300.320 (a)(4). The IDEA does not require that the IEP identify the specific methodology that the district will use.⁸ While the Parents' expert is well qualified, the expert's generalized testimony about the District's implementation of the ABA method is not persuasive. The expert's testimony lacked context about the Student's circumstances when the goals, SDIs, and related services were offered. In short, the expert's July 2021 report and testimony smacks of "Monday morning quarterbacking," The expert's insistence

⁸ *K.G. v. Cinnaminson Twp. Bd. of Educ.*, 73 IDELR 19 (D.N.J. 2018) (holding that an IEP does not need to identify the educational methodologies the district intends to use unless the evaluative data shows the student needs a specific methodology to receive FAPE), 71 Fed. Reg. 46,665 (2006)

on an ABA-only delivery of instruction with a one-on-one ABA aide fails to balance the Student's need for peer interactions. The Parent's ABA argument fails to recognize that the expert's opinions are not based on a direct observation of the Student in the school setting. Next, the expert did not consult with the district staff, which I now find omits valuable classroom context and data about the relative effects of the interventions, the SDIs and the related services. The report misidentifies the Student's name and, at another point, mislabels the Student's gender. The errors in the expert's written report undercut the reliability of the Student's testing data, if not the entire report.

The Parent's expert opined that, that in her opinion, more could be done using the ABA "gold standard." (NT pp.610-620). As the Parties know, the "gold standard is not applicable here.⁹ Accordingly, the ABA claim is denied an Order follows.

COMPENSATORY EDUCATION IS APPROPRIATE RELIEF.

The calculation of appropriate relief is a multi-step process. First, once liability is established, the hearing officer must determine the date when the district either knew or should have known (KOSHK) the denial of a FAPE occurred. Second, the hearing officer must determine whether the qualitative and/or quantitative will make the student whole. Third, the hearing officer must calculate the amount of compensatory education to make the Student whole. Fourth, the hearing officer must then calculate the reasonable rectification period. Fifth, once the reasonable rectification period is calculated, the hearing officer must equitably offset the awarded compensatory education by the length

⁹ IEPs "need not conform to a parent's wishes in order to be sufficient or appropriate." *K.S. v. Dist. of Columbia*, 962 F. Supp. 2d 216, 221 (D.D.C. 2013) (citing *Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148-49 (10th Cir. 2008), *N.T. v. Dist. of Columbia*, 839 F. Supp. 2d 29, 33 (D.D.C. 2012) ("While the District of Columbia is required to provide students with a public education, it does not guarantee any particular outcome or any particular level of education.").

of the reasonable rectification period. All the while, the hearing officer must always follow the guiding principle that "appropriate relief" must make the student "whole."

THE SHUTDOWN CALCULATION OF COMPENSATORY EDUCATION

The fundamental flaws in the provision of services during the shutdown were evident when they occurred. Allowing for an equitable adjustment in favor of the District, based on the circumstances, I now find the record is preponderant that the compensatory education KOSHK date is April 15, 2019. This date also represents an equitable adjustment for the reasonable rectification period, including the time necessary to convert from a face-to-face instruction to an online model.

Based on the intrinsic and extrinsic evidence reviewed, I will craft a modified hour-for-hour equitable award. Accordingly, based on the circumstances, I now find that two hours of instruction from the special education teacher per day from April 15 to June 9, 2020, is appropriate relief. I also find 45 minutes a week of OT and PT will put the Student back on a forward-moving path. This calculation represents an equitable award of appropriate relief.

THE 2020 ESY CALCULATION OF APPROPRIATE RELIEF

Using the 2021 ESY program as an equitable base, I now find the District in the Summer 2020 should have provided four (4) hours a day of face-to-face instruction. I also find the District should have provided 45-minutes a week of OT and speech services. Therefore, the District is now Ordered to provide a total of 80 hours (20 hours a week X 4 weeks=80 hours) of face-to-face ESY academic, behavioral and social instruction. For the 2020 ESY program, I also find that the District should now provide 45-minutes a week of speech and a 45-minutes a week of OT supports. Therefore, the District is Ordered to provide a total of 360 minutes of speech and OT (45 minutes X 2 = 90 minutes a week X 4 weeks = 360 minutes) in addition to the 80 hours of academic time.

