

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. 30220-24-25

Child's Name:

S.A.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent:

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

January 29, 2025

INFORMATION AND PROCEDURAL HISTORY

The Student is a high school-aged resident of the District in the [redacted] grade.¹ The Student is eligible for special education as a child with emotional disturbance and other health impairment (OHI). The Parent filed a due process Complaint with allegations that the District denied the Student a FAPE for the 2022-2023 and 2023-2024 school years in violation of the Individuals with Disabilities Education Act (IDEA)², Section 504 of the Rehabilitation Act of 1973³ and the Americans with Disabilities Act (ADA) and the corresponding federal regulations and those contained in the Pennsylvania code.⁴

As a remedy, the Parent seeks a Hearing Officer Order directing the District to convene an IEP meeting to develop appropriate programming and placement for the Student and payment of two years of compensatory education. The District asserts that it has provided the Student with FAPE for the period at issue, and all claims should be denied.

Following review of the record and for all of the reasons set forth below, the claims of the Parent are granted.

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2)

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are codified in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

⁴ 42 U.S.C. §§ 12101-12213

ISSUES⁵

1. Did the District deny the Student a FAPE during the 2022-2023 and 2023-2024 school years through its failure to:
 - a) conduct an appropriate evaluation;
 - b) adequately address the Student's social, emotional, behavioral and academic needs through appropriate programming?
2. If the District denied the Student a FAPE, what remedy is appropriate?

FINDINGS OF FACT

1. The Student is [redacted] years old and enrolled in the [redacted] grade in the District. The Student is eligible for special education based on emotional disturbance and Other Health Impairment (Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder).(P-1, S-1, p, 15)

Charter School Enrollment

2. From first through half of sixth grade, the Student was enrolled in a charter school. (S-1)
3. A 2016 charter school evaluation of the Student, a [redacted] grader, determined eligibility for special education support and services under the primary classification of other health impairment (OHI) because of ADHD. An FBA concluded that when presented with undesired tasks,

⁵ On the hearing record, counsel agreed to the issues for resolution. (N.T. 8-9)

the Student would engage in problem behavior to escape/avoid the undesired task. (S-1, p. 1)

4. The evaluation recommended counseling and social skills training to help the Student develop self-regulation and coping skills, make friends, and communicate emotions. (P-25, S-1)

2018-2019 School Year- [redacted] Grade

5. During the 2018-2019 school year, the Student was enrolled in the charter school but attended a therapeutic, emotional support behavioral program. In September 2018, the charter school conducted a reevaluation of the Student. (S-1, p. 2; N.T. 118)
6. Cognitive testing conducted in 2018 determined the Student had a full scale IQ of 94.⁶ The Student's performance on the WIAT-III to assess academic achievement concluded the Student had below average basic reading (5th percentile), comprehension and fluency, (6th percentile), math (13th%), and math fluency (8th percentile) skills. (P-25)
7. The 2018 reevaluation noted that components of the Student's cognitive ability highly correlated with attention deficit and impulse control. The RR concluded that the Student's primary educational disability category was better represented as emotional disturbance with secondary eligibility as OHI because of behavioral challenges in home and school. (S-1, p. 2-3)

⁶ Wechsler Intelligence Scale for Children – Fifth Edition

8. In February 2019, the charter school completed an FBA to address concerns about the Student's physical aggression, verbal disruption, task refusal and elopement. The resultant PBSP recommended planned ignoring, redirection, reminders, breaks, and a work schedule. (S-1, p. 16)

2019-2020- [redacted] Grade

9. During the 2019-2020 school year, the Student was enrolled in the [redacted]-grade charter school but attended a therapeutic behavioral program. (S-1, p. 15)
10. In July 2020, the charter school completed a reevaluation of the Student. Their RR included a summary of previous evaluations, educator and BCBA input, collected behavioral data, and conclusions from a 2019 FBA. The RR could not incorporate additional data because of school closures related to the COVID-19 pandemic. (P-25, S-1, p. 1)
11. The July 2020 RR concluded the Student continued to qualify as eligible for special education services under the primary classification of emotional disturbance and secondary classification of OHI. (S-1, p. 16-17)

2020-2021 - [redacted] Grade

12. During the 2020-2021 school year, the Student was enrolled in the [redacted] grade in a charter school but attended a full-time emotional support program. (S-3)

