This is a redacted version of the original decision. Select details have been removed from the decision to preserve 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

ODR No.
24792-2021

CLOSED HEARING

Child's Name:
[R.S.]

Date of Birth:
[redacted]

Parent:
[redacted]

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Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
July 2, 2021

Introduction

This special education due process hearing concerns the educational rights of a student (the Student). This hearing was requested by the student's parent (the Parent) against the Student's local public school district (the District).[1]

The Parent's claims arise under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. There is no dispute that the Student is a child with disabilities or that the District is the Student's local educational agency, as those terms are defined by the IDEA.

More specifically, the Parent alleges that the District violated the Student's right to a free appropriate public education (FAPE) in three ways: 1) by failing to implement the Student's Individualized Education Program (IEP) during the 2020-21 school year, 2) by refusing services that are necessary components of a FAPE for the Student, and 3) by refusing to provide an appropriate amount of special education. The Parent alleges that these violations resulted in the Student's inability to make progress towards IEP goals and inability to access the District's curriculum.

The Parent demands compensatory education to remedy the past denial of FAPE and an order for the District to provide a FAPE going forward. The Parent argues that the Student requires greater than an itinerant level of support (as defined below) and likely requires placement in an approved private school (APS). The Parent has not identified any particular APS that is appropriate for the Student, has not unilaterally placed the Student in an APS or other private school, and does not demand tuition reimbursement.

[1] Except for the cover page, identifying information is omitted to the extent possible.

As explained below, I find in part for the Parent and in part for the District.

Issues[2]

The issues presented in this matter are:

1. Did the District violate the Student's right to a FAPE during the 2020-21 school year by failing to implement the Student's IEP?

2. Did the District violate the Student's right to a FAPE during the 2020-21 school year by failing to offer an appropriate IEP?

3. Must the Student receive more than an itinerant amount of special education in order to receive a FAPE?

Findings of Fact[3]

I reviewed the entire record. I make findings of fact, however, only as necessary to resolve the issues presented for adjudication. I find as follows:

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[2] The parties phrase and sort these issues differently, but the substance is the same. More importantly, the District's Closing Brief suggests that the Parent also presented an intentional discrimination claim under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*. The Parent presented no such claim in this hearing. *See Parent's Complaint, Parent's Written Closing Argument,* NT 13-14. The Parent does allege that the District's failure to implement the Student's IEP made it impossible for the Student to access the curriculum. The Parent presents this as evidence of a denial of FAPE, not as a separate Section 504 claim. Similarly, the Parent demands no separate remedies under Section 504.

[3] I commend both attorneys for their efficient presentations. But for the confidentiality of these proceedings, those presentations should be studied and emulated.

1. I take judicial notice that on March 13, 2020, Governor Wolf issued an order requiring all Pennsylvania schools closed for in-person instruction as part of the Commonwealth's COVID-19 mitigation effort.

2. On April 21, 2020, the Student's IEP team revised the Student's IEP. The IEP contemplates both remote learning and placement in school. P-3, S-6.

3. The Student qualified for an IEP as a child with an Other Health Impairment (OHI). P-3, S-6.

4. The IEP provides an itinerant amount of learning support. An itinerant amount of special education means that the Student will receive supports provided by special education personnel for 20% or less of the school day. The learning support designation does not limit the type of special education available to the Student in any way. P-3, S-6.

5. Under the IEP, the Student is to spend 81% of the school day (5.40 of 6.67 hours) inside of a regular education classroom. P-3, S-6.

6. A Positive Behavior Support Plan is embedded into the Student's IEP. P-3, S-6.

7. The IEP includes four goals: a behavior goal tied to the PBSP (this goal was revised on May 27, 2020), a reading comprehension goal, a math goal[4], and a writing goal. P-3, S-6.

8. The IEP includes many items listed in the Program Modifications and Specially Designed Instruction (SDI) section. Of note, the IEP requires

[4] The math goal concerns word problems and, therefore, also includes a reading component.

school personnel to provide frequent movement breaks, consistent rules across settings, consistent behavioral rewards and consequents, specific behavioral techniques to encourage the Student's work (described in the IEP as "if…then" statements), a visual schedule, math manipulatives, and various provisions to "chunk" the Student's work.[5]

9. At all times pertinent, the Parent and District were in frequent if not constant communication with each other. From November 2020 onward, the Parent frequently wrote to the District about aspects of the IEP that were not being implemented. S-33, S-34, P-4, P-5, P-7 through P-15, P-18, P-20 through P-22, P-25, P-26; N.T. 211-14, 257, 376-379, 384, 436-437.

