

This is a redacted version of the original decision. Select details have been removed from the decision to preserve the anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code §16.63 regarding closed hearings.

**Pennsylvania Special Education Due Process Hearing Officer
Final Decision and Order**

CLOSED HEARING

ODR No. 30205-24-25

Child's Name:

J.R.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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Hearing Officer:

Brian Jason Ford

Date of Decision:

01/24/2025

Introduction

This hearing concerns the rights of a student (the Student). The Student's parents (the Parents) requested this hearing against the Student's public school district (the District). The Parents bring claims arising under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.*

There is no dispute that the Student is a child with a disability – Other Health Impairment (OHI) resulting from Attention Deficit Hyperactivity Disorder (ADHD) – and that the District is the Student's Local Education Agency (LEA), as those terms are defined by the IDEA. The Student receives special education pursuant to an Individualized Education Program (IEP).

There is no dispute that the Student is also protected by Section 504.

[redacted]

Some aspects of this matter and some terms used below are not common in special education cases. The remainder of this section provides some terminology and some context for the dispute, consistent with the findings of fact further below.

All students attending the District high school may participate in the International Baccalaureate (IB) program. The IB program is a multi-year, multi-class program. IB classes are academically rigorous, like Advanced Placement (AP) classes. Also, like AP classes, IB classes culminate with standardized tests. Unlike AP classes, IB classes are not typically selected *ala carte*. Instead, several IB classes in different content areas are taken together to make a complete academic program. Students who satisfy IB criteria earn an IB diploma in addition to the diploma issued by their schools.

All students attending the District's high school may participate in a "Lunch and Learn" program. During lunch periods, teachers make themselves available to students for extra help and review. Lunch and Learn is not a class in and of itself and is not part of any other class strictly speaking. Students are not required to participate in lunch and learn. However, lunch and learn is not *ad hoc* either; it is a scheduled period of the day.

Some students attending the District's high school are assigned to an Instructional Support Lab (ISL), which is a learning support class taught by a special education teacher. The District assigned the Student to ISL to receive

instruction on IEP goals that were not directly related to core academics (e.g. executive functioning skills).

Student began the IB program in the 2023-24 school year. Later in the 2023-24 school year, the Student was evaluated and, for the first time, was identified as a child with a disability. The Student began to receive special education pursuant to an IEP shortly thereafter. The Parents bring no claims about the appropriateness of the Student's IEP or, more generally, about the appropriateness of the special education and related services that the District provided for the Student during the 2023-24 school year.

After the 2023-24 school year, the Student and Parents selected the Student's classes for the 2024-25 school year. The Student, Parents, and District were all in communication with each other during that process. Shortly before the start of the 2024-25 school year, the District set a schedule for the Student based on the classes that the Parents and Student selected. Under the 2024-25 schedule, the Student was assigned to ISL during a Lunch and Learn.

The Parents allege that IB students are expected to meet with IB teachers during lunch and learn. By scheduling the Student's ISL during lunch and learn, the Student would have less access to IB teachers. The Parents claim that the District's unilateral change to the Student's schedule violates the Student's right to a free appropriate public education (FAPE) under the IDEA and Section 504.

Procedural History and Limited Scope

On August 30, 2024, the Parents initiated this matter by filing a due process complaint (the Complaint). The Parents demanded a finding that the District's schedule violated the Student's right to a FAPE. As for remedies, the Parents demanded that the District change the Student's schedule so that the Student would not have ISL during lunch and learn.¹ The Parents also demanded compensatory education to remedy any FAPE violation should the school year begin under the District's schedule.²

On September 6, 2024, the Parents filed a pendency motion. The Parents argued that the IDEA's "stay put" rule required the District to change the Student's schedule so that the Student did not have ISL during lunch and

¹ In the alternative, the Parents demanded that the "District allow [Student] to repeat the [2023-24 school year] without the IB program if the District is unable to deliver FAPE in the current schedule."

