

*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. 26814-22-23**

**Child's Name:**

D.D.

**Date of Birth:**

[redacted]

**Parent:**

[redacted]

**Counsel for Parent:**

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**Hearing Officer:**

Joy Waters Fleming, Esq.

**Date of Decision:**

12/24/23

## **INFORMATION AND PROCEDURAL HISTORY**

The student (Student)<sup>1</sup> is a high school student who resides and attends school in the (District). The Student is eligible for special education under the Individuals with Disabilities Education Act (IDEA) and protections under Section 504 and the Americans with Disability Act (ADA) as a child with a disability of intellectual disability, other health impairment (OHI), and a speech and language impairment.<sup>2</sup> The Parent filed initially this due process Complaint on the grounds that the District denied the Student a FAPE for its failure to provide appropriate special educational programming and violated the Student's rights under Section 504. In response, the District contended that the programming it offered and implemented was appropriate.

The Parent requested a conditional dismissal of the complaint, which the Hearing Officer granted. Before the expiration of the dismissal, the Parent requested reinstatement of the original due process complaint. The request to reinstate the complaint was granted.

Before the due process hearing, numerous motions and responses were submitted to the Hearing Officer for consideration. When necessary, the Hearing Officer entered a dispositive Order.<sup>3</sup> Notably, the Parent filed a

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<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. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 711.1 – 711.62. The Americans with Disabilities Act (ADA) is at 42 U.S.C. §§ 12101-12213.

<sup>3</sup> The Motions and Orders were marked as Hearing Officer exhibits.

Motion to Compel Production of a number of educational records pertaining to the Student. Although the Motion was granted, the Parent maintained that the District failed to adhere to the Hearing Officer's Order, and that many key documents were not produced.<sup>4</sup>

Ten hearing sessions occurred, and an extension of the decision due date was granted after a request from counsel. Although attempts were made to assert claims for the 2023-2024 school year, that time frame was not the subject of these proceedings. This due process hearing only addressed the claim period outlined through the agreed-upon issues, which included most of the 2020-2021, 2021-2022, and 2022-2023 school years, inclusive of summers.

Following review of the record and for all of the reasons set forth below, the Parents' claims are granted in significant part.

## **ISSUES<sup>5</sup>**

1. Did the District fail to perform a timely evaluation of Student?
  
2. From July 27, 2020 (two years before the filing date of the due process complaint) through the present, did the District deny

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<sup>4</sup> The requested records not produced included probes, tests, and data upon which any of the LEA's progress monitoring or IEP baselines for the Student were based, the Student's application for the vo-tech programs, records regarding rejection from the vo-tech programs, and records regarding appeals or interval reviews of the vo-tech programs decision to reject the Student from the program. Counsel for the District attested that all records had been produced. (HO-1; N.T.12 )

<sup>5</sup> On the hearing record, Counsel for the parties agreed to the issues as stated. (N.T 10-11, 1766-1777).

Student a FAPE by failing to provide the Student with an appropriate program and placement?

3. If the District denied Student a FAPE, what if any remedy is appropriate?
  
4. Did the District discriminate against the Student in violation of Section 504 and the ADA?
  
5. If the District discriminated against the Student, what if any remedy is appropriate?

## **FINDINGS OF FACTS**

### **Background**

#### **[Elementary School]**

1. In 2014, during the [redacted] grade, the District evaluated the Student. On the Wechsler Intelligence Scale for Children-4th Edition (WISC-IV) the Student's cognitive abilities fell within the extremely low range, with a full-scale IQ score of 57. On the Kaufman Brief Intelligence Test-2nd Edition (KBIT-II), the Student's cognitive abilities were within the lower range. On the Adaptive Behavior Assessment System- 2nd Edition (ABAS-II), the Student's adaptive skills were in the average range overall, with some concerns noted in community use, health, and safety. (P-2)

2. On the WIAT-III, the Student's academic skills were below average across all areas. The ER determined the Student did not meet the criteria for intellectual disability (ID) but was eligible for special education and related services under the classification of specific learning disability. (P-2, P-4, P-18, p. 5, P-36, p. 7)
  
3. In October 2017, the District reevaluated the Student during the [redacted] grade. On the (WISC-IV) the Student's cognitive abilities fell within the extremely low range, with a full-scale IQ score of 54. On the Kaufman Brief Intelligence Test-2nd Edition (KBIT-II), the Student's cognitive abilities were within the lower extreme range. On the (ABAS-II), the Student's adaptive skills were in the below average for communication, functional academics, school living, self-care, self-direction, and social skills.<sup>6</sup> The RR concluded that the Student met the classification criteria for Intellectual Disability (ID). The RR recommended continued intensive support in literacy and math in a supplemental setting. (P-4, p. 2, 7, 14-15, P-7, P-36, p. 6; N.T. 1024-1025, 1087-1089)
  
4. During the [redacted] grade, the Student received instruction in a life skills support (LSS) classroom. (P-5, P-6)

### **2019-2020 School Year – [redacted] Grade**

5. During the 2019-2020 school year, the Student transitioned to a District middle school and enrolled in the [redacted] grade. During the

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<sup>6</sup> Teacher but not Parent input was collected for the ABAS.

[redacted] grade, the Student received supplemental life skills support (P-10; N.T. 148-149, 700-701)

6. On November 4, 2019, the District issued its RR regarding the Student. On the Woodcock Reading Mastery Test, the Student performed at a grade equivalent in word identification at 1.5 and passage comprehension at 1.8. On the KeyMath-3, grade equivalencies were mental computation 1.7, addition/subtraction 2.2, and multiplication 1.8. The team recommended that the Student receive instruction in a life skills support program. (P-7, p. 13, P-36, p. 4, P-37, p. 5)
  
7. In November 2019, the IEP team met to develop educational programming. The November 2019 IEP contained six goals designed to address reading fluency (goal: word reading correct per minute from 41 to 60, baseline: 41 wcpm), math (goal: correctly answer 8 out of 10 addition/subtraction questions, baseline: 0), community skills (goal: select/purchase correct items 5 out of 5 times, baseline: 10, level 2 Fry sight words (baseline: 67), and reading comprehension (goal: answer who, what, when where, why questions with 80% mastery, baseline: 40%) The Student's instructional reading level was 1.3. (P-10, P-10a)<sup>7</sup>
  
8. Goal-specific SDI included drill and practice, direct instruction in math, small group instruction, and flashcards. (P-10a)

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<sup>7</sup> The IEP at (P-10) listed four goals and the IEP at a glance (P-10a) listed six goals.