2021-2022 - [redacted] Grade

13. During the 2021-2022 school year, the Student was enrolled in the [redacted] grade in the charter school but continued to attend a full-time, research-based emotional support program. During the second reporting period, the Student returned to the charter school. (P-18, p. 10, S-3, p. 1,7; S-7, p. 10; N.T 307)
14. An IEP developed in December 2021 indicated that the Student received special education as a child with an educational classification of emotional disturbance and OHI (ADHD). The charter school IEP contained reading, Speech, writing, math, and behavior goals. (S-3)
15. The reading, math and writing goals had baseline data from first to fifth grade. Both Speech goals had baseline data. (S-3, p. 17-28)
16. The December 2021 IEP contained a positive behavior support plan (PBSP) and noted behaviors of concern that included aggression and elopement. The December 2021 PBSP included one behavior goal, with SDI, to address self-control. The behavior goal had baseline data. (S-4)
17. The team determined the Student was eligible for extended school year services (ESY) to maintain academic and behavioral progress. Offered related services, included speech/language therapy and counseling for 960 minutes per IEP term. (S-3, p. 31-32)
18. Through the December 2021 IEP, the Student received supplemental emotional support through a research-based emotional support program in conjunction with a PBSP, push-in support in math,

forty-five minutes of pull-out support in reading twice a week, forty-five minutes of social skills/executive functioning classes, four times a week, and thirty minutes a week of both counseling and speech services. (P-21, P-18, S-3, p. 7, 35)

19. In addition to speech services and daily check-ins, the Student received 8.75 hours of weekly special education services (pull-out reading, executive functioning/social skills class, counseling, push-in math support). (P-21)

District Enrollment

20. On May 16, 2022, the Student transferred into the [redacted] grade in the District. (P-18, P-20, S-6)
21. On June 2, 2022, the District held an IEP meeting to discuss Student programming. The IEP noted that the Student exhibited behaviors that impeded learning. Present level information from November 2021 indicated the Student's overall diagnostic reading score was on a second-grade level, math was on a fourth-grade level, and a writing diagnostic score of 22% was obtained. (P-18, P-19, S-7)
22. Reading teacher input from the charter school recommended that the Student receive Tier 2 pull-out reading support in addition to the general education curriculum. The District determined that a reading intervention class was not needed, and a general education English class and Tier 1 reading program were appropriate based on the Student's Lexile score. (P-18, p. 6-7)

23. Present levels of the Student's functional performance in the June 2022 IEP referenced the previous completion of an FBA and PBSP. (P-18, p. 10; N.T. 239, 426)
24. The June 2022 IEP determined that the Student had needs related to reading comprehension, decoding, math, writing, receptive and expressive language, and self-control. (P-18, p.12)
25. The June 2022 IEP offered eight goals for reading, Speech, listening comprehension, writing, math and behavior. The reading comprehension and fluency goals identified the Student's instructional level as third grade. The remaining goals did not specify a grade level. The District IEP did not identify which goals were related to Speech.⁷ None of the goals included baseline data. The IEP noted the Student was new, and the District would collect baseline data in the fall of 2022. (P-18; N.T. 122)
26. SDI in the June IEP included movement breaks, access to the emotional support room, extended time, manipulatives, study guides, graphic organizers, and opportunities to develop phonics, fluency and comprehension. (P-18, p. 28; N.T. 123)
27. Although the June 2022 IEP offered fifteen minutes of weekly counseling and thirty minutes of weekly speech therapy, the speech goal was not labeled. (P-18, p. 29, S-7)

⁷ The December 2021 IEP prepared by the charter school specifically designated two of the goals as "Speech" goals. The District's June 2022 IEP did not designate these as goals related to Speech needs. (P-18, S-3)

28. The June IEP offered itinerant emotional support with 6.2 hours per day or 89% of the day in the regular classroom. The June IEP did not specify special education services for the remainder of the school day. (P-18, p. 32-33)