² The Parents also demanded prevailing party fees, which exceeds my jurisdiction. That demand is read as a reservation of rights to pursue that relief in the proper forum.

learn. The District responded on September 9, 2024. On September 11, 2024, I issued a pendency order denying the Parents' motion.

On October 22, 2024, the hearing was set to convene. Just before going on the record, the parties announced that they had reached an agreement in principle, and that a hearing was not necessary. The parties were unsure if a continuance or a conditional dismissal order was appropriate but, either way, the parties were unanimous that the hearing should not convene. I canceled the session.

On October 31, 2024, the parties jointly requested a 60-day contingent dismissal order. I issued the requested order the same day. The order speaks for itself but, for context, the order notes that the parties had reached an agreement in principle but needed time to finalize a settlement. The order enabled the Parents to reinstate the matter if the parties could not finalize a settlement.

On December 4, 2024, the Parents reported that a portion of the matter was not resolved and moved to reinstate the due process complaint. I reinstated the matter the same day and – in accordance with the terms of the contingent dismissal order – scheduled a hearing for December 11, 2024.

Between December 4 and 11, 2024, the parties clarified what issues were and were not resolved. The 2024-25 school year started with the Student attending ISL during lunch and learn. The District and Parents agreed to a different schedule on October 22, 2024, (the day that the hearing was originally set to convene). The only issue remaining was the alleged FAPE violation resulting from the schedule that was in place from the start of the 2024-25 school year through October 22, 2024. The Parents demand compensatory education to remedy this alleged violation.

On December 11, 2024, the hearing convened as scheduled. On January 10, 2024, the parties filed post-hearing briefs (colloquially, "written closing statements").

Discussed below, I find that the District did not violate the Student's rights under the IDEA. I find that the Student had less time to meet with teachers during Lunch and Learn as compared to students without disabilities during the time in question. However, I am obligated to consider "access" in terms of non-special education accommodations that the Student required. I do not find evidence in the record that the Student required, but did not receive, non-special education accommodations to participate in the District's programs. I deny the Parent's Section 504 claims on this basis.

Issues Presented

While the parties parse and phrase the issues somewhat differently, the following issues were presented for adjudication:

1. Did the District violate the Student's right to a FAPE under the IDEA by scheduling the Student's ISL period during Lunch and Learn?
2. Did the District violate the Student's right to a FAPE under Section 504 by scheduling the Student's ISL period during Lunch and Learn?

Findings of Fact

The parties filed joint stipulations of fact, some of which cite to evidence that is not in dispute, and some of which adopt language from the pendency order.³ I adopt those stipulations as if they were my own findings. I cite to the stipulations as "*Stip ¶ #,*" indicating the numbered paragraphs that the parties filed.

The stipulations, in turn, cite to other documents or indicate an agreement between the parties. I do not quote the stipulations verbatim. Rather, I edit the stipulations to protect the Student's privacy. Other facts flow from the documents entered as evidence and testimony, which are referenced in the typical ODR style.

Of note, there is no dispute about any of the Student's evaluations or IEPs. In fact, the parties stipulate that a reevaluation report of March 15, 2024 (the 2024 RR) "accurately reflects [Student's] strengths and needs." *Stip ¶ 7*. The 2024 RR was used to draft an IEP. The parties stipulate that the "goals and SDI are appropriate in the IEP." *Stip ¶ 8*.

I reviewed the record in its entirety but make findings only as necessary to resolve this matter. I find as follows:

Background and Programs

1. The District offers a Lunch and Learn period to all students. Lunch and Learn is one hour each day in which students and teachers have a thirty-minute lunch period and thirty minutes for teacher office hours, student collaboration, exercise, quiet study, or downtime. All students

³ The pendency order itself was based on undisputed documents that captured the Student's schedules at different points in time, information about the IB program, and information about ISL and lunch and learn.

have this one-hour block of time. Sometimes, this block is used to address a student's special education needs without missing academic content. See *Stip ¶ 15*.