10. A preponderance of evidence (including undisputed testimony from the Parent, some corroborating testimony from District personnel, and communications between the parties – particularly those from November 2020 onward) establishes that the District did not implement any of the above-noted modifications and SDI with fidelity. *See, e.g.* S-33, S-34, P-4, P-5, P-7 through P-15, P-18, P-20 through P-22, P-25, P-26; N.T. 61-62, 149, 211-14, 257, 328, 376-379, 384, 436-437, 446.

11. Under guidance from the Pennsylvania Department of Education, school districts should determine if students with disabilities require "COVID Compensatory Services" (CCS) to remediate losses attributable to COVID-related school closures. On March 23, 2021, the District concluded that the Student was not entitled to CCS. S-17.

12. The Student began receiving private Occupational Therapy (OT) in November 2020 after a referral from a medical doctor. The private OT is

[5] Generally, "chunking" involves breaking large or difficult work into smaller, manageable pieces.

provided by a therapist in accordance with a private OT evaluation. P-6. The Student occasionally misses school to receive private OT.

13. The District reevaluated the Student and drafted a Reevaluation Report dated March 31, 2021 (the 2021 RR). Therein, the District considered reports and recommendations from outside entities, including a recommendation for in-school OT to address the Student's sensory needs. The District itself did not recommend in-school OT. S-19.[6]

14. The IEP calls for quarterly progress reports. S-3, P-6. No progress reports were entered into evidence. However, reports of the Student's progress are embedded into other documents, including versions of the Student's IEP that were printed for IEP meetings throughout the 2020-21 school year. *See, e.g.* S-22.[7]

15. For the reading comprehension goal, mastery was set at 80% in four out of five consecutive trials. This goal was not benchmarked. The District did not collect data until the first marking period of the 2020-21 school year. In November 2020, the Student scored 58%. In February 2021, the Student scored 64%, and in April 2021 the Student scored 66%. While these scores represent averages, the reports do not say how many probes were administered in each reporting period. S-22.

16. For the math goal, mastery was set at 80% in four out of five consecutive trials. This goal was not benchmarked. The District did not report progress

[6] The omission of a recommendation for in-school OT is the only specific complaint that the Parent raises with the 2021 RR. *See, e.g. Parent's Written Closing.*

[7] Reporting progress through notes embedded in larger documents, as opposed to actual progress reports, is a confounding method. Although the issue is not before me, I urge the District to reconsider this practice going forward. Actual progress reports do a better job highlighting what is working and what needs to be worked on. In litigation, actual progress reports, when accurate and contemporaneously drafted, are the best way to show the efficacy of special education programming.

until the first marking period of the 2020-21 school year. In November 2020, the Student scored 66%. In February 2021, the Student scored 94%, and in April 2021 the Student scored 73%. While these scores represent averages, the reports do not say how many probes were administered in each reporting period except for the April 2021. The April 2021 score was an average of four probes in which the Student scored 60%, 75%, 90%, and 70%.[8] S-22.

17. For the writing goal, mastery was set at 75% in four out of five consecutive trials. This goal was not benchmarked. The District did not report progress until the first marking period of the 2020-21 school year. In November 2020, the Student scored 72%. In February 2021, the Student scored 94%, and in April 2021 the Student scored 66%. While these scores represent averages, the reports do not say how many probes were administered in each reporting period. S-22.

18. While there are multiple documents in evidence concerning the Student's behaviors, and testimony as well, there is no preponderant evidence (one way or another) concerning the Student's progress towards the behavioral IEP goal as written. Progress towards that goal is conspicuously absent from the most recent reports of progress towards IEP goals. *See* S-22. Reports of progress in November 2020 tend to indicate that Student required less redirection from District personnel. *See* P-3, S-6. However, the Student was at home with the Parent for remote instruction at that time. *Passim.*

19. On April 14, 2021, the Parent filed the due process complaint initiating this matter.

[8] The mathematical average of those scores is 73.75%.

20. The Student's IEP team met on April 19, 2021 (the 2021 IEP). The District proposed a new IEP, which incorporates a new PBSP. S-22. The District issued the new IEP with a Notice of Recommended Educational Placement (NOREP). S-21.

21. The 2021 IEP is based on the 2021 RR. *C/f* S-19, S-22.

22. The 2021 IEP and NOREP add a secondary disability category of Emotional Disturbance to the Student's primary disability category of OHI. S-22.

23. The 2021 IEP and NOREP change the Student's placement from itinerant learning support to supplemental learning and emotional support. The "supplemental" amount of special education indicates that the Student would receive supports and services provided by special education personnel for more than 20% but less than 80% of the school day. S-22.

24. Under the proposed IEP, the Student would spend 75% of the school day in regular education classrooms (5.00 of 6.67 hours per day). S-22.