9. Through a NOREP, the District proposed the Student participate in a life skills support program with a supplemental level of service and ESY. Through the IEP, the Student would spend 36% of the day in the regular classroom. The Parent approved the implementation of the recommended programming. (P-10, P-10b)

### **2020 Private Audiology Report**

10. On January 27, 2020, the Parent obtained an audiology evaluation of the Student. The audiologist concluded that the Student demonstrated weaknesses in comprehension of degraded speech, dividing attention and focusing on requested order, auditory decoding, and binaural integration consistent with a central auditory processing disorder (CAPD). (P-11)
11. On April 9, 2020, the District received the private audiology report via email from the Parent. After receipt of the report, the District did not contact the Parent to indicate legibility concerns or that it had a missing page. The Parent requested a review of the report and an evaluation regarding the CAPD diagnosis. (P-50, p. 2; N.T. 490-491, 513-515, 760-761, 1688)
12. Recommendations from the audiology evaluation included visual cues, gaining attention before speaking, preferential seating, highlighting of keywords, chunking for large amounts of information, minimization of writing needs, slower speech, and frequent breaks.<sup>8</sup> (P-11, p.4)

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<sup>8</sup> The District maintained it did not receive the page with recommendations until the due process hearing.

13. A teacher of the Deaf/Hard of Hearing (HH) and other team members reviewed the private audiology report, expressed concerns about the diagnosis and questioned whether the audiologist was aware of the Student's ID diagnosis. (N.T. 493-494, 506, 1630-1631)
14. In June 2020, the District developed a special education ESY remote learning plan for the Student. (P-13, P-13a)

### **2020-2021 School year – [redacted] Grade**

15. During the 2020-2021 school year, the Student was enrolled in the [redacted] grade at a District middle school. Because of the COVID-19 pandemic, the Student received remote instruction. (P-14)

#### **November 2020 IEP**

16. In November 2020, instead of an IEP meeting, the District sent the Parent a proposed IEP for review. The life skills teacher telephoned the Parent to discuss the proposed educational programming. (P-50; N.T. 105-106)
17. Under the present levels of academic achievement and functional performance (PLEP), the Student's grade equivalent, November 2020 academic levels on the WRAT-4 were determined as: word reading- 2.6, sentence comprehension- 2.8, spelling- 2.0, math computation- 3.5. The Student was slated to receive academic instruction at a second-grade level. (P-14, P-50, p. 3; N.T. 105-106)
18. The November 2020 IEP indicated the Student mastered the Fry level 1 sight word list and correctly identified 88/100 Fry sight words

at level 2. The Student reportedly was able to correctly answer 4/5 “WH” questions at 80%. (P-14. p. 22)

19. The November 2020 IEP indicated the Student’s functional academic needs included sight vocabulary and reading comprehension. In math, the Student needed improvement in subtraction with regrouping, multiplication and division skills. The Student’s learning support teacher indicated the Student also had academic needs related to decoding, vocabulary, writing, time, counting coins, and measurement. (P-14, p. 16; N.T. 673-679)

20. The November 2020 IEP contained six goals designed to address community skills (goal: 5 out of 5 correct demonstrations of grocery shopping, baseline: 2%), math-subtraction (goal: 8 out 10 correct, baseline: 2), Level 3 Fry sight words (goal: 100 correct, baseline: 66%), transition (goal: research four jobs, baseline: 0), reading comprehension (goal: 80 percent correct answers, baseline: 33.33%) and math-multiplication (goal: 10 problems within 50 with 80% accuracy, baseline: 20%).<sup>9</sup> The team determined the Student eligible for ESY. <sup>10</sup> Baseline data for the goals was obtained on November 16, 2020. (P-14, P-45)

21. Although the goals were essentially the same as the November 2019 IEP, the objectives for each goal were adjusted. (P-14)

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<sup>9</sup> %

<sup>10</sup> In the IEP document, the Fry sight word, and both math and the reading comprehension goals were repeated, twice. (P-14a, p. 2-3)

22. Modifications and SDI in support of the IEP goals included modeling and practice during outings and classroom lessons, small group instruction, flashcards, 30 minutes of daily, direct instruction in math, and internet access. (P-14, p. 20-24)
23. The IEP indicated the Parent was not concerned with the October 2020 digital learning plan because the Student appeared more focused during virtual learning. (P-14, p. 8)
24. On December 2, 2020, the Parent emailed the District and referenced a phone call from the previous week. The Parent expressed concerns about the Student's academic levels, how the auditory processing disorder would be addressed, services, low goals, and disagreement with the life skills classroom. (P-50, p. 3; N.T. 100)
25. According to the November 2020 IEP, the team did not consider use of supplementary aids and services. Through a NOREP, the District proposed the Student's placement in supplemental life skills, with 28% of the time in the regular classroom. The Student was slated to participate with non-disabled children during school activities such as lunch, expressive arts and assemblies. The Parent disapproved of the offered programming, citing that the Student's needs were not fulfilled. (P-14, p. 29, 33, P-15)
26. On December 21, 2020, the District invited the Parent to a meeting on January 6, 2021, to discuss the April 2020 private audiology report. At the January 2021 meeting, the team agreed to wait one month for an updated audiological report in which the

audiologist officially recognized that Student had an ID. However, the MDT Team, including the teacher of the Deaf/Hard of Hearing agreed to honor the findings and applicable recommendations from the initial audiological report if the Parent could not obtain an updated report. The Parent did not provide an updated audiological report to the team within a month. <sup>11</sup> (P-16, P-18, N.T. 1686-1689)

27. On March 2, 2021, the District issued its RR that considered the private audiology report and CAPD diagnosis. The RR noted that decoding and differentiating coins and math was difficult for the Student. After a review of the private audiology report, the District determined no additional data was needed; the Student's secondary eligibility category should be OHI and consult with the teacher of the Deaf/HH to assist with possible assistive listening devices should occur. (P-18)