2. [redacted]. *Stip ¶ 4*. [redacted]. See, e.g. *Stip ¶ 14*. [redacted] NT at 49.
3. The IB program is an academically rigorous, two-year, multi-course program. The IB program includes six (6) classes across academic disciplines and three (3) "core elements." *Stip ¶ 4*.

The 2022-23 School Year ([redacted])

4. During the 2022-23 school year, the Student participated in an academically rigorous program that included multiple AP classes and [redacted] programming. *Stip ¶ 3*.
5. The Student applied for and was accepted into the IB program. *Stip 16*.

The 2023-24 School Year ([redacted])

6. During the 2023-24 school year, the Student participated in the IB program. Additionally, the Student took Physical Education, an "Advisory," and [redacted]. *Stip ¶ 4*.
7. On December 22, 2023, the Student was diagnosed with ADHD, predominately inattentive type. *Stip ¶ 5*.
8. On March 15, 2024, the District determined that the Student was eligible for special education with a primary disability category of OHI and a [redacted]. *Stip ¶ 6*. The reevaluation report (RR) accurately reflects the Student's strengths and needs. *Stip ¶ 7*.
9. On March 20, 2024, the Student's IEP team met. The IEP team discussed the provision of direct instruction for one 55-minute class period per day in ISL, resulting in 220 minutes of special education services per four-day cycle. *Stip ¶ 9*.
10. On March 23, 2024, the District offered a special education program detailed in an IEP through a Notice of Recommended Educational Placement (NOREP). See *stip ¶ 10*.

11. On March 25, 2024, the Parents approved the NOREP (the March 2024 NOREP). *Stip ¶ 11.*
12. The goals and SDI in the IEP were appropriated when offered. *See stip ¶ 8.* The SDI in the IEP was somewhat different than what the parties discussed during the March 20, 2024, IEP team meeting, but there is no dispute about what was offered, or that the offer was appropriate. *See FF, below.*
13. The March 2024 NOREP placed the Student in itinerant learning support and [redacted]. *Stip ¶ 12.*
14. Under the March 2024 NOREP, the Student received direct special education to address areas of need in ISL. Specifically, during each four-day cycle, the Student would attend three, 55-minute ISL classes and one, 30-minute ISL class during Lunch and Learn. *Stip ¶ 13.*⁴
15. Both the 55-minute ISL classes and the 30-minute ISL class during Lunch and Learn constitute direct special education instruction. As such, the Student was scheduled to receive 195 minutes of special education instruction per four-day cycle. *Stip ¶ 13.*
16. On May 17, 2024, the parties revised the Student's IEP. *Stip ¶ 19.*
17. On June 7, 2024, the parties revised the Student's IEP. *Stip ¶ 19.*
18. The original March 2024 IEP, the May 2024 revised IEP, and the June 2024 revised IEP all included a "Projected 2024-2025" statement. That statement said that the Student would continue to receive three, 55-minute ISL classes and one, 30-minute ISL during Lunch and Learn during the 2024-25 school year. *See, e.g. Parent A at 59.* The statement was the same across all three revisions. *See, e.g. stip ¶ 19.*
19. The District issued the June 7, 2024, revised IEP with a NOREP. The Parents approved the NOREP on June 13, 2024. *Stip ¶ 20.*

The 2024-25 School Year ([redacted])

20. The Student continued in the IB program during the 2024-25 school year. *Stip ¶ 17.*

⁴ The language of the March 2024 NOREP was, "direct special education instruction on [Student's] areas of need within an Instructional Support Lab setting in 3 class periods per 4-day cycle and 1x per cycle – 30 minutes per session during a scheduled lunch and learn."

