

*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**

**Closed Hearing**

**ODR No. 29213-23-24**

**Child's Name:**

J.W.

**Date Of Birth:**

[redacted]

**Parent:**

[redacted]

**Counsel For Parent:**

Aimee Rankin Zundel, Esquire  
1575 McFarland Road, Suite 301  
Pittsburgh, PA 15216

**Local Education Agency:**

Woodland Hills School District  
531 Jones Avenue  
North Braddock, PA 15104

**Counsel For The LEA:**

Patricia R. Andrews, Esquire  
Salvatore Bittner, Esquire  
1500 Ardmore Boulevard, Suite 506  
Pittsburgh, PA 15221

**Hearing Officer:**

Cathy A. Skidmore, Esquire

**Date Of Decision:**

07/01/2024

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student, J.W. (Student),<sup>1</sup> is a [redacted] student residing within the boundaries of the Woodland Hills School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> and the applicable state regulations;<sup>3</sup> Student also has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.<sup>4</sup> Student currently attends school in the District.

In February 2024, the Parent filed a Due Process Complaint under the IDEA contending that the District did not provide appropriate special education programming for Student for the 2022-23 and 2023-24 school years; as remedies, she sought compensatory education and certain declaratory relief. The Parent also claimed that the District acted with deliberate indifference and retaliation under Section 504, engaging in discrimination against Student and the Parent. The Parent did not challenge the program from February 2024 forward, however. District denied the Parent's contentions and all relief demanded, and the matter proceeded to an efficient hearing.<sup>5</sup>

---

<sup>1</sup> 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).

<sup>2</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818.

<sup>3</sup> The relevant Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

<sup>4</sup> 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 contained in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

<sup>5</sup> 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 (HO-) 1. The District's Motion to Dismiss

Following review of the record and for all of the reasons set forth below, the claims of the Parent must be granted in part and denied in part.

## **ISSUES**

1. Whether the District's evaluation of Student in November 2021 was in compliance with the IDEA;
2. Whether the District's special education program for Student from November 2021<sup>6</sup> through a point during the 2023-24 school year were appropriate for Student;
3. If the District's programming for Student during the relevant time period was not appropriate, whether Student is entitled to compensatory education;
4. Whether the District should be ordered to provide an Independent Educational Evaluation, including a Functional Behavior Assessment and/or other declaratory relief; and
5. Whether the District engaged in retaliatory and discriminatory conduct against Student and the Parent and/or acted with deliberate indifference in violation of Section 504?

---

was denied prehearing. (HO-1.) Citations to duplicative may not be to all, particularly for pinpoint cites.

<sup>6</sup> The parties had entered into a tolling agreement to preserve the scope of the claims. (P-35.) The Parent confirmed the scope to be decided at the initial session (N.T. 29-31) to end in November 2023, although she also contended that the program was not appropriate until February 2024 (N.T. 20).

## **FINDINGS OF FACT**

1. Student is [redacted] and resides within the District. Student is eligible for special education under the IDEA under the Other Health Impairment and Autism classifications. (S-15.)
2. Student has needs in the areas of executive functioning and social skills as well as academic support. Student also exhibits sensory needs that may be manifested as problematic behaviors. Student is usually successful at home taking a break when that occurs. (N.T. 476-77, 485-86, 489, 492-93.)

### **Early Educational History**

3. Student was identified as eligible for special education on the bases of Other Health Impairment and Autism by a different Pennsylvania school district in the fall of 2019. At that time, previous evaluations of Student had reported diagnoses of Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, Sensory Processing Disorder, Anxiety Disorder, and Depressive Disorder. (P-1; S-2.)
4. A Functional Behavior Assessment also conducted by that other school district in the fall of 2019 identified anger as a behavior of concern when denied a request or opportunity or was corrected at school. The hypothesized function of the behavior was to gain peer or adult attention. (P-2; S-3.)
5. An Individualized Education Program (IEP) developed by that other school district identified needs in the area of managing behavior with an annual goal and program modifications/items of specially designed instruction addressing that need. A Positive Behavior Support Plan (PBSP) mirrored the IEP. Student's program was one of itinerant learning support with full participation in regular education. (S-4; S-5.)