28. The RR recommended incorporating most of the private audiology report recommendations into the Student's programming. Recommended SDI included preferred seating, chunking of auditory information, visual step-by-step directions, teacher/staff reduction of speech, repetition of information, repeating information back, reduction of stimulation and other auditory information. (P-18)

29. On April 9, 2021, the IEP team met to update the Student's IEP. The April 2021 IEP offered thirty minutes a term of deaf hard of

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<sup>11</sup> The Parent produced an updated audiology report during the due process hearing that indicated the Student's disability as ID. (P-83)

hearing consultation support with the classroom teacher and staff to assist with assistive listening devices for the Student. (P-18, P-19, p. 29-30; N.T. 477-478, 504, 1688-1689)

30. A speaker was placed in the Student's classroom to amplify the teacher's voice. (N.T. 479)
31. The April 2021 IEP offered sixty minutes, a term, of speech and language therapy consultation support with the classroom teacher and staff. (P-19, p. 30)
32. On August 30, 2021, the Parent, through a NOREP, approved the recommendation that the Student receive in-person instruction in the life skills support program. (P-22)

### **2021-2022 School year-[redacted] Grade**

33. During the 2021-2022 school year, the Student was enrolled in the [redacted] grade in the District. (P-26)
34. The teacher of the Deaf/Hard of Hearing provided a speaker to the Student's life skills classroom, as a good faith measure, to amplify the teacher's voice. (N.T 478-479)

### **Private Speech-Language Evaluation**

35. On October 26, 2021, the Parent provided the District with a privately obtained speech and language evaluation administered by a

Speech-Language Pathologist (SLP). <sup>12</sup> The date of the evaluation was August 26, 2020<sup>13</sup>. (P-50, p. 14, P-54, P-55, N.T. 616)

36. The SLP reviewed past educational records of the Student that included the District's evaluations (2014, 2017, 2019, 2022) and IEPs (2018, 2019, 2020, 2022, 2023), the 2020 independent audiology report and private evaluation reports from 2022 and 2023. The SLP conducted a virtual classroom observation of the Student. (P-54; N.T. 536, 547-548, 631)

37. For the evaluation, the SLP administered the TAPS-4: A Language Processing Skills Assessment, Clinical Evaluation of Language Fundamentals-Fifth Edition, (CELF-5) Clinical Evaluation of Language Fundamentals-Fifth Edition, (CELF-5); Reading Comprehension and Structured Writing Supplemental tests. Clinical Evaluation of Language Fundamentals-Fifth Edition, (CELF-5); Observational Rating Scale Comprehensive Assessment of Spoken Language- Second Edition, (CASL-II); and Supralinguistic subsections. Language Sample. (P-54)

38. On the TAPS-4, all of the Student's scores fell in the below-average range. Many of the scores fell under the first percentile. On the CELF-5, the Student received scores below the first percentile, indicative of deficient receptive and expressive language skills and vocabulary, sentence structure and language usage challenges. (P-54, p. 17: N.T. 552-555)

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<sup>12</sup> The SLP was qualified as an expert in speech and language pathology language disorders. (N.T. 522)

<sup>13</sup> The SLP conducted a school observation of the Student which delayed issuance of the report. (N.T. 620)

39. On the CASL-2, intended to measure the oral language processing skills of comprehension and expression, all of the Student's scores fell within the deficient range. (P-54, p. 22; N.T. 558)
40. Based on the assessment results, the SLP determined that Student met the eligibility criteria for a speech and language impairment under the IDEA. The SLP also diagnosed the Student with a severe language processing disorder, a speech-language disorder, a social communication disorder, a cognitive communication disorder and a language-based learning disability. (P-54, p. 28-29; N.T. 524, 558-560)
41. The expert SLP suggested that a processing disorder diagnosis was not affected by an intellectual disability. (N.T. 543)
42. The SLP recommended the Student receive skill development of receptive and expressive language strategies before accommodation, modification and generalization into the classroom through solely consultation services for the teacher. (N.T. 528-529)
43. The SLP recommended the Student receive direct, school-based individual speech and language therapy twice a week for 30 minutes each session and once a week for 30 minutes in a group setting to address pragmatic and nonverbal language skills with peers; 60 minutes per month of consultation time with the SLP and the Student's teachers. (P-54, p. 29-37; N.T. 571-572, 582, 590)

44. On November 10, 2021, the Parent consented to the reevaluation by the District for review of the private speech evaluation. (P-23)

**November 2021 IEP**

45. On November 17, 2021, the IEP team held its annual meeting to discuss educational programming. The November IEP indicated the Student needed assistive technology (AT). The Parent and the Student were present at the IEP meeting. No regular or special education teachers were present. (P-24, p. 6)
46. According to the WRAT-4, from November 2020 to November 2021, the Student's grade level equivalencies in word reading declined from 2.6 to 2.5, sentence comprehension decreased from 2.8 to 2.6, spelling remained at 2.0, and math computation increased from 3.2 to 3.5. The Student's score declined from 88/100 to 89/100 on the Fry words list. The Student received instruction on a mid-second-grade level and participated in all class activities. (P-14, p. 22, P-24, p. 8)
47. The Student's community skills and employment goals were not introduced through the November 2020 IEP. (P-45)
48. The November 2021 IEP offered six life skills goals designed to address community skills (goal: 5 out of 5 correct demonstrations, baseline: 2%), reading comprehension (goal: answering 80% of questions correctly, baseline: 48.66%), identification of beginning, middle, end of a story) (sequence of events)(main ideas), writing (goal: 8-word sentence, baseline: 4.33), math-two digit number subtraction (goal: 10 correct, baseline: 5) math-multiplication, (goal:10 problems with 80% accuracy, baseline: 50%), and transition

(goal: identify 5 jobs, baseline: 1 job). Baseline data for the goals was obtained in October and November 2021. (P-24, p. 16-; N.T. 683)