THE 2021 ESY AWARD

I now find the four hours a day of 2021 ESY academic, behavioral and social instruction offered was appropriate. I now find the team substituted administrative convenience over individualization in allotting the related services time. Therefore, aware of the increase in related services time, I will now equitably award 50-minutes a week of speech and 50-minutes of OT services. (100 minutes a week x 4 weeks=400 minutes). Therefore, the District is Ordered to provide a total of 400-minutes of compensatory OT and speech. Like the 2020 award, the District is directed to provide the services, at public expense, either after school, on the weekends or during breaks from school. All 2021 ESY services should be provided before the beginning of the 2026-2027 school year. To ensure the Parties act swiftly, I also find, based on the equities, that any services not otherwise used are forfeited.

THE FALL 2020 RETURN TO SCHOOL RELIEF

I now conclude that the District should have determined the FAPE denial when they made their COVID Compensatory Education determination. The team knew they did not take data during the shutdown. The team knew the amount of lost instructional time. The team knew the amount of provided instructional time. The team knew they did not issue a NOREP for an IEP covering the shutdown time. The team either knew or should have known that the May 2020 present levels were flawed, yet these omissions went unnoticed.

The May 2020 IEP provides that the Student should have received 6.5-hours of instruction each day. When full-day instruction was provided the Student received 6.5 hours a day. Understanding that safety was the guiding star, I will now award 6.5 hours per day for each day from September to December. At the same time, I find the reasonable rectification is 20 school days, i.e., the month of September. Therefore, I will equitably offset the

compensatory education award by 120 hours. Following the District's IEP, I now conclude the District should provide the Student with 6.5 hours of compensatory education for each school day in October, November and December (21 days +15 days+16 days=52 days), totaling 338 hours. This award is now reduced by 20 school days or 120 hours. Therefore the Student is now awarded 218 hours of compensatory education. (52 days x 6.5= 338 - 120=218, See 2020-2021 School Calendar SD-24).

ORDER

And Now, this December 3, 2021, to correct the above procedural and substantive violation, the District is hereby **ORDERED** as follows:

1. The District is Ordered to provide the following relief:
 - a. A properly licensed, certificated or credentialed individual should provide all compensatory education services.
 - b. To remedy the 2020 ESY FAPE violation, the District is now Ordered to provide a total of 80 hours (20 hours a week X 4 weeks=80 hours) of face-to-face ESY academic, behavioral and social instruction.
 - c. To remedy the 2020 ESY FAPE violation, The District is Ordered to provide a total of 360 minutes of speech and OT (45 minutes X 2 = 90 minutes a week X 4 weeks = 360 minutes) in addition to the 80 hours of academic time.
 - d. To remedy the 2020 shutdown FAPE violation, the District is Order to provide two hours of instruction from the special education teacher for all days the District was in session from April 15 to June 9, 2020.
 - e. To remedy the 2020 shutdown FAPE violation, the District is Ordered to provide 45 minutes a week of OT and PT for each week the District was in session from April 15 to June 9, 2020.

- f. To remedy the 2021 ESY violation, the District is Ordered to provide 50-minutes a week of speech and 50-minutes of OT services.
 - g. To remedy the return to school denial of a FAPE from September 2020 to December 2020, the District is Ordered to provide 218 hours of compensatory education.
2. The District can select any and all persons needed to provide the compensatory education services.
 3. The Parent's ABA claim for prospective relief is denied.
 4. The Parent's ABA claim for a BCBA and a one-on-one aide is denied.
 5. The Parents Section 504 discrimination claims are waived.
 6. The Parent's Section 1983 claims are exhausted.
 7. The compensatory education hours described may take the form of any developmental, corrective, remedial or specially-designed instruction, including related services, transportation services to and from the services, transitions services, supplemental aids, accommodations, as these terms are defined in the current or future regulations implementing the IDEA or Section 504.
 8. All other claims for appropriate relief or affirmative defenses are dismissed with prejudice.

s/ Charles W. Jelley, Esq. LL.M.
Special Education Hearing Officer
November 19, 2021
ODR FILE #24462- 20-21