21. On July 17, 2024, the parties met to discuss the Student's schedule for the 2024-25 school year. *Stip ¶ 21.*
22. The District told the Parents that the Student's IB classes, [redacted], and three 55-minute ISL classes, would not all fit into the Student's schedule. P-10, p.67; N.T. at 70-75.
23. The District proposed several scheduling options, but the default option was based on the Student remaining in IB classes and the [redacted]. That option included two 55-minute ISL classes and three, 30-minute ISLs during Lunch and Learn per four-day cycle. See *Stip ¶ 23.*
24. On August 27, 2024, the District issued a NOREP proposing two 55-minute ISL classes and three, 30-minute ISLs during Lunch and Learn per four-day cycle (the August 2024 NOREP). That offer was predicated on the Student remaining in IB classes and [redacted]. The NOREP also included contingencies about how the Student's schedule would change if the Student dropped classes in the IB program.⁵ *Stip ¶ 25.*
25. On August 29, 2024, the Parents rejected the August 2024 NOREP. *Stip ¶ 26.*
26. On August 30, 2024, the Parents filed a due process complaint initiating these proceedings.
27. The first day of the District's 2024-25 school year was September 3, 2024. *Stip ¶ 28.*
28. On October 22, 2024, the parties reached an agreement concerning the Student's schedule. *Passim.*

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*

⁵ Although not strictly relevant, for context it is worth noting that the Student was able to drop some IB classes and keep others. That option would not permit the Student to earn an IB diploma in addition to the District's diploma but would enable greater scheduling flexibility.

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).

I find that all witnesses testified credibly in that all witnesses candidly shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. To the extent that witnesses recall events differently or draw different conclusions from the same information, genuine differences in recollection or opinion explain the difference.

It is exceptionally rare for students to testify in special education due process hearings. The Student testified in this case, and that testimony helped me understand the choices that the Student and the Parents made regarding the Student’s course selection and scheduling. That rational is not a factor in the analysis that I am obligated to apply, but I appreciate the Student’s candor. Discrepancies between the Student’s description of the ISL class environment and teacher’s descriptions of the ISL class environment illustrate the genuine differences in opinion noted above.

Applicable Legal Principles

The Burden of Proof

The burden of proof, generally, 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. 2004).

Applied in this case, the Parents are the party with the burden of proof, and their burden is the same for their IDEA and Section 504 claims.

Free Appropriate Public Education – IDEA/Chapter 14 Standard

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, including school districts, meet the obligation of providing a FAPE to eligible students through 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.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew* case was the Court’s first consideration of the substantive FAPE standard since *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 satisfies 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* at 3015.

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 required 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 in terms of 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 instead 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*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id*. Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress even for an academically strong child, depending on the child's circumstances.

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.

Pennsylvania's IDEA implementing regulations are found at 22 Pa. Code § 14 (Chapter 14).

Free Appropriate Public Education - Section 504/Chapter 15 Standard

Some students who do not meet the IDEA's definition of a "child with a disability" are protected by Section 504. However, every student who meets the IDEA's definition of a "child with a disability" also protected by Section 504. The latter scenario applies in this case.

Section 504 protects "handicapped persons," a term that is defined at 34 CFR § 104.3(j)(1):

Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

In this case, the Student is a child with OHI resulting from ADHD. The parties agree that the Student's ADHD diagnosis and OHI designation qualify the Student for Section 504's protections.

Pennsylvania regulations implementing Section 504 to protect children with disabilities in school are found at 22 Pa. Code § 15 (Chapter 15). Chapter 15 applies Section 504 in schools to prohibit disability-based discrimination against children who are "protected handicapped students." Chapter 15 defines a "protected handicapped student" as a student who:

1. Is of an age at which public education is offered in that school district; and
2. Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program; and
3. Is not IDEA eligible.

See 22 Pa. Code § 15.2.