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).

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.

This does not mean that I give equal weight to all testimony. For example, a witness may genuinely believe that the Student made meaningful progress. When that belief is contrary to both objective data and other, equally credible testimony, it cannot serve as a deciding factor in this case.

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). In this particular case, the Parent is the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (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 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 F.* 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 F.* decision in 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 F.*, 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 F.*, 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. Rather, I must consider the totality of a child's circumstances to determine whether the LEA offered the child a FAPE.

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.

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

The hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). In *Reid*, the court concluded that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. *Reid* remains the leading case on this method of calculating compensatory education.

The more nuanced *Reid* method was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also embraced the *Reid* method in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid* to explain that compensatory education "should aim to place disabled children in

the same position that the child would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the *Reid* method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the *Reid* or "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

> "… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

Jana K. v. Annville-Cleona Sch. Dist., 39 F. Supp. 3d 584, 608 (M.D. Pa. 2014).

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) are warranted. Such awards are fitting if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist*., 39 F. Supp. 3d 584, 609 (M.D. Pa. 2014). S*ee also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone*

Cent. Sch. Dist. v. E.E. ex rel. H.E., 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence establishing the position that the student would be in but for the denial, or evidence establishing the amount and type of compensatory education needed for remediation, the hour-for-hour approach is a necessary default. Alternatively, full-day compensatory education can also be an appropriate remedy if the full-day standard is met. In all cases, however, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Discussion

IEP Implementation

As revealed in the findings above, the District did not implement portions of the Student's IEP with fidelity from November 2020 onward. Failure to provide the modifications and SDI guaranteed through an IEP is a violation of the Student's rights under the IDEA.

The Parent argues that the District's IEP implementation failure resulted in a substantive denial of FAPE, as evidenced by the Student's actual progress toward IEP goals. I reject this argument because the Parent has not proven that the Student's failure to make progress is the result of the District's IEP implementation failures. In fact, the Parent's broader argument undercuts the cause-and-effect relationship between the IEP implementation failures and the Student's actual progress.

The Parent's broader argument is that, regardless of implementation, the Student needs a higher level of service than what the IEP provides. If the Parent is right, a lack of progress would be expected even with perfect IEP implementation. Discussed further below, I agree that the IEP was inappropriate and that the Student needed more than what the IEP provided. The Parent has established that the Student was denied a FAPE because the IEP was inappropriate. The Parent has not established that the District's failure to implement that inappropriate IEP resulted in additional substantive harm.

In sum, the District violated the Student's rights under the IDEA by failing to implement the IEP as written. The Parent has not proven that this failure resulted in substantive harm, and so I do not award compensatory education for this violation.

Inappropriate IEP

I appreciate the challenge of developing an appropriate IEP during a pandemic. There is no preponderant evidence in the record that the Student's IEP was

inappropriate at the time it was drafted and (perhaps in a nod to the overarching, real-world circumstances of this case) the Parent demands no remedy before November 2020. However, the IDEA has no provision reducing children's rights even when unprecedented challenges like COVID-19 arise, and both state and federal guidance underscore this point.

The United States Department of Education has issued guidance that COVID-19 school shutdowns do not alter the Student's right to a FAPE. *Questions and Answers on Providing Servs. to Children With Disabilities During the Coronavirus Disease 2019 Outbreak*, 76 IDELR 77 (EDU 2020). The Pennsylvania Department of Education also acknowledged that COVID-19 mitigation efforts do not abrogate the rights of children with disabilities, but anticipated significant difficulty for LEAs to satisfy their obligations. The Pennsylvania DoE provided guidance that LEAs should offer CCS (compensatory education by another name) to remedy denials of FAPE. In this case, the District considered all available data and evaluations and concluded that the Student required a higher level of special education but was not entitled to CCS.

That same data, and the District's actions, establish that the Student's IEP was inappropriate and that the Student suffered a substantive harm as a result. There is no evidence in the record establishing that the Student's needs changed – for better or worse – from November 2020 through April 2021. The data on academic goals establishes that the Student mastered no goals and that progress was highly inconsistent. The data on behavioral goals is too scant and too skewed to draw conclusions. And, for purposes of a FAPE analysis, the dividing line that the District built between academic and behavioral goals is arbitrary. Education is not limited to academics.

In April 2021, the District concluded that the Student required a higher level of support. The District added a secondary disability category and offered an IEP

increasing both the type and amount of special education that the Student would receive. Although the 2021 IEP is not detailed in minutia above, it offers much more than the prior IEP, starting entirely new programs for the Student and increasing the amount of special education that the Student will receive. This offer makes the Parent's point. The Student's needs in April 2021 are indistinguishable from the Student's needs in November 2020. The Student's needs have been the same all along, and so the offer of appropriate services going forward illustrates that past services were inappropriate.