49. SDI in the November 2021 IEP included preferential seating, chunking of auditory information, visual step-by-step directions, reduced speech rate by teachers and staff, and reduced stimuli. Support for personnel included classroom teacher and staff Deaf/HH consult for thirty minutes an IEP term and classroom speech-language consultation for 60 minutes an IEP term. (P-24, p. 26-27)
50. SDI in support of the goals included preferential seating, chunking, modeling, speech rate reduction, Student repeating back of information, reduction of stimulation and auditory information, journal prompts, direct instruction, small group instruction, and internet access. (P-24)
51. According to the November 2021 IEP the team did not consider the use of supplementary aids and services. Through the IEP, the Student would spend 28% of the day in the regular classroom. The Parent approved the recommendation for the Student's placement in a life skills support program with a supplemental level of service and summer 2022 ESY. (P-24, P-25)
52. On February 20, 2022, the Parent consented to a District OT evaluation of the Student as recommended by the private SLP. (P-26)
53. On March 31, 2022, the District issued its RR that considered the independent speech and language evaluation obtained by the Parent. The RR concluded that the independent SLP's results should be viewed

with caution because of the nature and behavioral aspects involved with the Student as a child with an intellectual disability. (P-26, P-27, p. 21-23; N.T. 318-319)

54. Based on a review of the audiology and independent speech assessment, the RR recommended the provision of speech and language therapy support through consultation with the classroom teacher. No individual speech services for the Student were recommended. (P-27, p. 23)

55. On May 26, 2022, the District issued a NOREP that indicated the Student did not demonstrate regression in skills targeted in IEP goals in effect at the time of the COVID school closure and did not require learning-related remediation. (P-28, P-29)

56. Although eligible for ESY during the summer of 2022, the Student did not attend. (P-31; N.T 122)

### **2022-2023 School Year [Redacted]**

57. During the 2022-2023 school year, the Student enrolled in the [redacted] grade in a technical/vocational high school in the District. The Student was enrolled in the closest high school to the Student's home with an opening in the life skills program. (N.T. 347)

58. The high school offers career technical education programs, including culinary arts and baking, with instruction and programming beginning in the [redacted] grade. (P-63, P-64; N.T. 275, 350-351)

59. In the District, the career technical education high school provides specialized instruction aligned with industry standards for that particular career technical education program. The culinary program has twenty-four available slots. Applicants enter a lottery for enrollment. (N.T. 352-353)

60. The Student is interested in culinary arts. The waiting list for admission to the culinary arts program at the high school attended by the Student for the 2022-2023 school year was between 250 to 450 students. (N.T. 1566-1567)

61. At the start of the 2022-2023 school year, the District administered Star Reading and Math assessments to the Student. In math, the Student received a standard score of 829, a percentile rank of 1%, and a grade equivalent of 1.6. In reading, the Student received a standard score of 803, a percentile rank of 1%, a grade equivalent of 1.2, and an instructional reading level of pre-primer. (P-36, p. 3)

### **Private Educational Evaluation**

62. On October 28, 2022, the Parent provided the District with a privately obtained educational evaluation conducted by a certified school psychologist.<sup>14</sup> (P-56, P-57)

63. For inclusion in the report, the independent psychologist reviewed the Student's educational records, the privately obtained

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<sup>14</sup> The private school psychologist was qualified as an expert in school psychology. (P-56, P-56a, P-57; N.T. 1106)

2020 audiology report, the 2020 autism assessment, and the 2021 independent speech and language evaluation. (P-56)

64. The independent psychologist administered the Differential Abilities Scale, Second Edition (DAS-II), Comprehensive Test of Nonverbal Intelligence-Second Edition (CTONI-2) Kaufman Test of Educational Achievement (KTEA-3) Wechsler Individual Achievement Test, Fourth Edition (WIAT-4), Wide Range Assessment of Memory and Learning, Second Edition (WRAML-2) Woodcock-Johnson Tests of Oral Language, Fourth Edition Beery-Buktenika Test of Visual Motor Integration (VMI), Motor Coordination, and Visual Perception Test of Visual Processing Skills, Fourth Edition (TVPS-4) Behavior Assessment System for Children, Third Edition, Teacher Report System (BASC-3-TRS-A) Behavior Assessment System for Children, Third Edition, Parent Report System (BASC-3- PRS-A) Behavior Assessment System for Children, Third Edition, Self-Report System (BASC-3-SRS-A) Adaptive Behavior Assessment System, Third Edition (ABAS-3), and the Parent and Teacher Leiter International Performance Scale, Third Edition (Leiter-3). (S-5, P-56, p. 11-35)
65. For inclusion in the evaluation, the private psychologist observed the Student in school and obtained Parent and teacher input. (S-5, P-56)
66. The private evaluator concluded the Student met criteria for a diagnosis of Intellectual Disability. Due to significant co-occurring disorders related to language and auditory processing, the Student's

cognitive ability was more challenging to assess. The Student's functional level was determined to be well below age in terms of memory, conceptual reasoning and problem-solving, language skills, and academic skills. Adaptive skills were higher than cognitive skills, although the Student continued to demonstrate needs in social, practical, and conceptual functioning. (S-5, p. 31)

67. The evaluator recommended that the Student receive direct and intensive speech and language therapy, a SETT evaluation to determine the benefit of assistive technology, use of an FM system, classroom accommodations to reduce auditory fatigue, small class sizes, strategies to assist with memory difficulties, intense instruction in reading decoding, math, and written language, emotional regulation, an OT evaluation, and consideration of a private school, and a transition plan. (S-5, p. 32-35)

68. On November 10, 2022, the Parent consented to a reevaluation to review the private educational evaluation of the Student. (P-33, P-34, P-36)

### **November 2022 IEP**

69. On November 28, 2022, the District issued an IEP that indicated a meeting had occurred to discuss the Students' educational programming. The Parent did not receive an invitation to the meeting and did not attend. The IEP signature page indicated no one participated in the meeting. (P-24, P-35, P-52; N.T. 481, 780-781, 1563)

70. The November 2022 IEP was identical to the November 2021 IEP, with the same baseline data, goals and SDI. However, ESY was offered for the summer of 2023. On the IEP page that proposed an educational placement, no boxes were checked that indicated the team considered any supplementary aids and services. The November 2022 IEP offered the Student placement in supplemental life skills support. The IEP was implemented. (P-24, P-35; N.T. 395, 480, 1739)
71. On December 9, 2022, the District issued its RR that considered the privately obtained educational evaluation. The RR concluded that the Student continued to meet the criteria to receive special education services as a student with intellectual disability based on the assessment results from the private educational evaluation. Continued academic special education in life skills support was recommended. The evaluating speech therapist made no additional recommendations. (P-36, p. 31)
72. In January 2023, a new life skills teacher assumed responsibility for the Student's classroom. No assistive technology is used to assist the Student in the life skills classroom. (N.T. 381)
73. On January 30, 2023, after conducting an observation of the Student in the life skills support classroom in the high school and the collection of additional data, the private educational psychologist issued an amendment to the August 2022 educational evaluation. (P-56)

74. The amendment concluded that on a cognitive assessment that did not require verbal instruction or responses (Leiter-3), the Student scored considerably higher than on previous cognitive assessments, which were broader and included verbal reasoning, working memory, and processing speed skills (DAS-II). (P-56)
75. The private school psychologist also concluded the assessment results were consistent with a diagnosis of intellectual disability with a mild level of severity. The Student's significant co-occurring disorders related to language and auditory processing made the cognitive ability more challenging to assess. Although the Leiter-3 indicated higher cognitive problem-solving under optimal conditions, the Student's functional level was well below age, as evidenced by previous assessments regarding memory, conceptual reasoning and problem-solving, language and academic skills. The Student's adaptive skills were higher than cognitive skills and nearer to peers, although some social, practical, and conceptual functioning needs were demonstrated. (P-56, p. 34)
76. The January 30, 2023, amended evaluation incorporated the original report's recommendations and suggested ideal private school environments. (P-56, p. 36-38)
77. On February 13, 2023, the Parent provided the amended private educational evaluation to the District. (P-37, p.1)
78. On February 22, 2023, the District issued an amended RR, generated to reflect its review of the Parent supplied amended private educational evaluation. The RR recognized the Student's needs as self-

advocacy communication of wants and needs, awareness of specific accommodations that would be useful after graduating high school, and increased decoding, comprehension, and organizational skills. (P-37)

79. The RR concluded the Student continued to meet the criteria to receive special education services as a student with an intellectual disability based on the assessment results from the current private evaluation, and continued academic special education supports are best provided within the life skills support setting. (P-37)
80. On March 14, 2023, the District created a “proposed” IEP that was presented at an April 2023 meeting.<sup>15</sup>
81. On May 19, 2023, the private educational psychologist issued a second addendum to the Student’s evaluation. This report noted that the [redacted]-grade life skills support was not commensurate with identified needs because classmates seemed academically and functionally significantly lower than the Student. The Student was observed to be engaged academically at a deeper level, independently motivated, and followed routines and instructions quickly and conscientiously. (P-56a)
82. The private evaluator indicated a more inclusive option, rather than a private school, may be possible within the current school district if the Student received more intensive instruction in vocational

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<sup>15</sup> The IEP listed a creation date of March 14, 2023, and contained a watermark, indicating it was “Proposed”. It was not implemented. (P-38)

skills with modifications and instruction tailored to individual strengths and needs. (P-56a; N.T. 1192-1195, 1248-1249)

83. The private evaluator could not rule out that specific learning disability (SLD) instead of ID would be a more appropriate classification because of the Student's unique profile with high adaptive behavior scores, performance on the Leiter assessment and historical challenges with reading, writing and math.<sup>16</sup> (P-56a; N.T. 1154-1156)

## **2023-2024 School Year**

84. During the 2023-2024 school year, the Student is enrolled in the [redacted] grade in the District.

## **DISCUSSION AND CONCLUSION OF LAW**

### **General Legal Principles**

#### **The Burden of Proof**

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. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed. Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir.

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<sup>16</sup> The private evaluator characterized the Student's profile as complex, not easy to categorize, and that it merited consultation with colleagues. (N.T. 1157)

2004). Because the Parent was pro se, the Hearing Officer assigned the production burden to the District. The Parent, as the party seeking relief, bore the burden of persuasion.

### **Witness Credibility**

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. See, *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). See also, generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

The Parent introduced the testimony of twelve witnesses and the District three. This Hearing Officer found most of the witnesses to be generally credible as to the facts. Any conflicting testimony between the witnesses can be attributed to poor recall and differing perspectives. The weight accorded the evidence, however, was not equally placed.

Although the Parent elicited testimony from individuals qualified as expert witnesses during this proceeding, the testimony of the Parent's privately retained speech-language pathologist (SLP) and school

psychologist were accorded significant weight. The SLP coherently and persuasively outlined the various assessments administered that justified the introduction of individual speech services to this Student despite identification as intellectually disabled. Likewise, the school psychologist provided explanations, deemed highly credible despite changing points of view, over a total of three evaluations of this educationally complex student.

### **Substantive FAPE**

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies meet the obligation of providing a FAPE to eligible students through the development and implementation of IEPs, which must be "reasonably calculated to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. The United States Supreme Court in *Endrew F. v. Douglas Cnty* confirmed this long-standing Third Circuit standard. *Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew* decision was the Court's first consideration of the substantive FAPE standard since the *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982). In *Rowley*, the Court found that a LEA satisfied its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id.* The Third Circuit consistently interpreted *Rowley* to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential.

See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 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). In substance, the *Endrew* decision is no different.

A school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. See *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), cert. denied, 488 U.S. 925 (1988). However, the meaningful benefit standard requires LEAs to provide more than "trivial" or "de minimis" benefit. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), cert. denied, 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome or a specific level of achievement. See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than de minimis" standard, holding that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). In sum, the essence of the standard is that IDEA eligible students must receive specially designed instruction and related services by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

## **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 that are 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). Upon completion of all appropriate assessments, "[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]" 34 C.F.R. § 300.306(a)(1). Pursuant to 22 Pa. Code §§ 14.123 and 14.124, evaluations and reevaluations must be completed, and the evaluation report presented to parents or guardians no later than sixty (60) calendar days after receiving written parental consent for the evaluation.

Next, the IEP team determines whether there is a need for additional data. If the IEP team determines that no additional data are needed, the appropriate box on the RR is checked and the reason(s) written on the RR. Findings (based upon existing data) are summarized and conclusions regarding eligibility are made. A copy of the RR is given to the parent and the RR becomes part of the student's educational record. A student's IEP must be reviewed and revised within thirty (30) calendar days of the completion of the RR.

