

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. 27997-22-23

Child's Name:

B.S.

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer:

Charles W. Jelley Esq.

Decision Date:

March 1, 2024

OVERVIEW OF THE DISPUTE

The Parent filed the pending Due Process Hearing Complaint alleging multiple failures to provide a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act, Chapter 14 and Chapter 15.¹ Currently, the Student is a [redacted] grader and attends a private school. The Parents contend that the District failed to offer and provide a free appropriate public education (FAPE) under either Act. They now seek an award of compensatory education, reimbursement for out-of-pocket costs, and tuition reimbursement.

On the other hand, the District seeks a declaratory ruling that, at all times relevant, during the 2021-2022 and 2022-2023 school years, they procedurally and substantively complied with the IDEA and Section 504. After considering all of the intrinsic and extrinsic evidence, I now find it in part for the District and in part for the Parents. My reasons, analysis, and conclusions follow.

¹ All references to the Student and the family are confidential. Certain portions of this Decision will be redacted to protect the Student's privacy. The Parent's claims arise under 20 U.S.C. §§ 1400-1482 and under Section 504 of the Rehabilitation Act. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The federal regulations implementing Section 504 are found at 34 CFR 104.1 *et seq.* The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14) and the state parallel regulation implementing 504 are found at 22 Pa. Code Chapter 15. References to the record throughout this decision will be to the Notes of Testimony (N.T. p.), Parent Exhibits (P- p.) followed by the exhibit number, School District Exhibits attached to the Motion to Dismiss will be marked as (Motion to Dismiss Exhibit A-p.) followed by the exhibit letter, finally, Hearing Officer Exhibits will be marked as (HO-) followed by the exhibit number.

STATEMENT OF THE ISSUES

ISSUES PRESENTED

1. Did the District offer and provide the Student a FAPE during the 2021-2022 school year? If not, is the Student entitled to compensatory education?
2. Did the District offer the Student FAPE for the 2022-2023 school year? If not, is the Student entitled to tuition reimbursement and/or reimbursement for out-of-pocket expenses?

FINDINGS OF FACT

BACKGROUND AND HISTORY BEFORE ENROLLING IN THE DISTRICT

1. The Student attended a private school for preschool. (J-1, pp.2-3).
2. The Student transitioned to a different school for [redacted] through [redacted] grade. (J-1, p.3; N.T. p.121).
3. During the [redacted] grade year, the Student was coerced to participate in certain [redacted] acts by a same-aged peer. The Parents did not remove the Student from the school. (J-1, p 4; N.T. p.121, pp.133-34, p.138).
4. Parents placed the Student at a different private school for [redacted] grade. (J-1, p.3; J-47, p.2; N.T. pp.51, 132).
5. In November 2020, due to concerns regarding reading skills during [redacted] grade, the Parents obtained a private psychological evaluation (J-1, p.1; N.T. at 51).
6. The November 2020 evaluation included a variety of assessments, including achievement, cognitive testing, a speech and language assessment, an Autism screener, executive functioning, and multiple measures of social, emotional, and behavioral performance. (J-1, p.5).

7. At the time of the November 2020 evaluation, the Parent did not report any [redacted] abuse. Neither Parent nor the teachers reported behavioral or emotional concerns to the examiner. (J-1, pp.2-4; N.T. p.136).
8. The November 2020 evaluation diagnosed the Student with Attention Deficit Hyperactivity Disorder (ADHD), Autism Spectrum Disorder Level 1 (ASD), and Specific Learning Disorder (SLD) with impairment in reading comprehension. (J-1, p.1).
9. The November 2020 speech evaluation found that the Student was functioning in the above-average range. (J-1, p. 4).
10. The November 2020 evaluation incorporated programming recommendations, including allowing a longer response time, allowing the Student a longer time to complete assignments, not requiring the Student to complete work under time pressure, reducing the quantity of work, providing the Student with ample time to complete work, and providing breaks during tests and exams. (J-1, pp.13-14).
11. Following the November 2020 evaluation, the Student remained at the private school for [redacted] grade and into [redacted] grade. (J-1, p.13; N.T. p.140).

THE STUDENT ENROLLS IN THE DISTRICT

12. On January 3, 2022, the Parent enrolled the Student in the District. At that time, the Parent stated that the Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and a "social communications pragmatics disorder." The Mother also advised the District that there was "a question about whether [the Student] is on the "spectrum" and that "based on a significantly traumatic event, [the Student] has some intense sensitivities around personal space." (J-4; P-15, p.1; N.T. pp. 123-26).
13. On January 5, 2022, the Parent shared the November 2020 private evaluation with the District. (N.T. p.127, p.141).

14. On January 10, 2022, the Student began attending elementary school in the District. (N.T. at 53, 128).
15. On January 13, 2022, the school psychologist spoke with the Mother about the Students' needs. At that time, Parent expressed concerns about [redacted], anxiety, and social/pragmatic communication weaknesses. (J-6, p.1; J-13, p.1; N.T. pp.28-29, pp.397-98).
16. On January 14, 2022, the District issued prior written notice and a permission to evaluate (PWN/PTE) to conduct a comprehensive evaluation. The PWN/PTE explained that the evaluation. Parental consent for the evaluation was received on January 19, 2022. (J-6; N.T. p.54, p391, p.409).
17. On January 20, 2022, pending completion of the IDEA evaluation, the District invited the Parents to participate in a Section 504 meeting to determine if the Student was a person with a disability under Section 504 and Chapter 15. Parents were active participants in the meeting. (J-7, p.3; N.T. at 54, 143, 345). The team decided, and the Parents agreed that the Student's disability of Attention Deficit Hyperactivity Disorder (ADHD) was a disability within the meaning of Section 504 and Chapter 15. *Id.*
18. Relying on the documentation provided by Parents, a Section 504 plan was developed. The Section 504 Agreement offered the following accommodations: allowing extended time for tests and/or assignments; allowing more time to complete tests in a small group setting; providing frequent movement breaks; providing for chunking of assignments - breaking down larger assignments into smaller assignments - with separate due dates as needed; provided teacher check-ins for comprehension and understanding checks, along with frequent reassurance/encouragement; and teachers were instructed to prompt the Student to go back and recheck work for errors and understanding. (J-7, p.1; N.T. pp.389-90)
19. Parents agreed to the implementation of the 504 Agreement, and the District issued procedural safeguards. (N.T. p.143).

20. Throughout January 2022, the classroom teacher had frequent communication with the Parents. The reading and math specialists met with the Student to assess any academic needs. The behavior specialist also monitored the Student's transition. (J-8, p.2; N.T. pp.1250-52).
21. The teachers reported that the student was taking breaks in the classroom when needed. The teachers used different organizers to help break down the writing process to combat any frustration exhibited during writing assignments. The record indicates that the Student would sit with the teacher for one-on-one or small-group support. The guidance counselor also provided regular check-ins. (J-9, p.2). The Student appeared to be transitioning well. (N.T. p.1250).
22. On January 31, 2022, an Achievement Team meeting was held to discuss the Student's overall academic transition. At the meeting, Parent reported that the transition to the District was "better than expected" and that they were grateful for the support and communication provided by the school team. The Parent reported that the Student's psychiatrist was changing the Student's medications. The reading and math specialists reported that the Student was working at grade level. (J-8, p.2; J-9, p.1; J-10; N.T. pp.144-47).
23. Based on input received at the Achievement Team meeting, a regular education "Action Plan" was created. (J 8, p.3; J-10 pp.1-3; N.T. pp.144-47, pp.1249-53).
24. The Student started the new medication on February 6, 2022. (J-15, p.1).
25. Throughout February 2022, the District's behavior specialist observed the Student and collaborated with the teachers about classroom strategies that could further support the Student. (J-12, J-31, p.7).
26. By February 11, 2022, the staff noted a spike in interfering behaviors. The District amended the PWN/PTE to include a Functional Behavior Assessment

("FBA"). The Parent consented to the FBA on February 15, 2022. (J-6; N.T. p.149).