6. One of Student's family members passed away suddenly and unexpectedly in late 2020,<sup>7</sup> and that loss was very traumatic for Student. Student participated in trauma therapy following the death, and has received private therapeutic and psychiatric services over the years as well. (N.T. 477-81, 489; S-2 at 2; S-6 at 1.)
7. The Parent was previously involved with a community organization that she participated in founding, that worked to address concerns in the District. (N.T. 475.)

### **2021-22 School Year**

8. Student was enrolled in the District in the summer of 2021. (N.T. 482.)
9. In late August 2021, the very start of the school year, Student was involved in four incidents, one with a peer involving mutual verbal and physical aggression, two involving verbal comments to peers, and one involving a verbal outburst in class calling other students names. Student also engaged in physical aggression toward a peer, once on a school bus and once at school. (S-7 at 8; S-9 at 1.)
10. Another incident in a special class occurred on the second day of the 2021-22 school year with minor aggression between Student and a peer. The District promptly addressed the matter with both students, who apologized during a restorative conversation. (P-34 at 2-4; S-8.)
11. The District convened an IEP meeting for Student in early September 2021. The resulting IEP incorporated a majority of the content of the previous IEP and added limited current teacher input; information provided by the Parent focused on Student's typing and spelling, need for positive behavior support strategies including social skills, seating

---

<sup>7</sup> The family member and Student's relationship to that individual is explicitly identified at N.T. 478 LL 11-15 but omitted here for confidentiality reasons.

on the bus, and eating habits. The IEP identified specific needs for increasing time on task and managing impulsive behavior in the classroom, with annual goals addressed task initiation and staying in seat/raising hand. Program modifications/items of specially designed instruction provided for break opportunities, chunking of assignments, alternating preferred and non-preferred tasks, and opportunities for choices. A PBSP with antecedent strategies, replacement behavior, and consequences was also developed. Student's program again was for learning support at an itinerant level and full participation in regular education. The Parent approved the attached Notice of Recommended Educational Placement (NOREP). (N.T. 332; P-4; P-5; P-6; S-11; S-12.)

12. Shortly after the September 2021 IEP, the District suggested, and the Parent agreed to, a social skills group for Student that was developed for children with Autism. (S-13.)
13. An FBA conducted in the fall of 2021 identified calling out, leaving seat, and touching items of others without permission as behaviors of concern. No skill deficits were identified as related to these behaviors. Observations over a two-week period for the FBA involved forty class periods, with Student engaging in the calling out during 63% of those periods with the result that Student was off-task on those occasions; leaving seat during 20% of those periods; and touching items on one occasion. Student reportedly responded to one prompt during almost all of the leaving seat occasions, but there is no information on the level of prompting given or Student's response thereto on the other behaviors. The hypothesized functions of the behaviors were to gain peer/adult attention and to avoid non-preferred tasks. (P-7; S-14.)
14. The District evaluated Student in the fall of 2021 following a request by the Parent. The District obtained the Parent's consent for that

evaluation and completed an Evaluation Report (ER) in November 2021. (N.T. 54-56, 482; P-3; P-8; S-10; S-15.)

15. Cognitive assessment for the November 2021 ER reflected low average to average range Composite scores (Wechsler Intelligence Scale for Children – Fifth Edition) and a low average Full Scale IQ score. Assessment of academic achievement at that time revealed average-range scores in Listening Comprehension, Word Reading, and Math Fluency (Addition, Subtraction, Multiplication). Student earned low-average range scores in Reading Comprehension, Math Problem Solving, Numerical Operations, and Sentence Composition; the score in Spelling was in the Borderline range. (P-8; S-15 at 7-9.)
16. Student was cooperative in the administration of assessments for the November 2021 ER. (N.T. 61.)
17. The Behavior Assessment Scale for Children – Third Edition (BASC-3) for the November 2021 ER reflected a number of clinically significant concerns: for the Parent, those were hyperactivity, aggression, conduct problems, depression, attention problems, atypicality, adaptability, and activities of daily living. She also endorsed at-risk concerns with social skills and functional communication. The teachers' ratings, by contrast, revealed clinically significant concerns by one or more only with withdrawal and hyperactivity; ratings that were in the at-risk range for one or more teachers were aggression, depression, attention problems, learning problems, adaptability, social skills, leadership, study skills, and functional communication. (P-8; S-15 at 9-12.)
18. Occupational therapy evaluation was also part of the November 2021 ER, focused on fine motor skills such as grasp and handwriting. No related needs for the school setting were identified. (P-8; S-15 at 12.)