If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation—

(1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child. 34 C.F.R. § 300.502(c)

### **Least Restrictive Environment**

The IDEA contains a crucial mandate that eligible students are to be educated in the “least restrictive environment” (LRE) that also satisfies meaningful educational benefit standards. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C.S. § 1412(a)(5)(A); see also *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993).

The Third Circuit in *Oberti* identified a two-pronged test for deciding whether a student’s placement is in conformity with the LRE mandate in the IDEA. The first prong involves consideration of whether the child can, with supplementary aids and services, be educated successfully within the regular classroom. 995 F.2d at 1215. If placement outside of the regular classroom is determined to be necessary, the second prong requires an assessment of

whether the child has been included with non-disabled children to the maximum extent possible. *Id.* The U.S. Supreme Court's *Endrew* decision further recognized that educational benefit for a child with a disability is wholly dependent on the individual child, who should be challenged by his or her educational program. *Endrew, supra*, 137 S. Ct. at 999. Also crucial to the LRE analysis is a recognition that its principles "do not contemplate an all-or-nothing educational system" of regular education versus special education. *Oberti, supra*, 995 F.2d at 1218 (*quoting Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1050 (5th Cir. 1989)). Rather, LEAs are required to have available a "continuum of alternative placements" in order to meet the educational and related service needs of IDEA-eligible children. 34 C.F.R. § 300.115(a); 22 Pa. Code § 14.145. Furthermore, the "continuum" of placements in the law enumerates settings that grow progressively more restrictive, beginning with regular education classes, before moving first toward special classes and then toward special schools and beyond. 34 C.F.R. § 300.115.

### **Procedural FAPE**

From a procedural standpoint, the family has "a significant role in the IEP process." *Schaffer, supra*, 546 U.S. at 53. 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). Procedural deficiencies might warrant a remedy if they resulted in a "significant impediment" to parental participation or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E).

### **Section 504 and ADA Principles**

Section 504 and Chapter 15 require that children with disabilities in Pennsylvania schools be provided with FAPE. The provisions of IDEA/Chapter 14 and related case law, in regard to providing FAPE, are more voluminous

than those under Section 504/Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. *P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009).

Section 504 of the Rehabilitation Act of 1973 also prohibits discrimination based on a handicap or disability. 29 U.S.C. § 794. A person has a handicap if they have "a physical or mental impairment which substantially limits one or more major life activities" or 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); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Further, the substantive standards for evaluating claims under Section 504 and the ADA are essentially identical. *See, e.g., Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those two statutes, particularly when considered with claims under the IDEA. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 and ADA claims that challenge FAPE obligation on the same grounds as the issues under the IDEA claim are addressed together.

## **Parent's Claims**

The Parent alleged that for the school years at issue, the District denied the Student a FAPE through IEPs with deficient goals and SDI,

improper IEP meetings, untimely and inadequate evaluations, and the implemented programming failed to allow for progress in the least restrictive setting. The Parent further contended that the District intentionally discriminated against the Student. The Parent has established by a preponderance of the evidence that the District denied the Student a FAPE for most of the 2020-2021, 2021-2022, and 2022-2023 school years. The Parent has not established that the District intentionally discriminated against the Student.

### **2020-2021 School Year**

During the 2020-2021 school year, the Student was enrolled in the [redacted] grade and received remote instruction during the COVID-19 pandemic. The IEP developed the previous year remained in place until November of 2020, when the District proposed updated programming for the Student. In November 2021, the annual IEP meeting should have occurred. Instead, the meeting was replaced by a phone call from the life skills teacher to the Parent to discuss educational programming for the Student. Although the pandemic was in effect, remote programming was occurring. Yet, the District did not conduct a meeting, virtual or otherwise, which was inconsistent with the requirements that Parents receive an opportunity to participate in educational planning through an IEP meeting with team members. 34 C.F.R. § 300.324, 34 C.F.R. § 300.322.

Through the November 2020 IEP, six goals were slated for implementation. Although the goals were essentially the same as the November 2019 IEP, the objectives for each goal were adjusted. The implementation of some of the goals in a virtual environment was unsuccessful. The community skills goal, designed to introduce grocery shopping from a simulated list, oddly had a baseline of 2%. Progress

monitoring indicated the Student could navigate through a grocery store, reported progress at 2% for the entirety of the school year. According to the monitoring, the Student would be offered the ability to demonstrate skills in this area once in person learning resumed. This goal could not be implemented during the 2020-2021 school year. Similarly, implementation of the Student's goal related to future employment was never introduced and deferred to the resumption of in person learning. Although limited academic progress occurred from November 2019 to November 2020, no discernable plan was introduced to address the Student's other known needs, including decoding, spelling, vocabulary, writing, telling time, counting coins, and measurement. At this point, the Student was a [redacted] grader, regarded as a child with an intellectual disability, but based on the evaluative data, available to the District, was capable of making progress.

Next, the Parent contended the Student was denied a FAPE because two key privately funded evaluations provided to the District were not considered in a timely fashion. The first evaluation, a privately funded audiology report, was provided to the District in April 2020 but was not formally considered until January 2021. During the hearing, the District maintained the report it received was illegible and had a missing page. The District also had concerns because it was unclear whether the private evaluator knew the Student was identified as intellectually disabled (ID). None of these excuses satisfactorily explain the District's delay, particularly if the report was unreadable and no one followed up with the Parent. At the January 2021 meeting, to discuss the audiology evaluation and CAPD diagnosis, the team requested the Parent obtain an amended audiology report with the Student's ID identification. The Parent did not submit an amended report within a month, as suggested by the District. In April 2021, nearly a year after the Parent provided the privately funded report to the

District, some of the audiology recommendations were incorporated into the Student's programming. The District also introduced thirty minutes a term of deaf hard of hearing consultation support with the classroom teacher and staff to assist with assistive listening devices for the Student. Although no individual assistive technology solutions were pursued for the Student, a classroom speaker was provided but its use and effectiveness were unmonitored. With respect to ESY, although the Student was eligible to attend ESY during the summer of 2021, the Parent has presented no preponderant evidence regarding programming deficits during this time frame.

Based on the evidence presented, the Parent has established that the programming provided to the Student through the November 2020 IEP was not calculated to yield meaningful educational benefit and resulted in a denial of FAPE.

### **2021-2022 School Year**

During the 2021-2022 school year, the Student was enrolled in the [redacted] grade in the District. In October 2021, the Parent provided the District with a privately obtained speech and language evaluation. The evaluating SLP recommended the Student receive school-based individual and group speech services to address pragmatic and nonverbal language skills.

In November 2021, the IEP team met to develop educational programming for the Student. Although the Parent, a special education liaison, LEA representative, and a District speech therapist participated in the meeting, no regular education or special education teachers were present. From November 2020 to November 2021, the Student experienced a minimal decline or no established progress in some academic areas but

increased performance on assessed math computation skills. The five academic goals and one transition goal were not markedly different from the preceding IEP; however, a new writing goal was introduced. What is more concerning is that assistive technology was listed as a special consideration in the IEP, yet no modifications, SDI, or evaluation were proposed to address this need. Although a speaker system was recommended, the introduction of this technology was done without an evaluation or a plan to capture data to determine its use and effectiveness. Furthermore, at this point, the District had two parentally funded evaluations that outlined the Student's communication deficits, yet the offered programming contained no definitive steps to address those needs.

Many months later, the District determined individual speech services for this Student were unnecessary.<sup>17</sup> I reach the opposite conclusion. Based on the hearing evidence, the District did not properly regard the parentally obtained speech evaluation. During the hearing, the private SLP credibly explained the assessments administered, the results obtained and the basis for each of the conclusions reached. I also agree with the expert that the Student's teachers lacked the training to implement the speech and language services, and one hour a month of classroom consultation was insufficient. The District's refusal to heed the SLP's recommendations, primarily because the Student is a child with an intellectual disability, did little to refute the ultimate conclusion this evidence has established. This Student required intense, direct, individual speech-language services. For this Student, speech is a life skill. It is needed to meaningfully participate in the educational environment through communication and socialization with neurotypical peers and preparation for transition to the work force or additional education. The failure of the District to promptly and comprehensively consider the information provided in the parentally funded

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<sup>17</sup> The Parent was not invited to a meeting to consider this information

speech-evaluation and then its denial of services constituted a denial of FAPE.

The inexplicable delay by the District in failing to promptly consider the parentally funded audiology and speech evaluations resulted in a significant impediment to meaningful decision-making by the Parent. While the Parent waited for a determination of whether the private evaluators' reports would be embraced or rejected by the District, this Student was simply maintained in the same programming without the benefit of considering whether the professional recommendations were appropriate when in fact they were. The District's failure to consider the parentally funded private evaluations in a timely manner constituted a denial of FAPE. Based on the evidence presented, the Parent has established that the programming provided to the Student through the November 2021 IEP for was not calculated to yield meaningful educational benefit and resulted in a denial of FAPE. The Parent presented no preponderant evidence regarding programming deficits during the summer of 2022 or that the Student was denied a FAPE.

### **2022-2023 School Year**

For the 2022-2023 school year, the Student enrolled in the [redacted] grade in a technical/vocational high school in the District. This high school has a competitive enrollment policy and career technical education programs, including culinary arts and baking, with instruction and programming beginning in the [redacted] grade. The selected school was the closest to the Student's home with an opening in a life skills track.

Shortly after the school year began, the Parent provided the District with a third private evaluation concerning the Student. This educational evaluation, conducted by a school psychologist qualified as an expert for purposes of this proceeding, comprehensively and thoroughly outlined this

Student's complex educational needs. Although this evaluator revised the report two times, the ultimate conclusion was unchanged. This Student had an intellectual disability, possibly a SLD, but significant co-occurring disorders related to language and auditory processing that made cognitive abilities more difficult to assess reliably.

The November 2022 IEP, introduced into evidence as proposed for implementation for most of the 2022-2023 school year, contained annual goals and programming identical to the November 2021 IEP. Strangely, the IEP signature page was blank, and the Parent was not invited to and did not attend a meeting. The Parent offered unrefuted testimony that through this IEP, the Student continued to receive education in a life skills setting without the benefit of many recommended and needed interventions and inconsistent and undocumented use of the assistive technology.

The educational programming provided through the November 2022 IEP was deficient and denied the Student a FAPE. The IEPs developed from 2019 through 2021 contained nearly identical goals, the objectives supporting each goal were adjusted with increased expectations and the Student made some progress. However, the IEP offered in November 2022 was identical to the 2021 programming. The repetition and recycling of IEP goals is usually a strong indication of programming deficiencies and FAPE concerns. *Downingtown Area Sch. Dist. v. G.W.*, 2020 U.S. Dist. LEXIS 186586, at \*16 (E.D. Pa. Oct. 8, 2020) (affirming hearing officer's finding of FAPE violation where five of fifteen IEP goals were repeated verbatim from year to year and SDIs did not substantively change); *Laura P. v. Haverford Sch. Dist.*, 2008 U.S. Dist. LEXIS 96190, at \*34 (E.D. Pa. Nov. 21, 2008) (affirming hearing officer's finding that the student's "IEPs were 'repetitive without indication of either progress or a change in instruction' and 'lacked the systematic present levels of educational performance, measurable

annual goals, and appropriate progress monitoring . . . necessary to constitute FAPE.”)

After observing the Student in the high school, the evaluator strongly suggested the exploration of a more inclusive option for the Student with more intensive instruction in vocational skills and modifications and instruction tailored to individual strengths and needs. Importantly, for the second time, direct and intensive speech services were recommended. Additional recommendations included a SETT evaluation to determine the benefit of assistive technology, classroom accommodations, and intense instruction in reading, decoding, math, written language, and emotional regulation.

Just as significant for the provision of FAPE are the specially designed instruction and related services through an IEP that must offer an appropriately ambitious education in light of the Student's circumstances. There was a lack of recognition of this Student's auditory and speech needs during the 2022-2023 school year. Furthermore, the District failed to thoroughly consider the recommendations from the parentally funded private evaluation. The programming in place for this Student during the 2022-2023 school year failed to provide FAPE.

The Parent presented no preponderant evidence regarding programming deficits during the summer of 2023 or that the Student was denied a FAPE.

Overall, The Parent has established by a preponderance of the evidence that the IEPs in place during the 2020-2021, 2021-2022 and 2022-2023 school years were insufficient. In addition to recycled IEP goals, with the exception of minor changes, the SDI listed in the Student's multi-year IEPs (drill and practice, direct instruction in math, small group instruction,

flashcards) supporting the repetitive goals remained essentially unchanged from year to year.

In addition to the identified academic deficits, the Student also had known and documented decoding, encoding, phonemic awareness, reading fluency, vocabulary and writing needs.<sup>18</sup> In addition to these literacy needs, the Student had known deficiencies with basic skills that included making change, coin knowledge, and telling time. Although very generic and broad academic goals were offered, as a middle schooler transitioning to high school with a complex learning profile, more individualized educational programming commensurate with this Student needs was required. Based on the totality of evidence, the District's actions resulted in a denial of FAPE.

### **Least Restrictive Environment**

Finally, the Parent contends that the District failed to provide the Student with educational programming in the least restrictive environment. For the duration of the time at issue, this Student was educated in a highly segregated life skills setting, with minimal opportunity for inclusion with neurotypical peers. At each annual IEP meeting, the team failed to make reasonable efforts to consider supplementary aids and support services to ensure this Student was educated in the least restrictive setting. The Parent has established that the Student's placement in life skills without consideration of the use of supplementary aids and support services violated the IDEA's mandate of placing disabled students in the least restrictive environment. Supplementary aids and services are the key: they "enable the school to educate a child with disabilities . . . within a regular classroom, while at the same time addressing that child's unique educational needs."

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<sup>18</sup> A writing goal was added to the Student's IEP in 2021.

*Id.* at 1214. The District is required to “consider the whole range of supplementary aids and services” in determining whether a disabled child can be satisfactorily educated in the regular education classroom. *Id.* at 1216.

In this case, the evidence of record has established, the District did not engage in “reasonable efforts to include the Student in a regular education classroom with supplementary aids and services[.]” *Id.* at 1212. The unrefuted evidence has established the District *never considered any* supplementary aids and services that could be implemented to educate the Student with neurotypical peers. “If a school has given no serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child,” then a violation of the least restrictive environment mandate is likely to have occurred. *H. L. v. Downingtown Area Sch. Dist.*, 624 F. App’x 64, 65 (3d Cir. 2015). The failure to comply with these critical LRE principles was a fatal procedural flaw.

The evidence is also preponderant that the Parent participated in some meetings and communicated with the District; however, the evaluative delays and programming decisions that occurred without parental input, outlined above, lead me to conclude that the District denied the Parent the opportunity to participate meaningfully in educational decisions regarding the Student for the school years at issue.

### **Intentional Discrimination**

The final issue is whether the District intentionally discriminated against Student on the basis of disability. Intentional discrimination 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). To prove a denial of benefits, parents must establish the District's actions were intentional; therefore, in this instance, the Parent can meet that burden by establishing deliberate indifference. " Deliberate indifference must be a deliberate choice, rather than negligence or bureaucratic inaction." *Chambers v. School Dist. of Phila.*, 587 F.3d 176, 189 (3d Cir. 2009). There was insufficient evidence that the District acted with deliberate indifference in this case. There is no evidence of intentional discrimination, unreasonableness, bad faith or improper motive on the part of the school officials.

## **CONCLUSION**

Based on the foregoing findings of fact and for the FAPE violations outlined above, I conclude that under the IDEA and by extension under Section 504, the District denied Student a FAPE during the 2020-2021, 2021-2022 and 2022-2023 school years, exclusive of summers, and must be provided compensatory education. I also conclude that the District did not intentionally discriminate against the Student. A special education hearing officer has broad equitable powers to issue an appropriate remedy when a local education agency violates special education laws. Compensatory education is an equitable remedy that is available to a student. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *Big Beaver Falls Area Sch. Dist. v. Jackson*, 615 A.2d 910 (Pa. Commw. 1992); *Easter v. Dist. of Columbia*, 128 F. Supp. 3d 173, 105 (DDC 2015)

Based on hearing record, the Student was denied the chance to receive "significant learning" and "meaningful benefit". The record, as a whole, leads me to conclude that an award of one school day of compensatory education for each day the Student attended school, during the school years, at issue is appropriate relief.

The Student may use the compensatory education for any developmental, corrective, remedial, specially-designed instruction, supplemental aids, or accommodations, including but not limited to tutoring, teaching, transition services, related services, auxiliary aids and services, private evaluations/diagnostic testing, assistive technology supports/devices, or career/vocational counseling as defined in the IDEA or Section 504. The Parent may select the compensatory education service provider(s) at their sole discretion. The hours of compensatory education may be used at any time from the present until Student turns twenty-one (21). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent. The cost of the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the District.

## **ORDER**

As set forth above, for violations of the District under the IDEA and Section 504, the following relief is Ordered:

The District shall provide the Student with one full school day of compensatory education for each day of school the Student attended between July 27, 2020, and the last day of the 2022-2023 school year, exclusive of extended school year (ESY) 2020, 2021, and 2022;

The District shall provide the Student with direct, school-based individual speech and language therapy, twice a week for thirty (30) minutes each session, and once a week for thirty (30) minutes in a group setting to address pragmatic and nonverbal language skills with peers, and thirty (30) minutes per month of consultation time with a District speech-language pathologist (SLP) and the Student's teachers;

Within ten (10) school days of this Order, the District must issue a consent to conduct a SETT evaluation of the Student to assess for assistive technology needs;

Within ten (10) school days of this Order, the District must convene the Student's IEP team to include the Parent to revise the Student's IEP with the participation of a District or independent inclusion professional. The team shall consider whether Student can, with supplementary aids and services, be educated in the regular education setting to a greater degree than set forth in the last agreed-upon IEP and an assessment of whether Student has been included with typical peers to the maximum extent possible. The team shall consult the Supplementary Aids and Services Toolkit available through PaTTAN to guide this discussion. The team shall also review Student's program for alignment with the general education curriculum and revise accordingly.

Nothing in this Order should be read to preclude the parties from mutually agreeing to alter any of its terms in writing and signed by both parties and their respective counsel.

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

/s/ Joy Waters Fleming, Esquire

*Joy Waters Fleming*

HEARING OFFICER  
ODR File No. 26814-22-23