Section 504 and Chapter 15 prohibit schools from denying protected handicapped students' participation in, or the benefit of, the schools' educational programming. See 34 C.F.R. Part 104.4(a). Unlike the IDEA, which requires schools to provide special education to qualifying students with disabilities, Section 504 and Chapter 15 require schools to provide accommodations so that students with disabilities can access and benefit from "regular" or general education.

Chapter 15 details what schools must do to provide the accommodations that Section 504 requires. Under Chapter 15, "school district shall provide each protected handicapped student enrolled in the district, without cost to the student or family, those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities." 22 Pa Code § 15.3.

Chapter 15 requires school to evaluate students to determine what related aids, services, or accommodations are needed. Chapter 15 includes procedural and substantive rules such evaluations. 22 Pa. Code §§ 15.5, 15.6.

The related aids, services or accommodations required by Chapter 15 are drafted into a service agreement. Chapter 15 defines a service agreement as a "written agreement executed by a student's parents and a school official setting forth the specific related aids, services or accommodations to be

provided to a protected handicapped student.” 22 Pa. Code § 15.2. Service agreements become operative when parents and schools agree to the written document; oral agreements are prohibited. 22 Pa Code § 15.7(a).

For IDEA-eligible students, the substance of service agreements is incorporated into IEPs. Such students do not receive separate service agreements. See 22 Pa. Code § 15.2.

Discussion

IDEA/Chapter 14 Claims

The Parents argue that the District violated the Student’s rights under the IDEA by conditioning the Student’s receipt of appropriate special education on the Student’s withdraw from the IB program or the [redacted]. To make this argument, the Parents rely upon a Dear Colleague letter from the United States Department of Education Office for Civil Rights (OCR).⁶ The OCR letter cautions against forcing families to choose between rigorous academics and special education. The Parents also argue that requiring the Student to drop the IB programming after completing about half of the requirements for an IB diploma is equal to the sort of mid-year, unilateral program change criticized in *Block v. District of Columbia*, 748 F. Supp. 891, 896 (D.D.C. 1990). Both the OCR letter and *Block v. District of Columbia* are well-reasoned and persuasive, but neither are applicable to this case.

Block v. D.C. involved a child with disabilities who attended a specialized private school. The D.C. public school system proposed moving the child back to a public school mid-year, without accounting for havoc that would wreck – to say nothing of the child’s significant transition needs. The hearing officer considered those factors and required the public school to continue to fund the child’s private school tuition. The D.C. District Court affirmed.

The facts of this case are not analogous to the facts of *Block v. D.C.* Proposing a schedule change – not a program change, or a school change – in the summer between school years is not analogous to the sort of table flip that the D.C. public school system attempted in the *Block* case. Further, even if I were to accept the analogy, the record in *Block* highlighted the child’s well-established, complex, significant transition needs. The record in this case includes no similar facts. Also, the absence of transition planning, the timing of the transition, and a fact-specific analysis of the child’s special

⁶ Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Access by Students with Disabilities to Challenging Academic Programs, 2-3 (Dec. 26, 2007), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20071226.pdf>.

education needs brought the hearing officer and then the D.C. District Court to conclude that the proposed public special education placement in *Block* was substantively inappropriate for the child. In this case, both parties agree that the District's evaluations and IEPs complied with the IDEA's substantive mandates. Unlike the *Block* case, the District offered appropriate special education in this matter.

There is a stronger analogy between the facts of this case and the guidance in the OCR letter. It is obvious (or it should be) that many children with disabilities are capable of high-level academic work. Pennsylvania recognizes that children with disabilities may also be [redacted] in its regulations. See, e.g. 22 Pa. Code § 16.7. There is very little daylight between OCR's guidance and Pennsylvania's regulations. [redacted].