19. The District maintained the previous eligibility determination under the Other Health Impairment and Autism classifications in the November 2021 ER. Recommendations included strategies such as prompts and redirection, chunking of assignments, other test and assignment accommodations, and breaks as needed. (P-8; S-15 at 13.)
20. After the November 2021 ER was completed, the Parent asked for and the District completed assessment of sensory needs through a sensory profile. That profile, which is a questionnaire relating to “auditory, visual, touch, movement and behavioral sensory processing” (S-16 at 11), identified visual processing as a weakness particularly with organizational skills and completing written work. The profile further described significant difficulty with auditory processing (hearing and understanding verbal directions, listening to the teacher); minor difficulty with touch (proximity to peers, needing to touch objects); notable difficulty with movement (fidgeting); and challenging behaviors (inflexibility, frequent frustration, difficulty with transitions). The information was added to the ER but did not reflect a need to include programming for any sensory area. (S-15 at 12; S-16 at 5-6, 11.)
21. A meeting convened to develop an IEP after the November 2021 ER was completed. (N.T. 65, 90, 359; S-16 at 3-4.)
22. The November 2021 IEP, based on the recent ER, identified needs for increasing time on task, managing impulsive behavior in the classroom, and improving encoding skills. Teacher input reflected some disorganization, a few incomplete assignments, some inconsistent participation, and self-advocacy at times; parent information was for rewards other than technology, more opportunities for written assignments, a need for an agenda book, and a report on behavior by staff in the agenda. Annual goals with baselines



addressed spelling sight words, task initiation, and staying in seat/raising hand in the classroom. Program modifications/items of specially designed instruction provided for weekly social skills instruction (thirty minutes); ensuring Student's attention for directions; spelling practice; positive rewards for behavior; check-ins for organizational support; adult support as needed; test and assignment accommodations including chunking large assignments; scheduled breaks with access to the sensory room if requested; alternating preferred and non-preferred tasks; opportunities for choices; access to fidget items; and preferential seating. Student's program was one of learning support at an itinerant level with full participation in regular education except for social skills instruction. The Parent approved the accompanying NOREP for the IEP, which was to be implemented as of November 18, 2021. (P-9; P-10; P-11; S-17; S-18.)

23. A PBSP was also developed in November 2021 to address Student's behaviors, identifying antecedent strategies, replacement behavior, and consequences in that plan. The behavioral goals and program modifications/items of specially designed instruction are part of the November 2021 PBSP. (P-10; S-17.)
24. Later in November 2021, Student was involved in an altercation in a special class. The District notified the Parent that day, and made adjustments to student schedules as a result with potential further action if needed. (S-19.)
25. An Individual Student Safety Plan followed the November 2021 incident to be in place for the remainder of the 2021-22 school year. This Plan identified a trusted adult at school, specified monitoring at school by District staff, and provided for Student to visit a school

counselor or other staff as needed. Communication to the Parent of all further incidents was also included. (P-13; S-20.)

26. Student's IEP was revised in the early part of January 2022 following discussions with the Parent about a number of missing assignments. The revisions resulted from a facilitated IEP meeting.<sup>8</sup> The goal for task initiation was revised because it had been mastered, with increased expectations for remaining on task; the section on program modifications/items of specially designed instruction for individual adult support was revised to provide for staff review of Student's agenda, documenting behavior, and implementing the safety plan; and Student was required to write assignments and due dates in the agenda book. The PBSP was also revised consistent with the IEP. The Parent approved the accompanying NOREP. (P-14; P-16; S-25; S-38; S-40.)
27. Student's schedule was changed in January 2022 to reflect the Parent's request that Student be moved to honors classes in two core subjects. (N.T. 140, 503; P-17; S-7 at 9.)
28. In the middle of the 2021-22 school year, Student received a poor mark on an essay that was of personal nature to Student. Student inaccurately believed that the reason for the low mark was the topic and Student's response to the event, not the incompleteness of the essay. Student ultimately earned full credit after making necessary revisions. (N.T. 124-24, 132-34, 500-01; P-34 at 51-53.)