This finding should not discourage the District from offering appropriate services. While the District's current offer of appropriate services establishes a past FAPE violation, the offer also mitigates what would otherwise be an *ongoing* FAPE violation. There is no preponderant evidence in the record that the offered 2021 IEP is inappropriate. The 2021 IEP flows from the 2021 RR. The Parent's only contention with the 2021 RR is the lack of an in-school OT recommendation. The record does not establish that in-school OT is necessary for the provision of FAPE. As a whole, the record supports a finding that the denial of FAPE ended on April 19, 2021, when the District offered an IEP that was reasonably calculated to provide a FAPE.

In making this determination, I must reject the District's argument about the least restrictive environment (LRE). In its closing brief, the District argues that it educated the Student [in the] LRE. The District does not argue directly, but strongly implies, that its obligation to educate the Student in the LRE prevented it from offering appropriate services sooner. That argument, and all arguments like it, are meritless.

The FAPE and LRE mandates are in harmony – they do not conflict with each other. The District's obligation is to determine what the Student requires to receive a FAPE and only then determine the least restrictive environment in which those services

can be provided. The LRE analysis must include consideration of supplementary supports and services that can enable children to receive a FAPE in more inclusive environments, but that analysis comes after a determination about what a child needs in order to obtain a FAPE. A school cannot violate a child's right to FAPE by putting a child into an inappropriate program simply because that program is less restrictive than others. The District is required to offer the least restrictive of all placements in which a child can receive a FAPE. *See, e.g. Oberti v. Board of Education of Clementon Sch. Dist.,* 995 F.2d 1204 (3d Cir. 1993). An inclusive placement is not a defense to a substantive FAPE violation.

Level of Support

In a hyper-technical sense, the appropriateness of the 2021 IEP is not before me, and the Parent asks only for a determination that the Student requires more than an itinerant level of special education. However, for all practical purposes, the dispute about what level of service the Student needs going forward is an issue in this case.

The Parent has proven that the Student needs more than an itinerant amount of learning support. The District's offer of an IEP including a supplemental level of learning and emotional support proves this. As discussed above, the record does not establish that the Student requires more than what the District offered through the 2021 IEP and NOREP in order to receive a FAPE. I will not order the District to change the substance of the 2021 IEP.

I caution the District, however, to carefully monitor and report the Student's progress towards all IEP goals, and to act when and if the data signals that action is needed. The IDEA does not require data collection for its own sake. Rather, progress monitoring will either indicate that the IEP is working as expected or that

it is not. If the later, the same data will also determine whether additional evaluations are needed.

For technical purposes, I do not make any determination about the appropriateness of the 2021 IEP, nor do I order the District to implement the 2021 IEP, nor do I override the Parent's withholding of consent to implement that IEP (if consent was withheld). None of those issues are before me. Rather, I find that the Parent 1) has proven that the Student requires more than an itinerant amount of special education and 2) has not proven that the Student requires an amount of special education beyond what is offered in the 2021 IEP.

Compensatory Education Calculation

Above, I find that the Student's IEP was inappropriate during the 2020-21 school year until April 19, 2021. No evidence was presented to enable a *Reid* analysis. The best evidence in the record for an hour-for-hour calculation comes by comparing the 2021 IEP to the prior program. The 2021 IEP increased the amount of the Student's special education by 24 minutes per day. I find it equitable to award 30 minutes of special education per day to the Student for each day that the Student attended school from November 1, 2020 through April 19, 2021.

The Parent may use the compensatory education for any appropriate developmental, remedial, or enriching educational service, product, or device that furthers the Student's educational and related service needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation.

The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress.

Compensatory services may occur after school hours, on weekends, and during the summer months when convenient for Student and the Parent.

Any compensatory education that is not used by the Student's graduation or by the end of the school year in which the Student turns 21 years old, whichever comes first, is forfeited.

ORDER

Now, July 2, 2021, it is hereby **ORDERED** as follows:

1. The District violated the Student's right to a FAPE from November 1, 2020 through April 19, 2021. That violation resulted in a substantive denial of FAPE. I award compensatory education to the Student in an amount and for uses detailed in the accompanying order to remedy this violation.
2. The District failed to implement certain portions of the Student's IEP with fidelity during the 2020-21 school year. The Parent did not prove by a preponderance of evidence that the District's IEP implementation failure resulted in a substantive denial of FAPE.
3. The Parent has proven by a preponderance of evidence that the Student requires more than an itinerant amount of special education.

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

/s/ Brian Jason Ford

HEARING OFFICER