2022-2023 School Year

29. During the 2022-2023 school year, the Student was enrolled in the [redacted] grade in the District. (S-10)
30. During the 2022-2023 school year, the District implemented the IEP developed the preceding June but did not obtain updated baseline data to revise the goals. (P-18; S-13)
31. In October 2022, the Student was involved in three disciplinary incidents for defiance. In November 2022, the Student was involved in two disciplinary incidents for fighting and skipping classes. The Student received a three-day out-of-school suspension. In December 2022, the Student was involved in three separate disciplinary incidents, including physical aggression. (P-12, p. 15, S-21)
32. On February 8, 2023, the Parent consented to a reevaluation of the Student. (P-16, S-9)
33. On April 7, 2023, the District issued its (RR) regarding the Student. (P-15, S-10)
34. The RR included a summary of prior evaluations, Parent and educator input, an observation, cognitive, academic, and social-emotional functioning assessments. (P-15, P-25, S-10)

35. For inclusion in the RR, the Student's special education teacher administered two sub-tests of the TOMA-3 to assess math deficits and the IRI to measure reading comprehension and accuracy. (P-25, p. 9-10)
36. On the TOMA-3, the Student received average computation and word problem scores. On the IRI, the Student demonstrated some inconsistencies but was determined to be at the independent level of 90% at the sixth-grade level. The evaluator concluded that the Student did not require fluency or comprehension goals but would receive support in reading and ELA classes. (P-15, p. 34, P-25, p. 10, S-11, p. 9, S-18, p. 13)
37. The RR reported the Student met the previous IEP reading and writing goals. (P-15, p. 34-35, S-18, p. 17-18)
38. The Student did not master the behavior goal. (P-15, S-18, p. 16)
39. To assess the Student's academic performance, the District's certified school psychologist administered the Woodcock-Johnson -IV Tests of Achievement (WJ-IV). (P-25, p. 25)
40. On (WJ-IV), the Student's broad reading, basic reading and math skills were low (3rd to 6th percentile). The Student's letter-word identification, applied problems, passage comprehension were classified as low (3rd to 8th percentile). (P-25, p. 25)

41. Through the WJ-IV, the Student earned the following scores: letter-word identification 8th percentile, applied probelems-4th percentile, passage comprehension-3rd percentile, calculation-4th percentile, writing samples-14th percentile, word attack-2nd percentile, and reading fluency-12th percentile. The evaluator noted the Student “gave up” on the word attack subtest, ostensibly lowering the reported reading scores. (P-15, p. 25; N.T. 78-79, 88, 90)
42. The evaluator concluded that although the Student obtained low scores in academic areas, motivation and sustained energy varied during testing, but grades remained consistent. (S-18, p. 10)
43. To assess the Student’s cognitive functioning, the District’s school psychologist administered the Wechsler Abbreviated Scale of Intelligence – Second Edition (WASI-II). The evaluator chose the WASI-II because it was brief, the Student struggled to complete the achievement testing, and two other cognitive assessments were already on file. (P-15; N.T. 28-29, 74-75)
44. On the WASI-III, the Student received scores in the average range, indicative of a full-scale IQ of 94 and consistent with the previously obtained score. The Student performed equally well on non-verbal visual reasoning tasks and language-based, verbal tasks. (P-15; N.T. 37)
45. After observing testing behavior, the evaluator noted the Student’s motivation, attention, sustained energy and effort were variable and to interpret the scores with caution. (N.T. 81-82, 85)
46. After administration of the Clinical Evaluation of Language Fundamentals-5 (CELF-5) and Comprehensive Receptive and

Expressive Vocabulary Test-3 (CREVT-3) and analysis of collected data, the evaluating speech therapist concluded the Student no longer qualified as a child in need of services (P-15, p. 28-29)

47. To assess the Student's social-emotional functioning, the evaluator reviewed Behavioral and Emotional Screening System (BASC-3) rating scales completed by the Parent, teachers and the Student. The Student's overall behavioral and emotional risk indices were within the normal range. Teacher ratings indicated adaptive behavior was average at school. The Parent rated social skills and leadership scales as at risk. Functional communication, adaptability and activities of daily living were rated as clinically significant. (P-15, p. 31-33, 38; N.T. 82-84)
48. The evaluating psychologist concluded that the Student's inconsistent testing performance, behavior during the assessments, and confirmed emotional disturbance served to rule out consideration of a specific learning disability. The evaluator also determined that the Student's attentional and executive functioning concerns justified continued identification as OHI because of ADHD. (N.T. S-10; 91-93, 101)
49. The RR concluded the Student had needs related to reading comprehension, basic reading, math computation, math reasoning, written expression, self-control (following directions), and coping. (P-15, p. 33-34)
50. The RR concluded that the Student qualified for special education services as a student with an emotional disturbance (primary) and OHI-ADHD(secondary). (P-15, p. 38)

51. The RR recommended the Student receive extra opportunities for practice and repetition to learn and retain skills taught in all subjects. Teacher recommendations included frequent breaks, reminder prompts, repetition of materials, graphic organizers, sensory breaks, access to the emotional support room when escalated, firm expectations of classroom behavior, and frequent checks for understanding. (P-15, p. 40)
52. On May 9, 2023, the IEP team met to develop educational programming for the Student. The May IEP indicated the Student exhibited behaviors that impeded learning. (P-12)
53. The May 2023 IEP offered no academic goals but included one behavior goal to address remaining on task, following directions and staying in class. SDI included check-ins, movement breaks, access to the emotional support room, extended time, study guides, graphic organizers, and preferential seating. Offered related services included fifteen minutes of counseling once a week. (P-12, p. 25-27, S-11)
54. The May 2023 IEP offered the Student itinerant emotional support in the regular education environment for 100% of the school day. (P-12, p. 31-32)
55. On May 9, 2023, a "draft" positive behavior support plan, was created. The District was unsure if it was finalized and implemented. (P-14; N.T. 208-209)
56. On June 7, 2023, the team met at the request of the Parent to discuss concerns about the Student's academic achievement, scores

received on reading and math testing, and removal of IEP goals. (P-10)

57. After the meeting, the team agreed to conduct additional math testing, a functional behavior assessment (FBA) and revise the May 2023 IEP by splitting the behavior goal into two (remaining on task) (following directions). (P-10, p. 15, S-14; N.T. 175)
58. The behavior goals indicated baseline data would be established in September 2023. Goal specific SDI included attendance at an executive functioning class once a day to address behavior and organizational skills, and check-ins with the assigned case manager and counselor. (P-10, p. 15, S-14; N.T. 175)
59. The Student's ELA teacher observed the Student read and comprehended material at an appropriate pace and on grade level used proper writing strategies and grammar but had difficulty communicating ideas clearly and needed to improve study skills. (S-18, p. 25)
60. The Student's social studies teacher observed the Student read at an appropriate pace, made inferences, presented ideas clearly but frequently called out in class, struggled to organize and had difficulty transitioning from one classroom to another. (S-18, p. 25)
61. During the 2022-2023 school year, the Student had nineteen disciplinary incidents, received multiple detentions, and had five days of out-of-school suspension. The incidents included fighting, cutting class, defiance and wandering the hallways. None of the imposed behavioral consequences necessitated a manifestation determination. (P-1, p. 14, P-15, p. 3 12, S-21; N.T. 337-338, 351)

62. At the conclusion of the 2022-2023 school year, the Student earned grades of English-C, Social Studies-B-, Math-B, and Science-C+. (S-12)

2023-2024 School Year

63. During the 2023-2024 school year, the Student was enrolled in the [redacted] grade in the District. (S-10)
64. Because of parental concerns about math performance, the District conducted TOMA-3 testing. On the TOMA-3, the Student achieved below average in mathematical symbols and concepts and in the poor range for computation. (S-18, p. 17)
65. On September 21, 2023, the team amended the Student's May 2023 IEP with a math computation goal (solve one-variable equations from 10% to 90% accuracy in 3 out of 4 trials). Goal specific SDI included a graphic organizer and multiplication chart upon request. (S-18, p. 22, 38)
66. On November 27, 2023, the District circulated the Student's functional behavior assessment (FBA), completed by a contracted board-certified behavior analyst (BCBA) and licensed behavior specialist. The BCBA was unaware of the FBA and PBSP developed at the charter school. The FBA incorporated antecedent, behavior and consequence data collected by the BCBA. The BCBA recommended

collecting additional data and a revision to the Student's IEP behavior goal. (P-7, S-15, S-16; N.T. 409-412, 419, 433, 435)

67. The BCBA regarded the embedded preemptive strategies in the FBA as a positive behavior support plan (P-7, S-15, S-16; N.T. 409-412, 433, 435)

68. On November 30, 2023, the Parent and Student's case manager met by phone to discuss behaviors of concern that included work completion, task focus and hallway disruption. The Parent agreed to change the Student's class schedule to minimize negative interactions. (S-18, p. 21; N.T. 230-232)

69. On December 15, 2023, the Parent participated in an IEP amendment meeting to discuss the results of the FBA. The team agreed to collect 4-6 weeks of additional data, provide the Parent with the Student's behavior monitoring sheets, and create a new goal if needed, to align with the updated FBA. (S-18, p. 20; N.T. 432)

70. From September through January, the Student failed to turn in the point sheets used to monitor the behavior goals. (P-12; N.T. 214-217)

71. On February 7, 2024, the Parent met with the school team to discuss the Student's Math (58%) and English (73%) grades. The team recommended that the Student attend MTSS, a daily period, allotted in all students' schedules, to receive additional academic assistance. (S-18, p. 20; N.T. 250-251)

72. On March 5, 2024, an IEP amendment meeting occurred to discuss collected behavioral data and update the present levels. The data was incorporated into the FBA and IEP. The team recommended continued monitoring of the Student's behavior and achievement of 90% or better when following adult directives. (P-3, S-18, p. 16-19; N.T. 432-433)
73. On April 10, 2024, the IEP team met to update the Student's programming with three goals developed by the evaluating BCBA to address the Student's behavior and executive functioning needs. The IEP also included a math goal. (P-1, S-19, S-20; N.T. 434)
74. The first behavior goal expected the Student to remain in an assigned area with no more than two reminders for 95% of opportunities for three consecutive school days (baseline: 94%). The second goal expected the Student to raise a quiet hand with no more than two reminders for 95% of opportunities for three consecutive days (baseline: 93%). The third goal expected the Student to follow adult directions with no more than two reminders for 95% of opportunities for three consecutive days (baseline: 84%). (P-1, p. 25-28, S-19, S-20)
75. The Math goal expected the Student to solve linear equations with improvement of skills from 0/10 problems to 8/10 in three trials (baseline 0%). (P-1, p. 28)
76. Offered SDI included movement breaks, preferred seating, extended time, manipulatives, practice opportunities, and positive

reinforcement. Related services included fifteen minutes of weekly individual counseling. (P-1, p. 30, S-20)

77. The April IEP indicated the Student exhibited behaviors that impeded learning and that an updated FBA and PBSP were “attached to file”. (S-20, p. 5)
78. The April IEP offered the Student itinerant emotional support with 84% of the day in the regular classroom. (P-1, S-20)
79. During the 2023-2024 school year, the Student attended an executive functioning class with eight other students, jointly taught by two special education teachers. The class was intended to support skills related to working memory, flexible thinking, self-control, time management, organization and planning. (S-20, p. 2, 15; N.T. 174-177, 265, 318)
80. During the 2023-2024 school year, the Student received a total of three days of out of school suspension. None of the incidents were regarded as state reportable or necessitated a manifestation determination. (P-1, p. 14, S-21; N.T. 332-333, 339, 351)
81. During the 2023-2024 school year, a positive behavioral support plan was not incorporated into the Student’s programing, after the District initiated FBA. (P-6; N.T. 229-230, 435, 437)
82. At the conclusion of the 2023-2024 school year, the Student earned final grades of: English-C, Math-D+, Reading-C+, STEAM-A, Science-C+, Social Studies-C+, Executive Function-B+. (S-23; 380, 396)

83. On September 3, 2024, the Parent filed a due process complaint.

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

The burden of proof essentially consists of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 US 49, 62 (2005); *LE v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who filed the Complaint that led to this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58

Special education hearing officers, in the role of fact-finders, are responsible for making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *TE v. Cumberland Valley School District*, 2014 US Dist. LEXIS 1471 *11-12 (MD Pa. 2014); *AS v. Office for Dispute Resolution* (Quakertown Community School District), 88 A.3d 256, 266 (Pa. Commw. 2014). 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 District’s certified school psychologist, Supervisor of Special Education, the special education teacher, the Parent, the middle school Principal, the Student’s [redacted] grade Math teacher, a board-certified behavior analyst, testified at this due process hearing. The weight accorded the evidence was not equally placed across all witnesses. The elicited

testimony from the contracted BCBA that completed a functional behavior assessment was persuasive. She did not know of the previous FBA and PBSP and was unable to confirm the efforts to finalize the behavior plan and its implementation.

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

General IDEA Principles: Substantive FAPE

The IDEA requires the provision of "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 US 176 (1982), the US Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to assist a child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase free appropriate public education (FAPE) to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. NE*, 172 F.3d 238, 247 (3d Cir. 1999).

Through local educational agencies (LEAs), states meet the obligation of providing FAPE to an eligible student through development and implementation of an IEP, which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the US Supreme Court has

confirmed, an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, 500 US 386, 400, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

Individualization is, thus, a focal point for purposes of IDEA programming. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child’s parents.” *Ridley School District v. MR*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands services that are reasonable and appropriate in light of a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Endrew F.*, *supra*; see also *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standards must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); see also *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same) “The IEP must aim to enable the child to make progress.” *Dunn v. Downingtown Area School District*, 904 F.3d 248, 255 (3d Cir. 2018) (emphasis in original)

General IDEA Principles: Evaluation

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.

For an evaluation to be appropriate, it must satisfy the requirements of the Individuals with Disabilities Education Act (“IDEA”), found at 34 CFR §

300.304-311. Section 300.304 requires that when conducting an evaluation, a public agency must:

(1) [u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining –

(i) Whether the child is a child with a disability under § 300.8;
and

(ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 CFR § 300.304

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family including parents have “a significant role in the IEP process.” *Schaffer, supra*, at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b). Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to

meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). Procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE 20 USC § 1415(f)(3)(E).

General IDEA Principles: Compensatory Education

It is well settled that compensatory education may be an appropriate remedy where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has also endorsed an alternate approach, sometimes described as a “make whole” remedy, where the award of compensatory education is crafted “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); see also *Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

General Section 504 and ADA Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. §

104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). 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 together 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 the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

The Parent’s Claims

After transferring from a charter school to the District's [redacted] - grade [redacted] school year, the team developed an IEP in June that borrowed much of its programming from the previous school attended. In the complaint, the Parent contends the District denied the Student a FAPE during the 2022-2023 and 2023-2024 school years through its failure to conduct timely, appropriate evaluations and develop responsive academic and behavioral supports. Based on this hearing record, the Parent has proven that the school district IEPs were largely inappropriate and in violation of IDEA. The implemented IEPs lacked requisite elements and were not reasonably calculated to provide meaningful educational benefit in light of the Student’s unique individual needs as determined by the available evaluative data.

The Student began [redacted] grade in the District with the IEP in place, developed the previous June. During the [redacted] grade, this Student received special education through an IEP that delineated behavioral and academic needs and proposed programming through the implementation of a series of reading, writing, math, and behavior goals. Although the District goals mirrored the charter school IEP, developed months earlier, none of the baseline data from the charter school that attested to this Student's great academic and behavioral needs made its way into the District's programming. Oddly, the goals purported to address speech were not identified. Additionally, the specially designed instruction that provided the Student with necessary reading, math and social-emotional supports, in the charter school setting, were absent. When school returned in the fall, the District never revised this IEP with baseline data, as it pledged to do months before. As a result, many of the Student's academic goals lacked foundational data and were not measurable; therefore, reports of academic and behavioral growth are unreliable. This was problematic because the Student was a [redacted] grader, with average cognitive ability, yet the implemented IEP lacked a reliable measurement to accurately gauge and report the Student's progress towards each of the goals, essentially leaving no reference point to determine if the District's interventions were effective. It is axiomatic that flawed or absent present levels undermine the accuracy of the progress monitoring. Although the IDEA does not require baseline data, IEPs that lack objective starting points cannot fully consider a child's unique needs.

The Parent's claim that a FAPE denial occurred because an FBA was not immediately initiated once the [redacted] grader returned to school in the fall of the 2022-2023 school year is not as clear cut. Understandably, this District wanted to give the Student a "fresh start" in a new grade and educational setting, undefined by the behavioral judgments of the past.

However, this Student had undeniable historical and documented behavioral needs, which necessitated recent placement in a specialized behavioral setting. However, even when this [redacted] grader struggled to attend, remain regulated, and incurred disciplinary referrals, the District did not initiate a FBA, increase behavioral support, or introduce meaningful programming to address obvious social skills and executive functioning deficits. Furthermore, the June 2022 IEP did not clearly reference the PBSP, developed by the charter school. Therefore, implementation of its key prevention strategies (daily check ins, social skills and executive functioning classes) during the Student's [redacted] grade year were either non-existent or less than clear.

The IDEA mandates that an IEP team must consider the child's need for the use of "positive behavioral interventions and supports" in the case of a student with a disability whose "behavior impedes his or her learning or that of others." 34 CFR §300.324 (a)(2)(i). In Pennsylvania, a positive behavior support plan must be developed by the IEP team, based on a functional behavior assessment, and become part of the student's IEP.⁸ 22 Pa. Code § 711.46. In this matter, the last FBA was completed in 2021 when the Student was in an outside full-time emotional support program, while enrolled in a charter school. Despite the Student's well-documented historical behavioral needs and current struggles, as evidenced by the numerous disciplinary referrals, a District initiated FBA did not occur until the 2023-2024 school year. Although an FBA need not coincide with a

⁸ *Positive behavior support plan*—A plan for students with disabilities who require specific intervention to address behavior that interferes with learning. A positive behavior support plan shall be developed by the IEP team, be based on a functional behavior assessment and become part of the student's IEP. These plans include methods that utilize positive reinforcement and other positive techniques to shape a student's behavior, ranging from the use of positive verbal statements as a reward for good behavior to specific tangible rewards. 22 Pa. Code § 711.46

reevaluation, that time frame would have been logical and strategic, so collected data could be used to develop a responsive and individualized PBSP, particularly in light of the established eligibility grounds for special education. The June 2022 IEP, as offered and implemented, denied the Student a FAPE.

Next, the Parent contends that the April 2023 reevaluation of the Student was flawed because the District failed to consider whether the Student had a specific learning disability.⁹ Based on the evidence of record, the 2023 RR was completed by a credentialed school psychologist and administered in accordance with testing protocols, procedures, and directives. The RR incorporated previous evaluative data, aptitude and achievement testing, Parent, Student and educator input, and assessments of speech and social-emotional functioning.

In analyzing the collected information, the school psychologist thoroughly considered the Student's performance on administered assessments, behavioral observations, and all collected data. Furthermore, the evaluating psychologist's explanation of the weight given to the Student's attentional and behavioral considerations, notably the emotional disturbance eligibility, credibly justified the decision to rule out consideration of a specific learning disability for this Student but maintain the established eligibility categories.¹⁰ Overall, the District's RR was IDEA compliant, and a comprehensive assessment that yielded valuable data for the development of special education programming for this Student.

¹⁰ Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of intellectual disability, of emotional disturbance, or of environmental, cultural, or economic disadvantage. 34 CFR 300.8 (c)(10)

Although the District's RR correctly identified the Student's reading comprehension, math and writing needs, all academic goals were removed from the IEP developed in May 2023. However, the District's justification for removal of goals on grounds that the Student had attained mastery was questionable because IEP goals in place for much of the school year were ostensibly implemented without updated baselines. However, the Student's performance on IRI reading and TOMA-3 math assessments supported the District's decision to remove the academic goals. Although the RR credibly concluded that much of the Student's reading, math and writing testing performance on standardized measures was attributable to executive functioning and other behavioral needs, the offered May programming lacked academic IEP goals, direct instruction or any identifiable means to provide the Student with the executive functioning or emotional regulation skills the RR deemed necessary. Despite these actions, the Student's primarily unsupported academic functioning in the [redacted] grade reflected average grade level performance and a need for executive functioning and self-regulation strategies as evidenced by teacher observations. The sole behavioral IEP goal lacked baseline data, was confusing and ostensibly intended to simultaneously address three behaviors (remaining on task, following directions and elopement). Furthermore, the evidence was persuasive that a PBSP, developed in May 2023, was unfinalized and unimplemented as it pre-dated an FBA that occurred months later in November 2023. This IEP, as offered, was not calculated to provide meaningful educational benefit to this Student.

During a June 2023 IEP meeting, prompted by the Parent, the team agreed to conduct additional math testing, initiate an FBA, and revise the behavior goal. Although the District touted the Student's year end grades as evidence of school year academic progress and the provision of FAPE; nineteen disciplinary incidents, multiple detentions and days of out-of-school

suspension undermine that position. Based on the totality of this hearing record, the Parent has preponderantly established that the District's failure to revise the June 2022 with baseline data and provide the Student with individualized, responsive academic and behavioral programming denied the Student a FAPE during the 2022-2023 school year.

2023-2024 School Year

The Student started the 2023-2024 school year with the June 2023 IEP in place. Although it was revised in September 2023, with a measurable math goal and SDI that included a multiplication chart upon request; no direct instruction or individualized interventions were offered. With respect to other areas of need, the Student's executive functioning challenges, ostensibly responsible for deficits revealed during District achievement testing, were now slated to be addressed through a daily class in organization, study skills and time management.

Despite these efforts by the District and school team, the Parent has established by a preponderance of evidence that the District's delay in developing a PBSP during the 2023-2024 school year denied the Student a FAPE. Although each of the IEPs developed over this and the previous school year, acknowledged that the Student's behavior impeded learning and disciplinary events accrued, an FBA was not completed until November 2023, more than an entire school year after the Student entered the District.

¹¹ Although the District took steps to ascertain and address the Student's behavioral needs through goal revisions, no discernible PBSP resulted from these efforts. The evidence was convincing that the District meticulously collected and reviewed behavioral data and met with the Parent in the

¹¹ A draft PBSP, dated May 2023, was referenced during the due process hearing. However, this document was created before the District completed the FBA in November 2023 and cannot be considered operative. (P-14; N.T. 143)

months following the FBA; it does not appear that this information was reduced to a plan, able to be referenced, for educator application from class to class in this middle school through this Student's IEP. The detailed charts and graphs created by the BCBA indeed guided the process; however, each educator interacting with the Student needed a plan to address behaviors and possible consequences. Furthermore, the actual behavioral goals recommended by the BCBA were not added to the Student's IEP until April 2024.

The April 2024 IEP included one math goal and three behavior goals. The behavior goals included baseline data and were adequately measurable and responsive to the identified needs. Although the team determined the math goal was necessary because of the Student's deficient testing performance, again, no compatible special education direct instruction or programming was specified in the IEP.

Ultimately, this Student achieved year-end passing grades, except for math, and behavioral progress was made, as evidenced by the decline in disciplinary incidents. However, the record supports a finding that the District's failure to meet the Student's math and behavioral needs denied the Student a FAPE. In this case, the District knew the Student needed behavioral interventions but delayed initiating the FBA and subsequent PBSP, which, as of the conclusion of this due process hearing, has an unknown status. The fact that the Student managed with the programming that was provided and still made progress is not determinative of whether a FAPE occurred.

The evidence is preponderant that the District's programming, as implemented during the 2022-2023 and 2023-2024 school year, was not reasonably calculated to enable this Student to make appropriate progress in

light of known circumstances. *Endrew F.* For the FAPE denial, this Student is owed compensatory education.

Remedy

The Parent having met the burden of persuasion on a denial of FAPE for the 2022-2023 and 2023-2024 school years entitles this Student compensatory education to remedy the deprivation. The Parent has proposed that the Student should receive 8.75 hours per week of compensatory education as representative of the level of special education support (excluding speech and check ins), the Student received at the former LEA to address the same set of needs. That suggested award is adopted.

The award of compensatory education is subject to the following conditions and limitations. Student's Parent may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related services needs in the areas of identified disability. The compensatory education may not be used for products or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age eighteen (18). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent, and the cost to the District of providing

the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

CONCLUSIONS OF LAW

1. The District denied Student FAPE over the 2022-2023 and 2023-2024 school years.
2. The Student is entitled to compensatory education to remedy the deprivation.

ORDER

AND NOW, this 29th of January 2025, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District failed to provide the Student with FAPE during the 2022-2023 school year.
 - a. In accordance with the foregoing decision the Student is awarded 8.75 hours per week of compensatory education for each week that the Student attended school, less absences, during the 2022-2023 school year.
2. The District failed to provide the Student FAPE for the 2023-2024 school year.
 - a. In accordance with the foregoing decision the Student is awarded 8.75 hours per week of compensatory education for each week that the Student attended school, less absences, during the 2023-2024 school year.

3. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms

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

Joy Waters Fleming, Esq.

Joy Waters Fleming, Esq.
Special Education Hearing Officer

January 29, 2025