---

<sup>8</sup> The tone of some of the email communications between the Parent and District in December 2021 (S-21) strongly suggests that inviting a facilitator to the meeting was both appropriate and necessary. The names of other students have now been redacted from S-21.

29. Following an incident with peers in the cafeteria in March 2022, the District suggested that Student have lunch in another location for a short period of time, and the Parent agreed. (S-26.)
30. Student made progress toward IEP goals over the 2021-22 school year. (P-12; P-18.)
31. Student accumulated a number of absences over the 2021-22 school year (42 full days) and final grades in content area classes were all in the 78 – 97% range. (S-35 at 1-2; S-36.)

### **2022-23 School Year**

32. At the start of the 2022-23 school year, Student at times needed reminders and was easily distracted, sometimes calling out in class. Student also exhibited some academic difficulties, and at times did not complete assignments or have all materials at school throughout the year. Teachers notified the Parent of their concerns and tried to address them with Student throughout the school year as needed. (S-7 at 2-8.)
33. Student was enrolled in four honors classes in core subjects for the 2022-23 school year. (S-27 at 9.)
34. A new IEP was developed for Student in October 2022. Teacher input indicated that Student had near-failing grades in two of the honor classes but was doing well in the other two; difficulty with organization and focus was also indicated. The team discussed whether continuing in two of the honors classes was appropriate for Student, but the Parent did not agree to changes. Her concern was for focusing on Student writing assignments in the agenda book. Needs identified in this IEP related to executive functioning skills and particularly organization, with adult support still necessary. A post-secondary

transition plan reflected goals for college, competitive employment, and independent living. (P-19; S-27 at 1-14.)

35. The annual goals in the October 2022 IEP addressed Student daily writing assignments in the agenda book with a baseline performance; and demonstrating self-control by raising hand instead of calling out or getting out of seat.<sup>9</sup> The spelling goal had been mastered and was discontinued. Program modifications/items of specially designed instruction largely remained the same, with the following exceptions: spelling practice was removed; and a new provision was for written assignments when possible. The PBSP in October 2022 reflected these changes with antecedent strategies, replacement behavior, and consequences. Student's program maintained learning support at an itinerant level with full participation in regular education except for social skills instruction, and the Parent approved the accompanying NOREP. (P-12; P-20; P-21; S-27; S-39.)
36. In early November 2022, the Parent reported more difficulties between Student and peers in the cafeteria. The District contacted its school counselors as the Parent requested and alerted the staff in the cafeteria. One of the counselors spoke with Student and that conversation was reportedly successful. (S-29.)
37. Student's IEP was revised twice in the spring of 2023 at the request of the Parent, with first a removal of the check-ins for organizational and adult support with the agenda, with the next omission of small group testing. (P-19; P-22; S-27 at 9.)
38. In the spring of 2023, the District Safety and Security Coordinator, who is also a police officer in the community, received a telephone call

---

<sup>9</sup> The goal for demonstrating self-control was not part of the exhibit copies of the October 2022 IEP (P-19; S-27) but does appear in both the PBSP from the same date as well as the September 2023 IEP revision (P-20; P-22; S-30).

from a District administrator about a report by one of the Parent's children that the Parent had made statements that raised concerns for and upset the child. A second call to this Coordinator by a District representative confirmed this information, and the individual asked him to conduct a wellness check at the Parent's home. (N.T. 416-20, 434-35, 437-39.)

39. After the second call, the Safety and Security Coordinator went to the Parent's home, [redacted]. Two other borough police officers soon arrived at the home.<sup>10</sup> The Coordinator spoke with the Parent and explained his reason for being at the house, then contacted a crisis center after the Parent agreed to speak with one of its representatives. The Parent also conceded to making the statement of concern, and stated that she intended to do something later that day so that she would not be home when the children returned from school.<sup>11</sup> (N.T. 422-27, 442, 444, 460, 511.)
40. The District Safety and Security Coordinator left the Parent's home after speaking to the crisis center, and returned when one of its representatives called him to say that they arrived at the home. The Coordinator spoke briefly with the Parent again as the crisis center representatives were leaving, then he left as well. (N.T. 427-33, 515, 537)
41. The District Safety and Security Coordinator communicated with the District Superintendent through email approximately two weeks later to report on the wellness check. By that time, the Coordinator had

---

<sup>10</sup> The District serves the geographic area of approximately twelve municipalities. (N.T. 415-16.)

<sup>11</sup> The District Coordinator heard the Parent to say she planned to check in to a hospital, whereas the Parent recalled that she planned to check in to a hotel. They also had differing memories on what all was discussed that day and how long the visit lasted. These discrepancies are discussed briefly below.

learned that the Parent had expressed concerns about and was upset over that visit. (N.T. 447-50; S-32.)

42. The District Safety and Security Coordinator had no knowledge at the time of the wellness check that the Parent was involved with any local parent groups or participated at school board meetings. (N.T. 436-37.)
43. In the spring of 2023, Student's social skills group began to focus on peer interactions. However, Student did not want to attend the social skills group by the end of the 2022-23 school year and sometimes did not. Problems with peer interactions at that time were reportedly rarely occurring. However, the Parent was not at that time made aware of this circumstance, and the special education teacher did not recall discussing it with Student. In addition, the group conflicted with a content-area class. (N.T. 160, 176-77, 185-87, 206, 345-50, 384-85; P-28; P-29.)
44. Student accumulated a number of absences over the 2022-23 school year (60 full days), and final grades in content area classes were all in the 68 – 92% range. (P-30; S-35 at 3-5.)
45. Student made progress toward IEP goals over the 2022-23 school year. (P-23.)

### **2023-24 School Year**

46. At the start of the 2023-24 school year, teachers reported some concerns with absences, missing assignments, and two incidents of difficult peer interactions. (S-7 at 1-2.)
47. A meeting convened at the start of the 2023-24 school year and Student's IEP was revised again. At the Parent's request to foster Student's independence, the provisions for social skills instruction, written assignments, access to fidgets, and early dismissal were

removed; and the goal for writing in the agenda book was revised to provide for adult reminders when needed. Student was to be in regular setting for the entire school day, and no longer had social skills group; that group was replaced by individual and non-scheduled consultative social skills individually with Student's case manager (a special education teacher). (N.T. 153; P-22; S-30.)

48. The consultative social skills individually with the special education case manager occurred every two weeks. This consultation occurred when time permitted, often in the morning or end of day, and was limited to approximately five minutes with the teacher asking Student whether there were difficulties with peers and Student generally responding in the negative. (N.T. 160-164, 172.)
49. Another IEP meeting convened in October 2023. Parent concerns for this IEP reflected that Student was still grieving for deceased family members, and she shared her desire for Student to be more independent. Teacher input was positive across classes but noted that Student was sometimes unprepared, failed to complete assignments, was disorganized, and had recent absences; grades were then in the B to C range. Needs identified were again executive functioning skills particularly organization, and self-control in the classroom. The post-secondary transition planning maintained the same goals as before except that the form of further education was uncertain at that time. (N.T. 168; P-24; S-33.)
50. Annual goals in the October 2023 IEP, all of which had baselines, mirrored those in the most recent version of the prior IEP, addressing adult reminders for the agenda book as necessary and self-control in the classroom. The program modifications/specially designed instruction and program/placement sections also were maintained. The October 2023 PBSP also was retained from the previous version

with its goals, antecedent strategies, replacement behavior, and consequences. The Parent approved the accompanying NOREP. (P-24; P-25; S-33; S-34.)

51. The [redacted] school principal became involved with Student in the fall of 2023 when a teacher made a referral after an incident in the school gymnasium. Student was suspended from school for two days as a result. (N.T. 247-48, 255-57, 261; P-27; S-9 at 2.)
52. After a February 2024 IEP revision, the case manager/special education teacher met daily with Student about completing and turning in all assignments. Student had had several absences and the Parent decided to become more actively involved in Student completing assigned work. (N.T. 146-48, 192-93, 531-33.)
53. Student accumulated a number of absences over the 2023-24 school year (48 full days), and first semester grades in content area classes were all in the 72 – 91% range.. (S-35 at 6-7.)
54. Student made progress toward IEP goals over the first semester of the 2023-24 school year. (P-26.)

### **General Findings 2021-22, 2022-23, and 2023-24 School Years**

55. Student's teachers implemented the specially designed instruction in Student's IEPs. (N.T. 100-10, 121-23, 222-30, 340-41, 352, 364-65, 271-74.)
56. Student's teachers generally did not observe Student to have difficulty with peers. (N.T. 93-94; 248-50.)
57. The Parent was aware of, and often communicated with the District about, several instances of peer conflict for Student over the 2021-22 through 2023-24 school years. (N.T. 504-10.)



## **DISCUSSION AND APPLICATION OF LAW**

### **General Legal Principles**

The burden of proof is comprised of 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). Thus, the burden of persuasion in this case rests with the Parent who filed the Complaint that led 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 Parent also accepted the burden of production at the hearing.

Special education hearing officers, who have a role as fact-finders, are 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 all of the witnesses who testified to be generally credible as to the facts as they recalled them; several witnesses including the Parent did not at times have clear memories of exactly what took place when, which is understandable particularly regarding events more distant in time. The description of the wellness check incident by the District Coordinator was credited over the version of the Parent with respect to their interaction including its duration for several reasons: the demeanor of the Coordinator compared to the Parent when this subject was described; the Coordinator's relatively better recollection and more detailed recount of the home visit; the Parent's admissions throughout her testimony

that she lacked memory about details; and the Parent's asserted belief that she could not leave her home that afternoon despite an absence of any such warning or obstacles to her freely doing so (N.T. 526-27), which suggested a measure of exaggeration and, bluntly, was illogical under the circumstances.

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

### **General IDEA Principles: Substantive FAPE**

The IDEA mandates that states 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. 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 this 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). An IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Andrew F. v. Douglas County School District RE-1*, 500 U.S. 386, 399 (2017).

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). Proper assessment of whether a proposed IEP meets the above standards 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).

## **Evaluation Requirements**

Substantively, the IDEA sets forth two purposes of a special education evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to "determine the educational needs of such child[.]" 20 U.S.C. §1414(a)(1)(C)(i). Certain procedural requirements are set forth in the IDEA and its implementing regulations designed to ensure that all of the child's individual needs are appropriately examined. 20 U.S.C. § 1414(b)(2); *see also* 34 C.F.R. §§ 300.303(a), 304(b). The evaluation must assess the child "in all areas related to the suspected disability[.]" 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified," and utilize "[a]ssessment tools and strategies that provide relevant information

that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); see also 20 U.S.C. § 1414(b)(3).

When parents disagree with an LEA’s educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). Parents are entitled to an IEE funded by the LEA if its evaluation does not meet IDEA criteria.

### **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*, at 53. This critical

concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b). Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 565 (3d Cir. 2010).

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

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

### **General Section 504 Principles**

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

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). Accordingly, the coextensive IDEA and Section 504 claims relating to FAPE shall be addressed together.

With respect to a retaliation claim, the issue is whether an LEA engaged in retaliation against Student related to Student's disability and/or the Parent's advocacy for Student.

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

*Lauren W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007) (citations omitted). To establish the requisite causal connection a plaintiff usually must prove either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link. *Id.* (citations omitted).

Intentional discrimination under Section 504 requires a showing of deliberate indifference, which may be met by establishing “both (1) knowledge that a federally protected right is substantially likely to be violated ... and (2) failure to act despite that knowledge.” *S.H. v. Lower Merion School District*, 729 F.3d 248, 265 (3d Cir. 2013). However, “deliberate choice, rather than negligence or bureaucratic inaction” is necessary to support such a claim. *Id.* at 263.

### **The Parents’ Claims**

The Parent first challenges the District’s November 2021 ER as inadequate to assess all of Student’s needs, particularly in the areas of sensory processing, social skills, executive functioning, and behavior. With respect to sensory processing, it is true that the District did not utilize an instrument to evaluate such needs until, at the Parent’s request, a sensory profile was completed. This is somewhat surprising in light of Student’s known diagnoses to include a sensory processing disorder, but there is little in the record to suggest manifestation of sensory processing needs in the

school setting. The Parent is also correct that the November 2021 ER did not include separate tools specific to executive functioning and social skills. Further, the FBA did omit detail on the level of prompting needed during many of the observations.

On the other hand, the District's November 2021 ER (more than two years ago) did utilize multiple assessment tools, strategies, and instruments, rather than any single measure, to gather necessary information about Student's strengths and needs. The District conducted a review of education records; incorporated parental input including her views on Student's academic and social/behavioral functioning as well as a behavior rating scale; and obtained and reported on observations by and information from teachers and the District school psychologist. Although some instruments used for that ER were broad-based such as the BASC-3, rather than specific to the areas that the Parent challenges, each range of skills was assessed in some way. Viewed as a whole, the District accomplished the major purposes of a special education evaluation, assessing Student's suspected areas of disability and identifying needs in the areas of academic, functional, sensory, and behavioral functioning. Moreover, the Parent does not now raise current program claims; and Student is due a reevaluation in only a few months' time from the date of this decision, a period that encompasses the summer. This hearing officer concludes that an order for an IEE at public expense is not warranted at this time, and any program deficiencies that may have resulted will be addressed next.

The Parent's second claim is that the District's IEPs for Student have not been appropriate. On the face of the documents, they each identify Student's disability-related needs and address them through annual goals and/or program modifications/items of specially designed instruction. The goals were directly responsive to Student's areas of deficit and each contained baselines from which progress could be gauged. With respect to

Student's executive functioning weaknesses, those were manifested at school through behaviors for which antecedent strategies, replacement behavior, and consequences were in place. The same is true for the area of Student's sensory processing. The question, then, is whether as implemented, Student's needs were properly addressed.

Two areas that are striking on this record are the ongoing nature of Student's missing and incomplete assignments, and the social skills programming beginning with the end of the 2022-23 school year.<sup>12</sup> Despite provisions for organizational support and adult prompting, this weakness continued throughout each of those school years. While certainly Student required prompting, the efforts to teach Student to use the agenda book in the manner in which it was intended is a skill that Student obviously did not acquire. The IEP team was responsible for monitoring programming and revising it as necessary, and this hearing officer concludes that the failure to do so regarding Student's lack of organizational skills amounts to a denial of FAPE. In addition, Student has historically exhibited difficulty with peer interactions and age-appropriate social skills. Student's attitude toward the social skills group that began at the end of the 2022-23 school year led to brief, individual consultation that relied on Student's ability to understand and properly relay concerns with peers, and wholly deprived Student of practice and social skill acquisition including generalization across environments. However, to the extent that the Parent claims a procedural denial of FAPE, such a claim has not been established on these bases.

The Parent also contends that the District failed to appropriately address bullying of Student at school, which she characterizes as continual and ongoing. There can be no dispute that bullying is a significant concern in our nation and around the world. As the U.S. Department of Education

---

<sup>12</sup> There is no legal requirement for IEPs to identify specific curricula to be implemented.



recognized, “[b]ullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential.”<sup>13</sup> “Disability harassment that adversely affects an elementary or secondary student's education may also be a denial of FAPE under the IDEA[.]” In addition, “[h]arassment of a student based on disability may decrease the student's ability to benefit from his or her education and amount to a denial of FAPE.”<sup>14</sup> Furthermore, “[w]hether or not the bullying is related to the student's disability, any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied.”<sup>15</sup> Our own Third Circuit has recognized that a student who is the victim of bullying and whose education is adversely impacted as a result can be denied FAPE. *Shore Regional High School v. Board of Education*, 381 F.3d 194 (3d Cir. 2004). A New York federal district court logically addressed a claim that a school district deprived a student of an appropriate special education program because it failed to take appropriate steps to address bullying of the student by other students, thereby negatively affecting the victim student’s opportunity for an appropriate education. *T.K. v. New York City Department of Education*, 779 F.Supp.2d 289 (E.D.N.Y. 2011). In an extensive and cogent analysis of the concept of bullying, the Court noted that, “[e]very disagreement among children does not amount to bullying,” *id.* at 300, and “[w]hat distinguishes bullying from other forms of childhood aggression...is unequal and coercive power.” *Id.* (citation omitted). “Increased power need not be actually

---

<sup>13</sup> U. S. Department of Education, Office of Civil Rights, Dear Colleague Letter: Bullying and Harassment, at 1 (October 26, 2010).

<sup>14</sup> U.S. Department of Education, Office of Civil Rights, Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2000).

<sup>15</sup> U.S. Department of Education, Office of Special Education and Related Services, Dear Colleague Letter, 61 IDELR 263 (2013).

present, but there must be at least a perceived advantage for the bully either physical or psychological.” *Id.* (citation omitted). Bullying is also generally viewed as a pattern of negative acts committed over time. *Id.* at 298.

There are incidents over the relevant school years that one might describe as challenges with and even aggression to and by peers. Nevertheless, in this case, the District responded promptly each time such events occurred and addressed them in various appropriate ways. The record simply does not support a conclusion that a pattern of actions or some power advantage existed that amounts to bullying or a consequential denial of FAPE.

Finally, the evidence is far from preponderant that the District engaged in any retaliation against the Parent or Student, or acted with deliberate indifference in any respect in this case. Those claims must therefore be denied.

## **Remedies**

Having found a denial of FAPE to Student in addressing executive functioning and social skills, it is equitable to provide a remedy. There is no evidence from which to derive a “make whole” award, so the hour-for-hour calculation must be the guide. Prior to the end of the 2022-23 school year, Student received thirty minutes per week of social skills group instruction and that level of such services was not but must be provided by the District. With respect to the executive functioning skill relating to assignments, this hearing officer equitably estimates that one hour per week for the relevant time period quantifies this aspect of the FAPE deprivation. Accordingly, Student shall be awarded thirty minutes of group social skills intervention for each week that school was in session from the start of the 2023-24 school year (allowing a period of reasonable rectification in the spring of 2023)

through the date of the February 2024 IEP meeting when the Parent's challenges to programming formally ends; and one hour per week of compensatory education from November 18, 2021 through the date of the IEP meeting in February 2024 to remedy un-addressed executive functioning deficits.

The award of compensatory education is subject to the following conditions and limitations. Student's Parent 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 *specific to the areas of social skills and executive functioning*. 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 appropriately be provided by the District through Student's IEPs to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age seventeen (17). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent. 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.

## **CONCLUSIONS OF LAW**

1. The District's November 2021 ER complied with its legal obligations.

2. The District's special education for Student was deficient in the area of executive functioning from November 18, 2021 through the date of the February 2024 IEP meeting.
3. The District's special education program for Student was deficient in the area of social skills from the first day that school was in session for the 2023-24 school year through the date of the February 2024 IEP meeting.
4. Student is entitled to commensurate compensatory education to remedy the denial of FAPE.
5. The District did not engage in retaliation against, or act with deliberate indifference toward, the Parent or Student in violation of Section 504.

## **ORDER**

AND NOW, this 1<sup>st</sup> day of July, 2024, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's November 2021 ER complied with its legal obligations.
2. The District's special education for Student was deficient in the areas of executive functioning from November 18, 2021 through the date of the February 2024 IEP meeting.
3. The District's special education program for Student was deficient in the area of social skills from the first

day that school was in session for the 2023-24 school year through the date of the February 2024 IEP meeting.

4. Student is awarded one hour of compensatory education for each week that school was in session beginning with November 18, 2021 through the date of the February 2024 IEP meeting; and an additional thirty minutes per week for each week or partial week that school was in session from the start of the 2023-school year through the date of the February 2024 IEP meeting. All of the conditions and limitations on that award set forth above are expressly made a part hereof as though set forth at length, including the type of compensatory education to address the two specific areas that were not appropriately addressed.
5. The District did not engage in retaliation against, or act with deliberate indifference toward, the Parent or Student in violation of Section 504.
6. The District is not ordered to take any further action.
7. 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. 29213-23-24