Applied to this case, the District did not force the Student or the Parents to [redacted] and appropriate special education. Rather, the District offered and provided both. The program that the District offered though the NOREP included special education and [redacted]. Viewed through an IDEA lens, the only proposed change in the Student's special education program from the 2023-24 school year to the 2024-25 school year was an increase in ISL programming from 195 minutes per four-day cycle to 200 minutes per four-day cycle. While small changes may have large impacts upon some children with disabilities, the record of this case establishes that the five minute per four-day difference represents a continuation of the 2024-25 program – again from an IDEA perspective.⁷ That program included appropriate special education and appropriate [redacted]. The District did not require the family to choose one or the other.

The NOREP was also responsive to the parties' dispute, which was emerging at that time. Maintaining the Student's 2023-24 program in the 2024-25 school year shifted more of the Student's ISL time into Lunch and Learn. The Parents and the Student opposed that shift and expressed their opposition to the District. The District determined that removing some IB classes would solve the scheduling problem and noted that solution in the NOREP. But the NOREP does not represent a choice between programs. By operation of law, the NOREP represents a (singular) program offer. That offer included appropriate special education and [redacted]. Explaining how the Student's schedule would change if the Student dropped IB classes –[redacted]– does not represent the sort of forced choice that contradicts OCR guidance or runs afoul of Pennsylvania regulations.

⁷ Analysis under Section 504, discussed below, is different.

The IB program is an academically rigorous program, but it is not the Student's [redacted] program. Even assuming for the sake of argument that the District forced the Student to choose between a preferred special education schedule and the IB program, that choice would not violate Pennsylvania regulations. [redacted]. The same is true for the special education that the District provided in the form of ISL instruction. That instruction was provided pursuant to the Student's IEPs, and the parties stipulate that those IEPs were substantively appropriate. *See Stip.* ¶¶ 7, 8. At all times, the District offered and provided appropriate special education to the Student. I deny the Parents' substantive IDEA FAPE claims on this basis.⁸

Section 504/Chapter 15 Claims

Section 504 requires the District to provide accommodations so that the Student has access to its programs. Lunch and Learn is a program offered to all students in the District regardless of disability. I do not accept the District's argument that Lunch and Learn is just "free time." The parties stipulate that the District makes its personnel available to students during this time and the record confirms that Lunch and Learn is a scheduled period of the school day. *See, e.g. stip* ¶ 15. Lunch and Learn is optional for all students; no student is required to seek out extra help from teachers during the that period. But every student in the District who wants to take advantage of Lunch and Learn may do so. The Student's access to the District's Lunch and Learn program, therefore, has Section 504 implications.

Before going further, I caution against conflating the Lunch and Learn program with the IB program or the ISL program. Both parties and I made this conflation to some degree in remarks during the hearing. The record of this case does not support a finding that Lunch and Learn is a required part of the IB program, even if IB teachers encourage students to seek them out during Lunch and Learn time. The record includes evidence that students who do not participate in the IB program do participate in Lunch and Learn and, conversely, some students who do participate in the IB program do not

⁸ In their closing brief, the Parents also allege a procedural IDEA claim based on the District's unilateral changes to the Student's schedule and an alleged violation of the Parent's rights to meaningfully participate in IEP development. In a literal sense, those issues are not before me. *See* NT 9-11. For completeness, and in an abundance of caution, I find that the District's refusal to acquiesce to the Parents' demands is not evidence of a violation of Parents' rights to meaningfully participate in IEP development. Rather, the record contains many examples of the Parents' active participation and the District's responsiveness to the same. The contingencies in the NOREP are just one example. Further, the Parents' argument that the scheduling change in the 2024-25 school year is tantamount to a substantive, unilateral change in the Student's special education program is addressed and denied in the pendency order.

participate in Lunch and Learn (or do not do so consistently). Additionally, Lunch and Learn is not a special education program or a [redacted]. In contrast, the ISL program is a special education program, and the Student received special education while attending the ISL program during Lunch and Learn.