27. On February 16, 2022, the Student made statements about [redacted] and underwent a risk assessment. During the risk assessment, the Student spoke about feelings and was somewhat able to utilize verbal coping skills with both the school counselor and the school psychologist. (J-11; J-15 p.2; N.T. p.351).
28. On February 23, 2022, in a follow-up email from the Parent to the school counselor, the Parent advised the school counselor that an outside therapist "has been working with [redacted] since [redacted]" (J-15 p.2; N.T. p. 61).
29. Also, on February 23, 2022, while preparing for dismissal from class, the Student became increasingly frustrated and engaged in aggressive behaviors, including throwing chairs. After the other students were removed from the classroom, the Student was given time to cool down. When directed to return the chairs to their proper locations, the Student left the classroom, exited the building, and walked across the street to [redacted]. (J-15 p.8; N.T. p.66, p.355).
30. When asked by the District, the Parents stated that the Student's actions were atypical. (N.T. p.66, pp.396-98).
31. After the walkout, the staff and the Parents considered a modified school schedule; after a series of back-and-forth discussions between the school psychologist, the private counselor, and the Parent, it was decided that the Student would continue attending full-time. (J-14 p.23; J-15 p.6).
32. On March 2, 2022, the Student made statements regarding [redacted]; after completing a threat assessment, the statement was determined to be not actionable. The staff then increased the frequency of the Students' breaks, continued observations, and asked for and received additional recommendations from the behaviorist. (J-17; N.T. p.357; p.402).

33. On March 2, 2022, the District's Board Certified Behavioral Therapist (BCBA) and the school psychologist developed a "Safety Plan." A "Safety Plan" is a regular education intervention. The "Safety Plan" gave staff additional antecedent strategies and consequences to help the Student focus and self-regulate. (J-14 p.25; J-16; N.T. pp.153-54; pp.196-97; p.202, p.445).
34. The "Safety Plan" included "Antecedent" strategies like clear, concise direction wording. The "Safety Plan" was a one-page document that included a five-step sequence on how to deal with aggression, including consequences if the Student displayed unsafe physical behavior. At first, the Safety Plan did not incorporate the use of the District-wide crisis management system known as "Safety-Care." Finally, the Plan included a six-step guide on responding to elopement, including calling the Parents and being prepared to complete threat or risk assessments. (J-16).
35. Each school in the District has a team of people known as the "Safety Care Team." Intermediate unit employees train teachers on how to apply "Safety-Care" restraint holds and escorts. (N.T. pp. 197-98, p.266, p.498, p.1175; P-16).
36. Safety-Care training modules include learning and demonstrating how to use de-escalating protocols before using physical hands-on restraints, escorts, and various three (3) and four (4) person techniques. (P-13, N.T. p.540). Safety Care Team members attend regular refresher courses on how to apply the holds. *Id.*
37. On March 4, 2022, following another Achievement Team meeting, the District began implementing a structured break schedule that included two (2) scheduled breaks per day (one in the morning and one in the afternoon). These were in addition to the informal breaks the Student was provided in the classroom and [redacted] daily meetings with the school counselor. (J-14, p.21; J-31, p.11).

38. On March 7, 2022, as part of the FBA assessment, the Mother completed a six (6) page Parent input/interview to assist in developing a positive behavior support program. (J-18 p.1). The Mother also reported that the Student had engaged in "throwing and screaming" episodes within weeks of starting [redacted] grade (J-18 p.3). The Mother suggested a potential connection between COVID diagnosis before starting [redacted] grade and the behaviors. (J-18 pp.2-3). She further explained how the Parents manage inattention, frustration, "stubbornness," and verbal aggression in the home. (J-18 p.6, P-11; N.T. pp.1028, p.1044; N.T. pp.158-61). During a Parent interview on March 7, 2022, the Mother expressed frustration that the doctors were "constantly modifying medications." (J-18 p.6).
39. On March 9, 2022, in the early afternoon, the Student refused to return to class after lunch and remained in the school's atrium area. The hallway monitor called for help, and the Board Certified Behavioral Therapist responded. The Board Certified Behavioral Therapist, over the next 90 minutes or so, used various verbal de-escalation techniques to help the Student follow directions and self-regulate. Due to the location of the multiple hallway video cameras, some but not all of the interactions between the two were recorded. The situation escalated as school was about to dismiss for the day. The staff report and the video footage confirm that the Student began to punch, kick, and yell at staff. The video feed also confirms that a scuffle over the Student's fidget bag. At some point, the Student began to tear papers off the wall in the "atrium" area of the school. *Id.*
40. After the Student hit a staffer, the application of the restraint began in the standing position and then moved to the floor. Four staff members, including the Therapist acting as the lead, used various holds, escorts, and restraints to move the Student to a nearby classroom. (N.T. p.154, pp.297-99; J-20; J-21, J-22 a-d, J-23, J-24, J-25, J-26, J-27, J-28, J-29 a-g).

41. The first restraint, not caught on the video camera, was initiated in response to the Student punching the Therapist. The first hold was a standing two-person stability hold. The video indicates that the floor restraint lasted approximately 13 minutes. When the staff released the hold, the Student stood up. (J-20, p.2; J-22A; N.T. pp.218-20, p.289, p.490, p.554, p.557, p.576, pp.771-72, p.775, p.818). As school was about to dismiss, a second decision was made to transport the Student to a nearby classroom. *Id.*
42. The second restraint, a reverse escort, was initiated to transport the Student to the classroom. (J-20; J-22A; N.T. at 210, 296, 492, 508, 561, 564). When staff use a reverse escort hold, the student is facing to the rear, and the staff are facing forward. The escort requires the staff and the Student to move as one unit for personal safety. The "Safety Care Manual" provides that the staff stand next to the student, hip-to-hip, and walk the student to the selected destination while holding on the Student's arms. During the walk, the Student became unruly, and the staff lost control and were forced to readjust to the escalating behavior. The video footage and the still photos of the escort depict a failure to apply the two person escort restraint as instructed. (J-20; J-21, J-22 a-d, J-23, J-24, J-25, J-26, J-27, J-28, J-29 a-g).
43. A third restraint occurred in the classroom when the Student punched a staffer. While in the classroom, the staff continued to use various de-escalation strategies, but the Student remained highly agitated. (J-19; J-21; N.T. at 216, 510-512, 566, 781, 1266; J-19).
44. At some point, after the Student entered the room, a staffer called the Student's Father, [redacted]. The Father arrived at the school at 3:26 pm; the Student entered the classroom at 3:19 pm. Another staff member called the Mother, who left work and met up with him at the school. When the Mother arrived, sometime between 3:30 pm and 3:41 pm, she was taken to a conference room with her husband. Unaware of why they were called to

the school, the Board Certified Behavior Specialist and another staffer took the Parents to the classroom at 3:57 pm. As they approached the room, the Parents reported that they became uneasy. As the door to the classroom opened, they saw the Student seated in a chair next to a staffer who was telling the Student to remain calm for 60 seconds. When the Student did not comply with the directions, the staffer repeated the directions and restarted the 60-second countdown. The Student was visibly upset and crying. Upon seeing the Parents, the Student ran to the Parents in the hallway.

Reflexively, the Father took the Student to their home [redacted]. Stunned by the observation, the Mother left the school. Initially, the Student declined to discuss what happened; eventually, the Student did share the experience. Staff recall that someone advised the Parents about the county-wide mobile crisis behavioral health unit if the dysregulation continued. (N.T. pp.74-75).

45. After learning about the hours-long episode and restraint, the Parents took the Student to an urgent care center. No physical injuries were found, and no medical treatment was required. (J-34, p.6, N.T. p.621).
46. As a consequence of the urgent care visit, the doctors made a Childline abuse referral. The Police Department investigated the matter, and none of the school staffers were charged criminally. During the investigation, an unredacted copy of the video of the incident was provided to the police. After additional investigation, it was determined that the behaviors observed in the video did not rise to the level of child abuse. (J-20; J-34 p.7; N.T. p.84).
47. Following the March 2022 incident, the District emailed Parents, telling them the Student was welcome to return. The message also suggested that the staff would work on repairing any damage caused to the relationship between the Student and staff. (N.T. p.162).

THE SECTION 504 PLAN IS REVISED

48. On March 16, 2022, a conference was scheduled to discuss the Student's return to school. Although invited, Parents did not attend the conference. (J-12, p.7).
49. On March 18, 2022, a 504 meeting was held to review and revise the Student's Section 504 Agreement. Parents attended with counsel, and the 504 Agreement was modified to include a revised Safety Plan. The Safety Plan, for the first time, included the use of "Safety Care" – restraints- as a contingent consequence. (J-33; N.T. p.382, p.444).
50. The revised Safety Plan included more specific instructions, such as the need to notify Parents if the following occurred: (1) verbal de-escalation strategies were not successful after 15 minutes; (2) the Safety Care Team is called for support or (3) a physical management procedure is utilized. The revised Safety Plan provided examples of behaviors that could require physical management procedures. (J-33, pp.8-10).

THE IDEA REEVALUATION IS COMPLETED

51. The District's IDEA Evaluation Report ("ER") was also issued on March 18, 2022. The report included Parent input (J-31, pp.1-2), teacher and counselor input (J-31, pp.6-8, 10-11), a review of records including the November 2020 private evaluation report, prior academic records, the 504 Agreement, the Safety Plan (J-32, pp.2-5, 8-12), a classroom observation (J-31, pp.5-6), cognitive and achievement testing (J-31, pp.21-24), executive functioning/attention scales (J-31, pp.25-26), an assessment of social-emotional functioning (J-31, pp.26-28), a speech and language evaluation (J-31, pp.12-20), an occupational therapy evaluation (J-31, pp.28-33) and the results of the functional behavioral assessment. (J-31, pp.33-43; J-32; N.T. pp.370-80; p.417).
52. The Student's cognitive functioning was "well above average" and academic achievement score ranged from "average" to "well above average." (J-31, pp.22-24; N.T. at 374-75).

53. Results of the Brown Executive Functioning/Attention Scales demonstrated deficiencies in attention. Executive functioning skills deficits were very elevated both at home and school. (J-31, pp.25-26; N.T. at 376, 423).
54. The Parents' behavioral ratings did not produce clinically significant emotional/behavioral functioning scores. Teachers' ratings produced clinically significant scores in the areas of hyperactivity, aggression, conduct problems, anxiety, atypicality, and adaptability. The Student's self-ratings produced a clinically significant score in attitude toward teachers. (J-31, pp.27-28; N.T. p.377, pp. 423-24).
55. The Student did not qualify for speech services per the Speech and Language evaluation. Social skills instruction was recommended to support the use of pragmatic language skills. (J-31, pp.12-20, 45, 49; N.T. pp.373-74).
56. The occupational therapy (OT) evaluation recommended monthly consultative OT services to support sensory processing needs. (J-31, pp.28-33, 45; N.T. pp.377-78).
57. The FBA was fully incorporated into the evaluation report. The standalone FBA report included a review of records, Parent and teacher input, direct observations of the Student before the restraint, and a review of the Therapist's incident report describing the Student's behavior during the March 9, 2022, restraint. (J-31; J-32; J-14, p.29; N.T. p.268, pp.1145-1148, pp.1150-51).
58. The FBA identified the Student behaviors of concern as noncompliance, disruption, elopement, threats to self or others, property destruction, and physical aggression and recommended specific supports and accommodations for a positive behavior support plan. (J-31 pp.33-43; N.T. pp.378-79).
59. The evaluation report concluded that the Student had several disabilities, and as a result of those disabilities, the Student was eligible for special

education support and services. The team concluded that the Student's primary IDEA disability was Emotional Disturbance with secondary disability categories of Autism. Relying on the Student's Diagnostic and Statistical Manual of Mental Disorders-V (DMS-V) diagnosis of ADHD, the team concluded the Student had an Other Health Impairment. (J-31 p.46; N.T. pp.379, 417).

60. The evaluation report made a series of recommendations, suggesting direct instruction in written expression, coping strategies, and strategies for self-regulation, reducing behavioral rigidity and coping with his frustration and anger, direct social skills instruction, and support for executive functioning skills. (J-31, p.48; N.T. p.379, pp.425-26). The evaluation report also recommended a variety of classroom accommodations. (J-31, pp.48-49).
61. The FBA and the evaluation report recommended that the Student's IEP include a positive behavior support plan. The FBA also endorsed contingent restraint – "Safety Care" - by trained staff to respond to unsafe behaviors. (J-31, pp.49-50; J-32, p.11; N.T. pp.1159-60).

THE FIRST IEP IS DEVELOPED

62. An IEP meeting was held on March 29, 2022. Parents attended with counsel and participated fully in the meeting. (J-35; J-36; N.T. P.88, PP.825-26).
63. The IEP described the Student's strengths and needs before the March 9, 2023 restraint. (J-36, pp.33-34; N.T. at 827, 1073).
64. The IEP included goal statements addressing self-regulation/coping strategies and executive functioning skills and additional goals to address frustration tolerance, executive functioning skills specific to written expression, and written expression. As the Student was not attending school, baselines would be established on return. (J-36, pp.46-53; N.T. pp.428-29, pp.828-834, pp.1074-1085).
65. The IEP included a positive behavior support plan. The positive behavior support plan included the elements of the "Safety Plan" developed at the

previous 504 meeting. The positive behavior support plan endorsed the use of contingent restraint and holds – "Safety Care." The District now offered to notify the Parents when restraints were used. (J-36, pp.35-38, pp.46-47, pp.54-58; N.T. p.302, p.313, p.795, pp.1167-70).

66. The IEP included Specially Designed Instruction ("SDI") related to written expression, coping skills, self-regulation, social skills, executive functioning, and general classroom accommodations. (J-36, pp.59-65; N.T. at 429, 835). The IEP also offered daily check-ins, a designated break area, structured downtime, rapport building, preference assessment, scheduled breaks, continued data collection, and access to the Emotional Support/Autistic Support classroom. (J-36, pp.65-70; N.T. p.430).
67. The IEP team recommended that at any time of the day, the Student could take a break in the Emotional Support classroom. (N.T.pp.1098-99).
68. The IEP next offered the provision of a one-on-one aide throughout the school day. The one-on-one aide would offer to help with behavioral expectations, modeling, and coping skills. The one-on-one aide would also support the Student's attention and executive functioning weaknesses. (J-36, p.71; N.T. pp.308-09, p.384, p.429, p.800, p.802, p.836). Finally, the IEP included consultative OT services for sensory processing and self-regulation challenges. (N.T. p.837).
69. The IEP offered Supplemental Learning Support in writing 30 minutes per day; executive functioning support 30 minutes per day; emotional/autistic support 30 minutes per day; social skills instruction 15 minutes per day; and daily 15-minute check-ins and check-outs. (J-36, p.74; N.T. at 430, 796). Writing instruction would take place in a class of approximately 10 students. While executive functioning instruction, Emotional/Autistic support, and social skills instruction in classes of no more than six (6) students. The one-on-one would also be with the Student throughout the day, including during small group instruction. (N.T. pp.838-39, p.885, p.1087, p.1091, p.1094).

70. In the Emotional/Autistic support classroom, the Student could receive instruction using materials from Zones of Regulation. (N.T. p.1089).
71. A Notice of Recommended Educational Placement (NOREP) was issued on March 29, 2022. On April 8, 2022, Parent returned the NOREP requesting an informal meeting. Initially, the Parents wanted the Student to either attend school virtually or be able to attend another elementary school in the District. (N.T. at 89-90, 164, 846-48). Initially, the District denied each request. *Id.*

**THE PARENTS ASK, AND THE DISTRICT AGREES TO PROVIDE
HOMEBOUND INSTRUCTION**

72. As the Student was not in school, the Parents asked for homebound instruction and the District agreed to provide homebound provided the Parents submitted proper documentation. On April 11, 2022, the Parents submitted a one-page statement from the treating psychiatrist. The treating psychiatrist's statement provided the following diagnoses: 1. ADHD combined, 2. Generalized Anxiety Disorder, 3. Adjustment Disorder with Depressed Mood, 4. Social (pragmatic) Communication Disorder, 5. [redacted]. The statement then noted that the Student's disabilities prohibited school attendance for the following reasons; "[Redacted's] communication disorder can lead to misunderstandings in the school setting. [Redacted] has a history of limited ability to regulate emotions. School staff have chose [sic] to place [redacted] in physical restraints, which was traumatic for a child with a history of abuse. New triggers of traumatic events should be avoided. [Redacted] currently feels safe at home." The note further explains that the prognosis is "good with appropriate support." The treatment plan called for "homebound instruction with academically appropriate materials and support to complete [redacted] grade without the need to return to the school building where the student experienced physical restraints and lacks a sense of safety." The communication ends by stating

that the "Probable duration of excusal [was] until a safe learning environment can be arranged." (P-3; P-11; N.T. p.84, p.161, p.163, p.1255).

73. An informal meeting to review the Parents' concerns with the IEP was scheduled for April 22, 2022, but it had to be rescheduled to May 6, 2022. The Parent attended with counsel and fully participated in the May 6, 2023, meeting. At the meeting, Parents expressed their concerns about the use of restraint. Finally, they told the staff that the Student would not return to the District until the school was safe. (N.T. p.90, p.1280).
74. Following the May 6, 2022, meeting, the IEP and NOREP were updated to include adjustments discussed at the meeting. The positive behavior support plan was revised to require staff to redirect the Student rather than ignore certain behaviors, and the District also offered to modify classroom assignments. The NOREP was also revised to reflect the offer to implement the IEP, with restraints, at a different elementary school. (J-36, p.55; J-40, pp.7, 56, 72; J-41, p.2; N.T. at 164-65, 1344-46).
75. On May 11, 2022, a revised IEP and NOREP were sent to Parents through counsel along with a permission to evaluate (PTE) for a Student Attendance Improvement Plan (SAIP). The proposed evaluation called for an updated psychological and new FBA evaluation. The District also offered to have all testing completed by the staff at the intermediate unit. (J-39; J-40; J-41; J-42).
76. On May 17, 2022, the Parents approved and returned the NOREP. The permission to evaluate was not returned, and the District did not seek to override the refusal to consent. (J-44, p.4). The testing never started. (J-44).
77. While the IEP negotiations were going on, the Student began homebound instruction on May 23, 2022, and continued with homebound instruction through the end of the year. (J-45; N.T. at 96, 1346).

THE PARENTS MAKE A UNILATERAL PLACEMENT

78. On August 1, 2022, the Parents applied, and the Student was admitted to the private school for the 2022-2023 school year. (J-47, p. 8; N.T. at 168).
79. On August 8, 2022, Parents advised the District, in writing, of their intent to make a unilateral placement. The letter also advised that they would seek tuition reimbursement from the District. (J-48; N.T. p. 102).
80. The private school provided the Student with a "Personal Education Plan" for the 2022-2023 school year. The plan notes the following disabilities: Attention Deficit Disorder, Autism Spectrum Disorder, and Dyslexia/Reading. The private school records do not mention trauma. (J-51; N.T. p.1008).
81. The "Personal Education Plan" provides six (6) accommodations/SDI: breaks as needed, positive reinforcement, one-on-one support for social missteps and emotional regulation, 1-on-1 support when writing, use of a laptop, and use of approved fidgets. (J-51; N.T. at 1008).
82. The private school provides, and the Student receives, modified Reading and Language Arts programming. (J-59; N.T. p.1012). The Student also receives group counseling once per week for 40 minutes, a "perspective class" once per week for 40 minutes, and social/emotional instruction two times per week for 40 minutes in a class of 33 students using a curriculum that is not research-based. (N.T. pp.1016-1020).
83. The private school does not have a safety plan. Data collection and progress monitoring are provided through quarterly report cards. The Student is advancing in each subject and is expected to be promoted to the next grade. (N.T. pp.1016-1020).
84. During the 2022-2023 school year, the Student was absent 26 days and accumulated 19 tardies. (J-59; N.T. pp.1013).

THE PRIVATE COUNSELOR AND THE PSYCHIATRIST

85. As a consequence of the restraint, the Parents incurred out-of-pocket expenses for counseling services. Beginning in March 2022 and continuing

through April 2023, the Student participated in private one-on-one therapy. The Therapist diagnosed the Student with the following diagnoses: Attention Deficit Hyperactivity Disorder, combined type, Post-Traumatic Stress Disorder, unspecified, and Autistic disorder. (P-4).

86. In therapy sessions, the Student presented with a high level of emotional dysregulation. During the sessions, the Therapist noted that the Student displayed noticeable signs of irritability, anger, depressed mood, defiance, distractibility, hyperactivity, and discussed engaging in destructive behaviors. (P-4).
87. At times, the Student would become dysregulated and angry when discussing the topic of the school restraint and then would need support to re-regulate. The Student continues to hold a lot of anger and fear around the event. The Student would benefit from continued trauma work around this event. (P-4).
88. The Mother reports and the private counselor confirms that when the topic of restraint came up during a January 2023 session, the Student became agitated and began to make threats to self-harm and others during the therapy session. When talk therapy did not reduce the agitation, the counselor and the Mother transported the Student to the Emergency Room to assess safety needs. After this session, the counselor decided that the Student required a higher level of care. The counselor referred the Family to the community behavioral care provider to continue therapy. (P-4, p.3; N.T. at 171).
89. The counselor reports that the Student identifies the school restraint episode as a traumatic event that was "life-threatening." The counselor next reports that at the time of the transfer to a higher level of care, the Student continued to show signs of significant emotional distress when exposed to discussions or reminders about the school restraint and the District. The counselor expressed concern that the Student continued to hold negative

beliefs about adult staff and their ability to provide a safe environment. Finally, the counselor noted that at the time of the transfer to the higher level of care, the Student continued to struggle with low mood, irritability, aggression, and difficulty with concentration. (NT pp.897-925; NT pp.954-969).

90. When the Student's treating psychiatrist was asked, on the record, about the use of restraints, he stated that because the Student "has significant anxiety, difficulty trusting people, and gets very upset when [redacted] doesn't feel safe," he went on to say, "I don't think a child like [sic] that should be restrained. (NT pp.1031-1034). The psychiatrists then explained that the Student's level of anxiety would increase if the restraints continued. Finally, he concluded that the Student would not be safe had the Student gone to middle school and the program at the middle school would allow restraint. (NT pp.1055-1058).

GENERAL LEGAL PRINCIPLES

BURDEN OF PROOF AND CREDIBILITY

Generally, the burden of proof consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the Party seeking relief. The Party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. In this case, the Parents are the Party seeking relief and must bear the burden of persuasion.²

During a due process hearing, the hearing officer makes "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses."³ Explicit credibility determinations give courts the information that

² *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

³ *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).

they need in the event of a judicial review. While no one-factor controls, a combination of factors causes me to pause and comment on the particular testimony of several witnesses.⁴

On the Parents' side, I found the Mother and the Father open, thoughtful, and frightened for the Student's safety. I found their testimony candid and complete in acknowledging what they knew and how they felt. At the same time, each acknowledged the constant struggle to understand the difference between what they believed happened and what they learned occurred. Each Parent took ownership of their omissions, misstatements, and actions. Each Parent was otherwise credible in describing the sequence of events leading up to the Family's refusal to allow the Student to return to the District.

I found the testimony of the Parent's expert on "Safety Care" helpful in understanding the dynamics of how to stay calm and deliberate when applying restraint while being hit, kicked and yelled at by another.

I also found the testimony of the District's witnesses, which explained how they provided regular educational support and services to the Student, helpful. Each witness added to my understanding of the dispute and how the Parties reached this turning point.

The "Safety Team" members were candid and answered all questions to the best of their abilities, even when it exposed the apparent restraint errors in the video. At the same time, I now believe they held back when asked to describe what happened after the Student entered the classroom.

⁴ The fact finder's determination of witness credibility is based on many factors. Clearly, the substance of the testimony, including the detailed description of the relevant events, consistency /corroboration with others recollection, the accuracy of recall of past events when contrasted with written documents, played some part in my credibility determination. Furthermore, when the witness contradicts him or herself or is contradicted by the testimony of other witnesses can play a part in the credibility determination. Finally, no-verbal observable actions factors like constantly adjusting body movement, eye contact, feigned confusion, and whether the responses are direct or appear to be either evasive, unresponsive or incomplete are important in determining persuasiveness.

The psychologist and the Board Certified Behavioral Analysts were also helpful in explaining how they taught "Safety Care."

Finally, the competing videos offered by the Parent and the District and the accompanying summary timeline documenting the dynamics of restraining a dysregulated student helped me learn about what happened and judging credibility. While I understand the District's desire to preserve student privacy, I found the un-redacted video obtained from the police more helpful in understanding the events in the vestibule, the multiple restraints, and the escort to the room. While the competing video exhibits displayed the same events, the blurred faces and backgrounds in the District's exhibit made it challenging to follow along. While a great deal of time was spent reviewing whether the staff followed the training, the trauma-related aftermath now shapes the Student's path forward.

THE IDEA OFFERS STUDENTS A FREE APPROPRIATE PUBLIC EDUCATION

The IDEA is a "comprehensive scheme of federal legislation designed to meet the special educational needs of children with disabilities."⁵ In exchange for federal funding, states pledge to comply with several substantive and procedural conditions in providing educational services to qualifying disabled students.⁶ In turn, state recipients then apportion federal funds to Local Educational Agencies ("LEAs") - school districts - responsible for providing day-to-day educational services in compliance with the IDEA.⁷ The IDEA makes clear that a FAPE consists of "specially-designed instruction," "supplemental services," and "related services, along with "accommodations" that meet the Student's needs and circumstances.⁸

⁵ *M.A. ex rel E.S. v. State-Operated Sch. Dist.*, 344 F.3d 335, 338 (3d Cir. 2003).

⁶ *T.R. v. Sch. Dist. of Philadelphia*, 4 F.4th 179, 182-83 (3d Cir. 2021).

⁷ 20 USC §§1412-1414.

⁸ *Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. V. Rowley*, 458 U.S. 176, 188-89, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982); *Andrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir

THE IEP PROCESS REQUIRES PARENT AND TEACHER INPUT

The "centerpiece" of a FAPE is the IEP, which serves as the "primary vehicle" by which states provide students with a FAPE.⁹ "An IEP is a written statement, 'developed, reviewed, and revised' by [an] 'IEP Team'— a group of school officials and the parents of the Student—that spells out how a school will meet an individual disabled student's educational needs."¹⁰ In addition, an IEP sets forth the Student's "present levels of academic achievement, offers measurable annual goals to enable the child to . . . make progress in the general educational curriculum, and describes supplementary aids and services . . . provided to the child to meet those goals." *Id.*¹¹ Hearing officers analyze the appropriateness of the IEP at the time it was issued, sometimes called the "snapshot" rule, and not at some later date.¹² Third Circuit consistently interpreted the IDEA to mean that the "benefits" to the child must be meaningful. Finally, the meaningfulness of the educational benefit is relative to the child's potential. *Id.*

FAPE OFFERED UNDER SECTION 504 IS SOMEWHAT DIFFERENT

When students are dually eligible under the IDEA and Section 504, the IDEA and Section 504 provide similar causes of action. For dually eligible students, the same conduct is often used to form the basis for the IDEA claims that can be used to bring claims under Section 504. However, procedural rights and remedies differ for eligible students under Section 504. The Section 504 regulations require that districts "provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap."¹³ Unlike the IDEA, the Section 504 regulations define a free appropriate public education as the provision of both

2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003).

⁹ *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988).

¹⁰ *Y.B. ex rel. S.B. v. Howell Twp. Bd. of Educ.*, 4 F.4th 196, 198 (3d Cir. 2021).

¹¹ 20 U.S.C. §§ 1414(d)(1)(A)(i)(I).

¹² *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 564- 65 (3d Cir. 2010).

¹³ 34 CFR §104.32.

regular or special education and related aids and services that (1) Are designed to meet the individual educational needs of disabled persons as adequately as the needs of non-handicapped persons are met under 34 CFR §104.33 (2). Are based upon adherence to procedures that satisfy the requirements of 34 CFR §104.34 - educational setting; evaluation and placement decisions must comply with 34 CFR §104.35, and any (3) disagreements over offered services are subject to the procedural safeguards found at 34 CFR §104.36.¹⁴

For Section 504 eligible only students, the Third Circuit in *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280 (3d Cir. 2012) held that fact finders must apply a "reasonable accommodation" or "reasonable modification" analysis in reviewing Section 504 FAPE claims. The *Ridley* court further held that Section 504, "accommodations" or "modifications," must offer the opportunity for "significant learning" and "meaningful benefit." *Id.* Courts within this Circuit have also rejected assertions that litigants in Section 504 FAPE disputes must establish something more than a denial of a FAPE to recover.¹⁵

TUITION REIMBURSEMENT IS A FORM OF APPROPRIATE RELIEF

A three-part test determines whether parents are entitled to reimbursement for special education services. The test flows from *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). The first step is to determine whether the program and placement offered by the LEA are appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that merit a reduction or elimination of a

¹⁴ *C.G. v. Commonwealth of Pennsylvania Dep't of Educ.*, 62 IDELR 41(3d Cir. 2013).

¹⁵ *Centennial Sch. Dist. v. Phil L. ex rel. Matthew L.*, 799 F. Supp. 2d 473, 488, 489 n.10 (E.D. Pa. 2011) (rejecting the argument that to prevail under Section 504, a plaintiff must prove not only a denial of a FAPE but also that the denial was "solely on the basis of disability"); See also *Neena S. ex rel. Robert S. v. Sch. Dist. of Philadelphia*, 2008 U.S. Dist. LEXIS 102841, 2008 WL 5273546 (E.D. Pa. Dec. 19, 2008).

reimbursement award. The steps are taken in sequence, and the analysis ends if any step is not satisfied.

THE IDEA AUTHORIZES MULTIPLE FORMS OF APPROPRIATE RELIEF

Parents who establish a substantive violation of either Act may seek compensatory education.¹⁶ Parents may also seek prospective injunctive or declaratory relief for procedural violations independent of a substantive deprivation of a FAPE. *Id.* However, Parents seeking compensatory education are expected to put forward sufficient evidence that explains the underlying claim for relief.¹⁷ Sometimes, "no compensatory education is required if Parents fail to produce any evidence of harm." Stated another way hearing officers can conclude that no compensatory education is required even though they find a denial of a FAPE. *Id.* In addition to compensatory education, reimbursement for out-of-pocket and tuition reimbursement costs are other recognized forms of relief. *Id.*

ANALYSIS AND CONCLUSIONS OF LAW

THE STUDENT IS SECTION 504 ELIGIBLE

After reviewing the record, I now conclude that the District's January 2022 through March 2022 Section 504 Agreement offered the Student a FAPE. On or about January 3, 2022, the Student enrolled in the District. By January 20, 2022, a group of knowledgeable people, including the Parents, concluded that the Student was a person with a disability. After concluding that the Student's ADHD disability substantially limited the major life function of learning, working, and concentration, the District offered, and the Parents agreed to, a series of aides,

¹⁶ *G.L. v. Ligonier Valley Sch. Auth.*, 802 F.3d 601, 322 Ed.Law Rep. 633 (3d Cir. 2015).

¹⁷ *Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011), citing *Reid*, (the parent, as the moving party, has the burden of "propos[ing] a well-articulated plan that reflects the student's current education abilities and needs and is supported by the record."); *Phillips ex rel. T.P. v. District of Columbia*, 736F.Supp.2d 240, 248 (D.D.C.2010) (citing *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 583 F.Supp.2d 169, 172 (D.D.C.2008) (Facciola, Mag. J.); *Cousins v. District of Columbia*, 880 F.Supp.2d 142, 143 (D.D.C.2012) (the burden of proof is on the parents to produce sufficient evidence demonstrating the type and quantum of compensatory education that makes the child whole). (quoting *Cousins v. District of Columbia*, 880 F. Supp. 2d 142, 145 n.3 (D.D.C. 2012)).

services, and accommodations. The Agreement was reduced to a writing, and the District provided the Parents with procedural safeguards. Throughout January, February, and March, the building-level staff met and implemented a variety of regular education adjustments and accommodations to improve the Students' transition, academic performance, and behavioral health.

After a mid-February 2023 chair-throwing incident and elopement out of the building, the staff met and created a "Safety Plan." The March 2, 2022, "Safety Plan" included a variety of de-escalation techniques. Taken as a whole, the record is preponderant that during this short time, the District's services offered the Student an equally effective opportunity to achieve the same results otherwise offered to others.

Section 504 Agreements and Chapter 15 Service Agreements are not required to produce identical results or levels of achievement for disabled and non-disabled persons. 504 Agreement must, however, afford eligible individuals an equal opportunity to obtain the same result, gain the same benefit, or reach the same achievement levels in the most integrated setting appropriate to the person's needs and circumstances. Accordingly, I now conclude that the record is preponderant that the District initially complied with all procedural and substantive requirements at 34 CFR §104.33 (2) through 34 CFR §104.36. Therefore, the Parents' demand for compensatory education is Denied. However, the same does not hold true after the Student was restrained.

THE STUDENT IS RESTRAINED AND NEVER RETURNS TO THE BUILDING

To ensure students have a safe school, the hallways, and the atrium, but not the classrooms, are equipped with video cameras. The record includes hours of videotape from multiple angles and multiple cameras. The videos partially explain what happened on March 9, 2022, in the atrium and hallways of the Student's elementary school. The Student was in the atrium and an adjoining hallway with

the Board Certified Behavior Therapist from 1:30 pm to 3:19 pm. While in the atrium, the Student became agitated and hit a staffer. At first, two staff members restrained the Student while standing. When the Student went to the floor, a third staffer joined in and restrained the Student's legs on the floor.

After about thirteen (13) minutes of uninterrupted restraint on the floor, a staffer decided to end the restraint as the school was about to dismiss. When the Student stood up, five (5) staffers surrounded the Student. The Board Certified Behavioral Therapist then decided to move the Student down a nearby hallway to a classroom. The Therapist directed the staff to apply a two-person reverse escort. A two-person reverse escort requires the staff to have the Student turn around in a rear-facing position, after which two adults now facing the other way - forward- would hold on to the Student's upper arm, one on each side, and walk the Student to the room.

Contrary to the sworn testimony of the staff, the video clearly shows that the staff did not use a two-person escort to transport the Student down the hall into the classroom. Instead, it depicts the opposite; as the Student resisted, one staffer released their grip, allowing the Student to turn around. With everyone now facing forward, a third staffer joined to support the scrum and shuffled the Student and the others into the classroom. The Student entered the classroom at 3:19 pm; school dismissal occurred at about 3:30 pm.

As all of the above was happening, another staffer called the Mother at 3:13 pm and asked the Mother to come to the school. A different staffer called the Father [redacted]; the Father arrived at the school at 3:26 pm., some seven minutes after the hallway scrum. Upon arriving, the Father, unaware of the restraint, was instructed to wait in a conference room; shortly after that, the Mother arrived. The video shows that upwards of nine (9) adults were in and out of the room with the Student from 3:19 pm until the Parents were taken to the classroom at 3:57 pm. Upon arriving at the room, the Parents heard raised voices and overheard the Student crying.

When the classroom door opened, the Student ran to the Father, and the Father and the Student left the building. The Mother briefly stayed in the room, but few, if any, words were spoken, and the Mother left the building at 4:01 pm. The video shows that the last staffer left the room at 4:17 pm.

Later that night, the Parents took the Student to an urgent care center. The record indicates that the Student had red marks on the wrist and shoulders. Before the discharge, the staff at the center, after interviewing the Student, told the Parents that they would file a child abuse complaint, which then caused the police to open an investigation. Ultimately, all staff were cleared on all charges. Due to the elevated levels of trauma after the restraint, the Student did not return to school for the remainder of the school year.

Three adults held the child down on the floor for 13 minutes, and then for the next five (5) minutes or so, three to four adults restrained the Student on the way to the classroom. After entering the classroom, the Student was again restrained in a chair for some undetermined time. This combination of events caused a spike in anxiety, adjustment, and mood. Somehow, the team lost sight of the underlying circumstances when they moved on to review the evaluation and create either the IEP or the 504 Agreement.

The record is clear that nine (9) staffers went in and out of the room, and none of the witnesses could explain what they did to support the Student for the next 27-plus minutes after dismissal until 3:57 pm. The tape documents and the record support a finding that the Student was in the room for 38 minutes, from 3:19 pm to 3:57 pm, before the Parents arrived. None of the witnesses clearly or cogently explained why, after the Father arrived at the school at 3:26 pm, less than seven (7) minutes after the Student entered the room, the staff instructed the Father to wait in a conference room until 3:57 pm. These events and the explanation gap strengthen my finding that the Student underwent a traumatic event from 1:30 pm to 3:57 pm.

As a consequence of the restraint, the psychiatrist's and the counselor's testimony is compelling. The psychiatrist explained, based on this Student's diagnoses, that as a consequence of the restraint, the Student is now fearful and sensitive to hands-on holds and restraints. The resulting changes in the Student's disability profile and circumstances were unknown at the time of the evaluation. Moving forward with the now stale understanding of the Student's circumstances after the reaction to the restraint caused a procedural and substantive error. The District erred in not reevaluating the Student and erred again when it pushed forward, absent understanding of the circumstances, with the scheduled Section 504 and the IEP meetings. As further explained below, the failure to do either procedural requirement appropriately caused the District to miss the opportunity to create a personalized program to address the Student's substantive FAPE rights. Absent such individualized consideration, the Student could not return to school. This series of events fundamentally changed the Students' disability profile, individual circumstances, and unique needs.

THE EVALUATION IS COMPLETED, THE IEP AND THE REVISED SECTION 504 AGREEMENT

The Parents do not challenge the March 18, 2022, evaluation team's conclusion that the Student has an IDEA disability or the finding that the Student needs special education services. They do, however, challenge the conclusion in the evaluation report that the positive behavior support plan should include consequence-based restraint strategies. They further assert that after the March 9, 2022, restraint episode, neither the evaluation report, the IEP, nor the Section 504 Agreement addresses the Student's needs, safety, education, or the surrounding circumstances. Finally, Parents insist that any future use of restraint will cause new and even deeper trauma.

On March 18, 2022, the Section 504 team met to revise the 504 Agreement to include a revised version of the March 2, 2022, "Safety Plan." The 504 version of the Plan included multiple "Consequence" strategies like de-escalation and

redirection techniques to respond to elopement and dysregulation. The "Safety Plan" also included several new subsections. The first new subsection was labeled "Crisis Plan." The "Crisis Plan" permitted the staff to use "CPI Safety Care" physical management–restraint procedures as a last resort to maintain safety. Finally, the "Safety Plan – Crisis Plan" included "Operational Definitions" and examples of behaviors that may require physical management procedures, like punching, kicking, and throwing heavy objects.

On March 29, 2022, the Parties met to prepare an IEP. At the March 29, 2022, IEP meeting, the District proposed, and the Parents rejected using contingent restraints like those listed in the 504 Agreement.

Neither the IDEA nor Section 504 expressly addresses the use of restraint and students with disabilities. However, the use of these techniques has the potential to violate both statutes.¹⁸ While state law may allow restraint, its use must not cause a denial of a FAPE or traumatize students.¹⁹ Improper or overuse of restraints may deny a student FAPE when the use of the restraint techniques traumatizes the student or when the student is deprived of educational instruction or services by the impact of its repeated use.²⁰ Precautions should be taken to protect children who have restraint sensitivities.²¹ When there is reason to believe, like here, that the use of restraint has or may adversely affect the

¹⁸ *Letter to Anonymous*, 50 IDELR 228 (OSEP 2008) (In states that permit the use of restraints, a district may physically restrain a student with a disability only if the student's IEP specifically allows the use of restraints as a behavior management technique.); *Letter to Anonymous*, 57 IDELR 49 (OSERS 2010) (If such methods are permitted by state law and necessary for a particular child to receive FAPE they should be incorporated into the child's IEP or behavioral intervention plan).

¹⁹ *Letter to Trader*, 48 IDELR 47 (OSEP 2006); *Letter to Weiss*, 55 IDELR 173 (EDU 2010).

²⁰ *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities*, 69 IDELR 80 (OCR 2016) (warning districts that restraint could deny a student FAPE where it has a traumatic impact or results in the student not receiving needed services).

²¹ *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities*, 69 IDELR 80 (OCR 2016). "Depending on the nature of his or her disability, a student with a disability may be especially physically or emotionally sensitive to the use of such techniques. That traumatizing effect could manifest itself in new behaviors, impaired concentration or attention in class, or increased absences, any of which could, if sufficiently severe and unaddressed, result in a denial of FAPE for that student. Other effects could include socially withdrawn behavior, or diminished interest or participation in class."

provision of a FAPE, the district must (1) determine what additional or different interventions or support and services the student requires and (2) ensure that needed changes are made promptly, and (3) remedy any denial of FAPE.²²

Unable to reach an agreement, the Parents requested, and the District agreed to provide homebound instruction when the physician provided proper documentation. On April 11, 2022, the Student's psychiatrist submitted the documentation, and the District agreed to provide homebound instruction. The psychiatrist's one-page statement identified five DSM-V disabilities, one of which the District used – the ADHD diagnosis - to identify the Student as IDEA-eligible. While known, the other four (4) diagnoses were not discussed in the evaluation report or any other meeting.

The psychiatrist's statement further noted that the Student's five (5) DSM-V diagnoses prohibited school attendance, while, before the restraint that was not the case. The psychiatrist next concluded that the use of physical restraint was traumatic for a child with a sensitive history [redacted]. The psychiatrist, in his letter and later in his testimony, further explained that future consequence-based restraint would cause new traumatic events. Once the psychiatrist introduced trauma and restraint sensitivities into the mix, the circumstances and the Student's needs dramatically changed.

The psychiatrist's letter and the District's agreement to provide temporary homebound to address the post-restraint spike in dysregulation put the District on notice that the IDEA evaluation should be updated to address the new circumstances. The record is preponderant that by May 2022, when the student

²² While I acknowledge that *Dear Colleague Letters* are not binding on districts, I now find that due to the number of times OCR has referenced the 2016 Restraint *Letter the above* Dear Colleague Letter is otherwise persuasive. See, e.g., *Weber (UT) Sch. Dist.*, 71 IDELR 109 (OCR 2017); *Dolores (CO) Sch. Dist. RE-4A*, 69 IDELR 255 (OCR 2017); *Tanque Verde (AZ) Unified Sch. Dist.*, 114 LRP 47361 (OCR 08/01/14); and *Prince William County (VA) Pub. Schs.*, 114 LRP 34872 (OCR 07/29/14); *Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 122 LRP 24161 (OSERS 07/19/22); *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities*, 69 IDELR 80 (OCR 2016).

was not attending school, the District either knew or should have known the Student was not learning. Once on notice of the DSM-V diagnoses and the restraint sensitivities, the District had an obligation to reevaluate the Student. The District's insistence on restraints smacks of a predetermination.

The psychiatrist's April 11, 2022, conclusions are corroborated by the Student's private Therapist's report. The record is preponderant that the student felt unsafe in school or around people who may use restraints. The counselor further reports that months after the restraint, the Student displayed significant levels of anxiety, agitation, and depression. During therapy sessions, the Student also expressed difficulty trusting people after the restraint. The record is preponderant that during many of the therapy sessions, the Student would regularly lose concentration, become frustrated, and be dysregulated when the topic of restraint came up during sessions. At another session, the Therapist reported that the Student viewed any use of restraint as life-threatening. The trauma arising out of the incident interrupted the Student's access to regular and special education services.

Applying *Rowley, Andrew*, and the Section 504 FAPE standards, I now find that using consequence-based restraint in this Student's IEP and Section 504 Agreement would deny the Student a FAPE. It is axiomatic that if restraint substantially harms the Student, the IEP is not reasonably calculated to provide meaningful benefit. These findings and conclusions now require me to discuss remedies.

APPROPRIATE RELIEF

The Parents now seek tuition reimbursement, compensatory education, and reimbursement for out-of-pocket therapy-related expenses as appropriate relief. The request for tuition reimbursement and reimbursement for expenses is Granted. The request for compensatory education is, however, Denied. The

District's request for declaratory relief is also Granted.

COMPENSATORY EDUCATION

Commonly, when a fact finder concludes that a district failed to offer a FAPE, the Student is awarded compensatory education. In this instance, after establishing a denial of a FAPE, I now conclude that the record, as a whole, lacks facts to calculate the basis for an equitable award of compensatory education. Absent a factual record, I cannot craft a "make whole" remedy; therefore, the request for compensatory education is Denied.²³

TUITION REIMBURSEMENT

The first part of the *Burlington-Carter* test calls for me to evaluate the appropriateness of the District's special education offer. As described above, the first prong favors the Parent.

The second step requires me to determine if the unilateral placement is appropriate. For all the following reasons, I now conclude that the private placement is otherwise appropriate. The private school witness's testimony describing the Student's placement was cogent and convincing. The private school witness is one of the Student's teachers; therefore, I will give his testimony medium weight. The Pennsylvania Association of Independent Schools, the Middle States Association, and the Pennsylvania Department of Education accredit the school. The school specializes in students who have average intelligence and different disabilities, like students with autism spectrum, students with oppositional defiance disorder, and students with ADHD.

The private school is small. The middle school serves thirty-five (35) students. The student-teacher ratio in classes is one (1) to four (4). Twice (2) a week, the Student can participate in a therapeutic group session. Twice a week, the Student

²³ *Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011), citing *Reid*, (the parent, as the moving party, has the burden of "propos[ing] a well-articulated plan that reflects the student's current education abilities and needs and is supported by the record.")

can participate in a social-emotional learning class. Students can receive emotional support throughout the school day. The teaching staff receive regular continuing education on implementing the curriculum and working with the students. The school offers, and the Student participates in extra-curricular activities that are open to all. Since enrolling at the school, the Student has never been restrained. The Student regularly attends school. The Student receives needed small group instruction throughout the entire school day.

The school coordinates behavioral health needs with the Student's private counselor. Therefore, based on these fact-specific circumstances, I now find the school offers needed personalized instruction and is otherwise appropriate.

THE BALANCING OF THE EQUITIES

After balancing the equities, the District now argues that tuition reimbursement should be denied should the dispute get this far. The District contends that the Parents provided the District with limited information regarding the Student's background on enrollment. They next suggest that, as the year went on, the Parents held back information about the Student's "impulse control" issues and the increasing agitation. They go so far as to suggest that, "in their view," the Parents actively withheld information. Finally, they assert that the "Parents' withholding of information served only to sabotage the District's efforts at programming." For all the following reasons, I find the District's argument is misplaced.

On January 3, 2022, the Mother signed and returned the District's request to release all records before the Student started school. But for checking the "Other" box on the form, the Parents gave the district permission to gather all medical, psychological, and school records. The email message further states that the Student has an ADHD diagnosis, a pragmatic language weakness, and concerns for telltale signs of Autism. Finally, the Parent told the District that as a result of a "significantly traumatic event, [redacted] has some intense sensitivities around

personal space."

Shortly after these disclosures, the District invited, and the Parents attended and agreed to the proposed Section 504 Agreement. In other emails between the Mother and the teachers, both sides shared open and frank discussions about how the Student reacted to the new school. In one email, the Mother told the teacher, "they [the Parents] broke down," and the Student started a new medication. In another February 2023 email, she tells the staff that the Student cannot keep up and that the Student fears they may not complete [redacted] Grade. The teacher responds, "Thanks for sharing."

Later, on March 7, 2023, the Mother returned a six (6) page "Parent Interview" form to assist in completing the behavior assessment. The Mother disclosed the Student's medication list, the dates of previous IQ and speech testing, and the name of the Student's psychiatrist. She then goes on to disclose personal family issues surrounding recent medical issues in the lives of the grandparents that affected the Student's concentration. The record as a whole reflects an open and amicable working relationship until March 9, 2022. Therefore, for all these reasons, I now find that the equities favor the Parent.

SUMMARY

The Parents' claim for tuition reimbursement and reimbursement for out-of-pocket expenses is Granted. The Parents' request for compensatory education is Denied. The District's request for declaratory relief that they offered and provided a FAPE for the 2020-2021 school year is Granted. All other claims, demands, or requests for appropriate relief are Denied.

FINAL ORDER

AND NOW, on March 1, 2024, I find that the above Findings of Fact and Conclusion of Law have resolved this dispute.

1. The Parents' 2020-2021 Section 504 and IDEA denial of FAPE claims are Denied.

2. The Parents' 2021-2022 request for compensatory education claim is Denied.
3. The Parents' request for tuition reimbursement for the 2022-2023 school year is Granted.
4. The Parents' request for reimbursement for out-of-pocket expenses is Granted. The Parents should submit an affidavit of tuition and reimbursement costs, consistent with the exhibits, to the District within 10 days of the Order. The District should reimburse the Parents within 60 days.
5. The District's request for declaratory relief that it offered and provided a FAPE during the 2020-2021 school year is Granted,
6. All other claims for appropriate relief, causes of action, demands, or affirmative defenses not argued for in the Parents' or the District's closing statements and not discussed herein are now dismissed.

Date: March 1, 2024

s/ Charles W. Jelley, Esq. LL.M.

Hearing Officer
ODR FILE 27997-23-24