Framing the Student's placement as "ISL during Lunch and Learn" can yield confusion. See, e.g. NT 22, 24. It is more accurate to say that the District scheduled the Student into ISL during the Lunch and Learn period, thereby replacing the Student's Lunch and Learn period with an ISL period three days per four-day cycle. As such, the District reduced the Student's participation in Lunch and Learn relative to children who do not have disabilities.

The Parents argue that the District's unilateral reduction of the Student's Lunch and Learn time constitutes a Section 504/Chapter 15 violation almost *per se*. I cannot agree with this argument. If that argument were true, any reduction of a child's time in general education programs to receive special education would violate Section 504.

Under the IDEA, schools are required to place children with disabilities in the least restrictive environment (LRE) in which they can receive a FAPE. The IDEA does not, however, permit schools to place a child in an inappropriate setting, or otherwise violate a child's right to a FAPE, simply because the inappropriate setting is less restrictive than the appropriate setting. See, e.g. *Lebron v. North Penn Sch. Dist.*, 769 F.Supp.2d 788 (E.D. Pa. 2011); see also *Oberti by Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204 (3d Cir. 1993) (concerning what efforts schools must make to maintain inclusive placements before proposing more restrictive placements).

Holding that any reduction of a child's time in regular education so that the child can receive appropriate special education violates Section 504 *per se* is incompatible with with 32 years of IDEA precedent.

Better guidance is found in Chapter 15 itself. Chapter 15 is the basis of my jurisdiction to hear matters arising under Section 504. Section 504 is a broad statute that covers much more than education. See, e.g. *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 137 S. Ct. 743, 197 L. Ed. 2d 46 (2017). My authority is limited to Section 504 claims that amount to Chapter 15 violations. Chapter 15 concerns itself with the accommodations that schools must provide so that children with disabilities can access the schools' programs. My inquiry, therefore, is limited to the question of whether the District provided appropriate accommodations for the Student.

Chapter 15 permits, but does not require, students to raise claims concerning “denial of access, equal treatment or discrimination based on handicap” in a due process hearing. 22 Pa. Code § 15.6.⁹ The method by which Chapter 15 ensures access, equal treatment, and nondiscrimination is the development and implementation of a service agreement that details the accommodations that the child will receive. See 22 Pa. Code §§ 15.5, 15.6, 15.7. Those accommodations are not special education.

By its own terms, Chapter 15 does not apply to children who require special education and are protected by the IDEA and Chapter 14. 22 Pa. Code § 15.2(iii). Yet every student who is protected by the IDEA is also protected by Section 504, and the Third Circuit instructs that Section 504 claims are not automatically subsumed by IDEA claims. *B.S.M. v. Upper Darby Sch. Dist.*, 103 F.4th 956 (3d Cir. 2024). Rather, in cases where distinct Section 504 claims are raised, a separate Section 504 analysis is required. Chapter 15 provides the only framework for that analysis at the due process level in Pennsylvania. The Parents’ Section 504 claim, therefore, cannot be resolved exclusively by acknowledging that the time that the Student spent in a regular education program decreased so that the Student could receive appropriate special education. Rather, the question turns on whether the District offered appropriate accommodations so that the Student could access the District’s non-special education programs.

I find no preponderant evidence in the record that the Student required non-special education accommodations to access the District’s programs. The Parents make no argument that the Student required such accommodations or that the District failed to provide the same. The record absolutely supports a finding that the District changed the Student’s special education schedule in a way that reduced the amount of time that the Student spent in a regular education program (Lunch and Learn). That is not, however, a determinative factor in a Section 504 case using the Chapter 15 framework.

The record does not establish that the Student required but did not receive non-special education accommodations to access the District’s programs. I deny the Parents’ Section 504/Chapter 15 claims on this basis.

ORDER

Now, January 24, 2025, it is hereby **ORDERED** as that the Parents’ claims are **DENIED** and **DISMISSED**.

⁹ This section excuses administrative exhaustion, enabling families to bring such claims directly to court. See *also* 22 Pa. Code § 15.11.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER