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. 30370-24-25

Child's Name:
S.L.

Date of Birth:
[redacted]

Parents:
[redacted]

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Hearing Officer:
Cathy A. Skidmore, Esquire

Date of Decision:
01/31/2025

INTRODUCTION AND PROCEDURAL HISTORY

The student, S.L. (Student),[1] is a late teenaged student residing with the Parents within the boundaries of the Lower Merion School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)[2] based on criteria for Autism, Speech/Language Impairment, and Other Health Impairment because of a medical condition ([redacted]), and accordingly has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.[3] Student currently attends the District high school.

In the fall of 2024, the Parents filed a Due Process Complaint under the IDEA and Section 504, contending that the District did not provide appropriate programming for Student for portions of the 2022-23 and 2023-24 school years. The District denied the Parents' contentions and the relief demanded, asserting that its programming and accommodations did not deprive Student of a free, appropriate public education. The matter proceeded to hearing with a number of witnesses and substantial documentary evidence,[4] all of which was necessary for complete

[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). The Parents also cited to, but did not make claims under, the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 – 12213.

[4] References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibit 1 (HO-1). Citations to duplicative evidence is not necessarily exhaustive. At the end of the hearing, the parties very commendably

understanding of Student's disability-related needs and the District's approaches to accommodating them.

Following a thorough review of the record and careful consideration of the evidence as a whole, and for all of the reasons set forth below, the claims of the Parents must be granted in part and denied in part.

ISSUES

1. Whether the District denied Student a free, appropriate public education (FAPE) in the fall of 2023, the spring of 2024, and the fall of 2024, relating to implementation of Student's Individualized Education Program (IEP) and participation in specific extracurricular activities;
2. Whether the District discriminated against Student over the same period of time and essentially for the same reasons;
3. Whether Student is entitled to compensatory education for any FAPE denial;
4. Whether the Parents are entitled to reimbursement for certain expenses they incurred; and
5. Whether the District should be ordered to revise Student's IEP with respect to certain related services?

reached an 81-paragraph set of stipulations of fact that have been marked as HO-1 for purposes of this decision, and it is hereby admitted.

FINDINGS OF FACT

1. Student is late teenaged and resides with the Parents within the District's geographic boundaries. Student currently attends the District high school and is eligible for special education under the IDEA based on Autism and a Speech/Language Impairment, and also qualifies under Other Health Impairment because of a [redacted] (hereafter medical condition) and Attention Deficit Hyperactivity Disorder (ADHD). Student also is an individual with a disability pursuant to Section 504. (HO-1 at 1 ¶¶ 1, 2, 7, 9, 10, 11, 13, 14.)

2. The District is Student's local educational agency (LEA) and is a recipient of federal funds for purposes of the IDEA and Section 504. (HO-1 at 1 ¶¶ 15, 16.)

3. During the relevant time period, the Parents and District communicated continually and met frequently about Student's needs and the Parents' concerns. (HO-1; N.T. *passim.*)

4. Student's medical condition was diagnosed at the age of five years. (N.T. 673.)

5. Student's medical condition has been known to the District since Student's enrollment in 2014, and requires administration of medication by a nurse at school when the medical condition is actively manifested. Student also requires a different emergency medication for any manifestation of the medical condition that is five minutes in duration as set forth in Student's Emergency Care Plan (ECP) that are based on [redacted] and physician orders for the medication administration. Student's life may be in danger if the emergency medication is not administered by a nurse or other qualified person (such as the Parents) within five minutes. (N.T. 567-73, 904, 1100;

P-1; S-1; S-2; S-3; S-4; S-5 at 87; HO-1 at 1-5 ¶¶ 17, 18, 19, 20, 21, 23, 28, 32.)

6. It is only through direct observation of Student that one can detect when Student is actively manifesting the medical condition. (N.T. 518-19, 568-70, 590-91.)

7. It was important to District nurses to speak with Student's physician about the medical orders for the medical condition on several occasions.[5] Such requests are not uncommon, especially when the orders were revised. The Parents usually did not believe that such conversations were necessary because they continually provided medical information to the District, and because they were not informed of the questions that were unanswered. (N.T. 615-16, 687, 755-56, 758-59, 761-62, 869-70, 882-83, 900-02.)

Relevant District Practices

8. There are two different types of paraprofessional aides at the District: instructional aides and behavioral aides. Instructional aides provide assistance with personal care needs and reinforcement of teaching concepts taught by a teacher, with some level of behavioral support such as implementation of a Positive Behavior Support Plan (PBSP) for low intensity behaviors. Behaviors were reported to the case manager by the instructional aides, but no data was collected by the them. (N.T. 304-06, 310-11, 316, 351, 396, 930-32.)

9. Behavioral aides in the District are provided for students with high intensity and/or high frequency behaviors. (N.T. 462-63; 930-32.)

[5] The District sought, and this hearing officer issued, a subpoena for the physician to testify at the hearing over the Parents' objection. The physician did not respond in any manner to the issuance of the subpoena, and did not appear at the hearing.

10. Even before Student first entered school-age programming in the District, Student engaged in problematic behaviors. Student was assigned a personal care assistant (PCA) upon enrollment in the District. When behaviors increased during middle school, Student was assigned a behavioral aide rather than a PCA. (N.T. 674-75, 740.)

11. The District did not provide a behavioral aide for extracurricular activities throughout the relevant time period. (N.T. 1210-20.)

12. All nurses in the District are registered nurses. Any of them may be a certified school nurse assigned to a particular school building, or a staff nurse in a health office responsible for addressing any health care needs. The District also has a coordinator of health services who manages the department and is also a certified school nurse. (N.T. 862-65, 875-76.)

Fall 2021 Evaluation

13. The District conducted an evaluation of Student and provided a Reevaluation Report (RR) in November 2021. Student was determined to be eligible for special education under the Autism and Speech/Language Impairment categories. (S-6.)

14. Student's November 2021 Individualized Education Program (IEP) addressed needs related to reading comprehension, written expression, speech/language, social problem solving, executive functioning including self-monitoring, behavior including self-regulation, and responding to social cues. A full-time behavioral aide throughout the school day, on field trips, and during extracurricular activities,[6] with planned fading in identified classes and during transitions when appropriate, was one of a number of program

[6] Detailed findings about the two extracurricular activities at issue follow the sections of findings related specifically to programming.

modifications and items of specially designed instruction. This IEP was reviewed and revised on several occasions. As of June 2022, the Parents' input reflected a desire for Student to gain independence and their agreement with reducing aide support. (S-8.)

15. Student's plan for manifestation of the medical condition in November 2022 identified, for the first time, a more serious episode having occurred that summer. The plan essentially remained the same as in December 2021, except that the emergency medication was for manifestations lasting five minutes only rather than also when a second manifestation occurred within 24 hours. (S-7; S-15.)

2022-23 School Year

16. At an IEP meeting in November 2022, the District asked for permission to speak with Student's physician about the plan for the medical condition because of the changes noted. The Parents notified the District of their refusal to grant their consent, then granted the request several days later for a single telephone call. (S-21; S-22.)

17. A new IEP was developed in November 2022. Parent input at the time included full support during extracurricular activities, including behavioral and nursing support. They continued to express a goal for Student's independence, with reduction in aide support in specific classes and review for additional opportunities for fading the aide. (P-4; S-18; S-19.)

18. Needs identified in the November 2022 IEP included reading comprehension, written expression, speech/language skills (receptive, expressive, pragmatic), self-regulation, coping skills, problem solving skills, and development of trusted relationships with adults at school. A post-secondary transition plan reflected goals for college, independent living, and competitive employment. (S-18 at 39-46.)

19. Annual goals in the November 2022 IEP addressed needs related to reading comprehension, written expression, speech/language, social problem solving, executive functioning including self-monitoring, behavior including self-regulation, and responding to social cues. A PBSP was also included. (S-18 at 41-71.)

20. A full-time behavioral aide throughout the school day, on field trips, and during extracurricular activities, with planned fading in identified classes to be expanded as appropriate, was one of a number of program modifications and items of specially designed instruction in the November 2022 IEP. The behavioral aide was to collect data, reinforce appropriate behavior, and provide reinforcement in implementing the PBSP. An ECP was also part of the IEP. (S-18.)

21. Student would participate in regular education except during English, reading, instructional support, and related service therapy in a program of autistic, learning, and speech/language support at a supplemental level according to this November 2022 IEP. Student was eligible for extended school year (ESY) services. (S-18 at 91-94.)

22. The Parent approved the Notice of Recommended Educational Placement (NOREP) accompanying the November 2022 IEP, but asked that certain input provided after the IEP meeting be included. (S-20.)

23. The Parents did not approve a subsequent NOREP in December 2022 that described an upcoming conversation with Student's physician, and they continued to challenge the necessity of speaking with the physician. (S-23; S-24.)

Spring 2023 Semester

24. In late January 2023, the physician sent a "To Whom It May Concern" letter reiterating Student's need for the emergency medication and

declining to discuss the plan with District representatives. (P-3; S-24.)

25. The District sent another NOREP in February 2023 that described an upcoming IEP meeting to discuss the letter from the physician. The Parents did not approve this NOREP, questioning the reasons that it was issued and stating that the District failed to incorporate all of their updates and input in the IEP. (S-25.)

26. Student's November 2022 IEP was reviewed and revised numerous times over the 2022-23 school year, with ongoing addition of new Parent input. In December 2022, the physician's plan for manifestation of the medical condition was reviewed and the need to speak with the physician was again discussed. (S-95.)

27. At a February 2023 IEP revision meeting, the team reviewed Student's progress and performance at the end of the second quarter. The District also drafted a letter to the physician at that time with a number of questions and need for clarification. (S-27; S-95.)

28. Student's physician responded in writing to the District's questions and clarified that the emergency medication must be administered by a nurse or other trained adult for any manifestation lasting five minutes. Student's last manifestation according to the physician was July 2022. (S-34.)

29. The District convened a transition meeting in the spring of 2023 as Student planned to enter the [redacted]. Among other things, the team discussed Student's participation in extracurricular activities. As Student made this transition, Student did not exhibit high intensity or high frequency behaviors, and no longer needed the support of a behavioral aide. When the District proposed replacing the behavioral

aide with an instructional aide during high school, the Parents did not agree. (N.T. 677, 816, 932, 957-59, 1155-56.)

30. Another IEP meeting convened in March 2023 to review the ECP and the physician's response to the District's February 2023 letter. The ECP was updated accordingly, with administration of the emergency medication by a nurse continuing when a manifestation of the medical condition lasted five minutes. The Parents made suggestions that were incorporated in a plan ultimately approved in June 2023. (S-35; S-36; S-37; S-38; S-39; S-40; S-41; S-95.)

31. Student experienced a manifestation of the medical condition at school in May 2023, and the emergency medication was administered before transportation to a hospital. (HO-1 at 2 ¶ 38.)

32. Other IEP revisions in the spring of 2023 related to changes to goals and items of specially designed instruction, additional fading of the behavioral aide during the school day (but not during extracurricular activities), ESY eligibility, and additional Parent input and concerns. (P-6; S-28; S-95.)

2023-24 School Year

33. Student's physician provided a new plan for Student's manifestation of the medical condition in September 2023. This plan provided for contact with the school nurse or parent who should be within a five minute response time to reach Student with emergency medication; the nurse on any vehicle transporting Student for school or school activities; and a staff member having Student within line of sight at all times at school to communicate with the nurse. (P-17 at 4-5.)

34. Student experienced a manifestation of the medical condition at school in mid-September 2023. Its duration was for less than one minute. (HO-1 at 3 ¶ 47.)

35. Revisions to the November 2022 IEP in the fall of 2023 related to changes to goals and items of specially designed instruction, additional fading of the behavioral aide during the school day (but not during extracurricular activities), additional Parent input and concerns, and extracurricular activities. The District also again sought permission from the Parents to speak to Student's physician about the plan for emergency medication, and it provided questions for the physician in the event that no discussion would occur. One scheduled fall 2023 IEP meeting was cancelled by the District because its staff wanted to wait for the requested information from the physician. (S-48; S-95.)

36. A new IEP was developed in November 2023. Parent input at that time included full support during extracurricular activities, specifically behavioral and nursing support. They continued to express a goal for Student's independence with reduction in aide support in specific classes with review for additional opportunities for fading the aide. (P-26; S-50 at 110-11.)

37. Needs identified in the November 2023 IEP remained the same as in the prior school year: reading comprehension, written expression, speech/language skills (receptive, expressive, pragmatic), self-regulation, coping skills, problem solving skills, and development of trusted relationships with adults at school. A post-secondary transition plan again reflected goals for college, independent living, and competitive employment. (S-50 at 28-93, 113, 118-20.)

38. Annual goals in the November 2023 IEP addressed needs related to reading comprehension, written expression, speech/language, social problem solving, executive functioning including self-monitoring of tasks, behavior including self-regulation, self-advocacy, and

responding to social cues. A PBSP was included in this IEP. (S-50 at 128-71.)

39. A full-time behavioral aide throughout the school day, on field trips, and during extracurricular activities, with planned fading in identified classes as appropriate, was one of a number of program modifications and items of specially designed instruction in the November 2023 IEP. The behavioral aide was to collect data, reinforce appropriate behavior, and provide reinforcement in implementing the PBSP. An ECP was also part of the IEP, with nursing support during field trips, extracurricular activities, and other school-sponsored events with a five minute response time. (S-50.)

40. Student would participate in regular education except during adult literacy, instructional support, and related service therapy in a program of autistic, learning, and speech/language support at a supplemental level according to the November 2023 IEP. Student was eligible for ESY services. (S-50 at 187-200.)

41. Student's IEP team continued to meet frequently over the 2023-24 school year and made revisions as necessary. Parent concerns were updated including progress on goals and behaviors, and they continued to express Student's specific needs during extracurricular activities. In March 2024, the District added a new item of specially designed instruction for the aide's responsibilities during extracurricular activities that removed the provision for collecting behavior data. (N.T. 468-69; P-30; P-34; S-50; S-54; S-55.)

42. In the spring of 2024, during second sport season, a "Plan for Success" was developed for completion of that experience. This plan included expectations for participation and consequences for not following the plan. The Parents did not approve the plan and asked

for only verbal reminders of expectations for second sport expectations. (N.T. 495-99, 627-28, 658-59, 699, 704-06, 786-87; P-36; S-75.)

May 2024 RR

43. The District issued another RR in May 2024. At that time, Student had last experienced a manifestation of the medical condition at school in September 2023 that did not require the emergency medication; Student had not experienced a manifestation requiring the emergency medication at school since the spring of 2023. (S-63.)

44. The May 2024 RR summarized previous evaluations in detail. Current input from the Parents included self-confidence, social engagement, and motivation at school; weaknesses related to executive functioning skills, emotional dysregulation, academic weaknesses, pragmatic language, post-secondary transition, and Student's need for a sense of belonging rather than being treated differently than peers. (S-63 at 13-14.)

45. Teacher input into the May 2024 RR reflected that Student generally followed and complied with directions, used self-advocacy and coping skills, engaged with peers, and worked well independently; but Student at times did not respond appropriately to social cues and needed redirection/prompting. (S-63 at 24-26.)

46. Cognitive assessment for the May 2024 RR reflected variability among abilities a below average range Full Scale IQ but average-range scores on the Cognitive Proficiency Index and General Ability Index. Academic achievement assessment revealed below average range scores on a Reading Composite but average range scores for written expression and a mathematics Composite. (S-63 at 44-46, 48-49.)

47. On rating scales for executive functioning skills in May 2024, all raters reported areas of deficit and overall. Behavior rating scales similarly yielded scores at clinically significant and at-risk levels for several domains, with hyperactivity at the higher level for all raters. On a rating scale of social skills, all raters again noted areas of weakness particularly with self-management, core skills, and overall on the Composite. Student's adaptive behavior was rated as variable across domains with overall deficits. (S-63 at 47, 49-53.)

48. A Functional Behavior Assessment in May 2024 identified several behaviors of concern: unexpected statements/questions; disruption to the learning environment; off-task behavior after a directive and one prompt; and emotional dysregulation. Although Student had made progress on using self-regulation strategies and had gained independence at school, a PBSP continued to be recommended. (S-63 at 71-90, 92.)

49. Speech/language assessment for the May 2024 RR reflected continued needs and eligibility, as did occupational therapy evaluation for self-regulation. (S-63 at 56-71.)

50. Student remained eligible for special education following the May 2024 RR under the primary category of Autism and secondary categories of Other Health Impairment (based on ADHD and the medical condition) and Speech/Language Impairment. Detailed recommendations related to continued areas of need, including for post-secondary transition, were provided in this RR. (S-63.)

June/July 2024 IEP

51. A new IEP was developed in June 2024 at a meeting to also review the May 2024 RR. (S-68 at 12-15.)

52. Parent input for the June 2024 IEP mirrored that in the May 2024 RR. They also emphasized Student's specific nursing and behavioral support needs during extracurricular activities. (S-68 at 66-70.)

53. Needs identified in the June/July 2024 IEP were: reading comprehension, written expression, speech/language skills (receptive, expressive, pragmatic), executive functioning (self-regulation, study skills, self-monitoring, attention); emotional regulation and coping skills; social and social problem solving skills, perspective taking, and adaptive/daily living skills. A post-secondary transition plan continued to reflect goals for college, independent living, and competitive employment. (S-68 at 15-63, 76-79.)

54. Annual goals in the June/July 2024 IEP addressed needs related to reading comprehension, written expression, speech/language, social problem solving, executive functioning including self-monitoring of tasks, behavior including self-regulation, self-advocacy, and responding to social cues. There was also a PBSP in the IEP. (S-68 at 87-117.)

55. A full-time aide throughout the school day, on field trips, and during extracurricular activities, with planned fading in identified classes as appropriate, was one of a number of program modifications and items of specially designed instruction in the June/July 2024 IEP. The aide was to collect data during the school day, as well as reinforce appropriate behavior and provide reinforcement in implementing the PBSP during the school day, field trips, extracurricular activities, and other school events. An ECP was also part of the IEP, with nursing support during field trips, extracurricular activities, and other school-sponsored events with a five minute response maintained. (S-68.)

56. Student would participate in regular education except during academic- literacy, instructional support, and related service therapy in a program of autistic, learning, and speech/language support at a supplemental level based on the June/July 2024 IEP. Student was still eligible for ESY services. (S-68 at 144-58.)

57. A new plan for manifestation of Student's medical condition was provided by the physician in July 2024. The provisions remained the same as in the fall of 2023, including the nurse within a five minute response time of Student and a staff member with Student in line of sight at all times for communication with the nurse. (S-67.)

58. The Parents approved the NOREP accompanying the June/July 2024 IEP with certain conditions, requests for clarification, and disagreement with any suggestion for removal of a behavioral aide. (P-43.)

59. The June/July 2024 IEP is the pendent IEP as approved by the Parents. (N.T. 1197-98; P-43.)

2024-25 School Year

60. Student's IEP was revised in August 2024, at which time the Parents provided input focused on services during extracurricular activities including their disagreement with the alternative routes for first sport. (P-46; S-68 at 9, 63-66.)

61. The Parents did not approve the August 2024 NOREP that specified an instructional aide instead of a behavioral aide. In their reasons for not approving the NOREP, they stated that the change in aide was never discussed. (S-69.)

62. Student's physician provided a new plan for Student's manifestation of the medical condition in mid-August 2024. This plan was the same

as that from July 2024 with the addition of Student having access to a cellular phone "to allow for location tracking and health information for emergency responders" in the event of a manifestation. (P-51.)

63. In late August 2024, the District again asked for the Parents' permission to speak with Student's physician. The Parents again denied the request, and asked that staff provide any questions they had to them so that the Parents could answer them. (S-71.)

64. Also in late August 2024, the Parents notified the District of their retention of a private investigator. In early September 2024, they filed a Complaint and Motion for Injunctive Relief with the local federal district court, which questioned the parties about whether administrative remedies should be exhausted. The Parents voluntarily withdrew their Complaint and Motion in order to pursue due process at this level. (S-74; HO-1 at 4-5 ¶¶ 79, 80, 81.)

65. Student's ECP for the 2024-25 school year continued to provide for administration of the emergency medication by a nurse or other authorized person for a manifestation lasting five minutes. (S-94.)

Student's Participation in a Fall Sport

66. Student participated in a specific extracurricular activity, a team sport (first sport), in the fall of 2023 and the fall of 2024. The coach of first sport was an instructional aide at the high school who did not provide behavior support but only support related to instruction. (N.T. 52-53, 102; HO-1 at 2 ¶ 39, 4 ¶ 73.)

67. The coach of Student's fall sports team had a copy of Student's ECP and was trained in its implementation by a school nurse who described the procedures necessary including administration of the emergency medication within five minutes of [redacted]. (N.T. 55-57, 78.)

68. The coach of Student's fall sports team developed schedules for practices during both fall seasons, assigning students to groups based on ability. Some of those practices were to be conducted off-campus with each student determining the routes. However, Student was not always part of the group going off-campus because of the need for implementing the ECP; Student was assigned an alternative route with other team members who were either also assigned to that group or volunteered. Student occasionally expressed frustration about not being able to go off-campus, but sometimes chose to use an alternative route. (N.T. 53-54, 60-68, 72, 83-84, 86-87, 91-93, 105-08, 113-14, 116-17, 127-29, 146-49, 161-65, 168, 242-44, 247-51, 258, 268-72, 274-77, 284-85, 333-34, 355-57, 388-88, 391-93, 421-22, 424-26, 1032-33, 1069-71, 1091-94; P-11; P-12; P-14; P-15; P-16; P-47; P-48; P-69; P-71; S-51; S-52.)

69. The off-campus practice routes sometimes were near busy highways, and it would have been extremely difficult, and also dangerous for Student, for an adult to follow Student on foot, on a bicycle, or in a vehicle. (N.T. 130-33, 280-82, 575-80, 767-68.)

70. The District considered but rejected a number of options for Student to go off-campus for practices, including a coach remaining with Student throughout the activity; having staff trail Student on a bicycle, all-terrain vehicle, or automobile; and use of technology to track Student's location. All were not feasible for ensuring Student's safety. (N.T. 1059-60, 1122-23, 1223-25; S-43.)

71. The Parents did not agree with Student using alternative routes. (N.T. 608, 617-18, 634, 681, 715-16, 1035-36; P-11; P-13; P-24 S-43.)

72. Student was part of the first sport team that participated in various activities throughout the season other than practices. (N.T. 124-25, 144, 159-60; P-18; P-75.)

73. Student had an instructional aide for first sport activities in 2023 and 2024 for Student's safety. The coach provided the team schedules to other District personnel to make arrangements for the school nurse and aides. The team also had an assistant coach who similarly had the ECP, which was reviewed by a school nurse. The instructional aides for first sport during both seasons had the ECP that was reviewed with them by the school nurse and others. (N.T. 103-04, 109, 150, 153-54, 237, 239-40, 258, 265-66, 306-12, 328-29, 352-54, 360, 381-82, 405-09, 414, 558-60, 562, 565, 829-31, 838-40, 843-44, 848-49; S-76; S-77; S-94.)

74. When the team members went off-campus during both seasons, the adults had walkie-talkies to be able to communicate with each other. There were times that neither the coach nor the aide assigned to Student had Student in sight. The nurse and/or aide sometimes was not near enough to be able to reach Student within five minutes, especially during the 2023 season. (N.T. 73-75, 79-81, 138-39, 244-45, 253-57, 277-78, 308-10, 357-59, 417-18, 426-27, 545-54, 691-92; S-43.)

75. One of the Parents began to attend all practices for first sport in the fall of 2023, and followed Student when off-campus in a vehicle. This Parent intended to provide Student with necessary medical care should Student's medical condition manifest itself, but the Parent at times was not able to directly observe Student for minutes at a time. That routine continued into the fall 2024 season for first sport until practices were closed. (N.T. 687-89, 692-93, 726, 767-68, 1087-88; P-64.)

76. On one occasion in the fall of 2023 during first sport off-campus, Student did not return to the school property with the teammates. Student returned later having injured self and was picked up by one of the Parents. (N.T. 364-65.)

77. For the 2024 season of first sport, an individual was assigned to accompany Student during certain activities off-campus. The District found it very difficult to locate individuals for that role who were available and physically capable of doing so. One such individual sustained an injury when accompanying Student but, fortunately, was still able to complete the activity with Student. (N.T. 259-60, 397, 429, 553-54; 1075-77; P-65.)

78. When the first sport team went to events off-campus, team members were provided with bus transportation. The school nurse and Student's aide also rode the bus and attended the events. (N.T. 122-23, 151, 245-46, 312-13, 395-96, 428-30, 438-39.)

79. At some point in the fall of 2024, other first sport team members reported that one of Student's Parents was taking pictures at practices. They also reported feeling uncomfortable about this occurring and did not want to go off-campus as frequently. The parents of a few of the teammates also expressed concerns with the photography as an invasion of their childrens' privacy. The District asked the Parents to refrain from these activities. (N.T. 155-56, 171, 286-87, 294-95, 585-87, 1081-82, 1086-88, 1128-30; P-52; P-54.)

80. The PIAA had specific rules about what it terms "accommodations" for certain competitive team events. Among those are the need to apply for any "accommodations" to be provided for a student such as specific provisions in an IEP. (N.T. 158-59, 1034, 1141.)

81. The District made application to the PIAA for accommodations for Student for events in the fall of 2023, and requested recent documentation from Student's physician. The PIAA denied the application, leaving the accommodations to the District. (N.T. 1039-44, 1102; P-15; P-17; P-20.)

82. The District again made application to the PIAA in the fall of 2024, and granted the request for a staff member to accompany Student on foot during its events. (N.T. 1072-75, 1123; P-52; P-53.)

83. In the fall of 2024, the Parents retained a private coach of first sport. (N.T. 728-29.)

Student's Participation in a Spring Sport

84. Student participated in a different extracurricular activity in the spring of 2024 that was also a team sport (second sport). (N.T. 185-86., 203; HO-1 at 3 ¶ 55.)

85. In addition to the coach, the second sport had several assistant coaches. The coach developed and provided schedules of practices and other activities. (N.T. 184; S-58; S-59.)

86. Student had an instructional aide for second sport activities in 2024. (N.T. 308-09, 313-14.)

87. The second sport coach, who is also a first aid instructor, was provided with a copy of Student's ECP and a nurse reviewed that with the coach and instructional aide. The school nurse and an aide were present each day that second sport met. (N.T. 186-88, 201, 222, 336-37; S-61; S-62.)

88. The second sport team members sometimes went off-campus for practice. The practice schedules were developed by the coach but

were flexible based on factors such as weather and individual student stamina on a particular day. (N.T. 189-94, 204, 209-12.)

89. Student was not able to go off-campus during second sport because of the ECP, and was provided alternative routes that permitted adult response within five minutes. Sometimes Student was alone on those routes. Student did complain to the second sport coach about the limitation on one occasion, and the Parents expressed great concern with this provision. (N.T. 194-96, 208-09, 219-21, 229-31, 314-15; P-39.)

90. Student participated in many other second sport team events outside of practices. (N.T. 204-07, 214-17, 225-27.)

91. Adults including the nurses had walkie-talkies to communicate with each other during second sport activities. (N.T. 315-16, 893-94.)

92. On one occasion during second sport practice in 2024, Student eloped from the instructional aide within the school building. The instructional aide located Student a few minutes later, still in the building but quite a distance away on a different floor. Student then joked that Student had experienced a manifestation of the medical condition. The District called the Parents to pick up Student. (N.T. 318-19, 338, 624-25, 652-54, 654-57, 663-64, 705, 1065-68; P-32)

93. One of the Parents attended second sport practices and sometimes took photographs of Student. (N.T. 707; P-37

94. At a meeting in February 2024, the Parents asked that the nurses conduct trials of the time it would take them to transition to the area where the second sport practiced. Two did so and were able to arrive in less than five minutes. (N.T. 621-22, 702-04, 891-92; S-50 at 23.)

95. Throughout the 2023-24 school year, Student's aide for extracurricular activities was faded such that an instructional aide,

rather than a behavioral aide, was provided. The District observed that Student was exhibiting increased independence and had a plan for systematic fading of the behavior aide support beginning with non-academic tasks. However, the IEP itself did not reflect this fading of the behavioral aide support. (N.T. 461-65, 485.)

96. Student wrote an essay in the spring of 2024 about leaving campus during both sports. Student appeared at a school board meeting and spoke to its directors about Student's ability to participate in off-campus extracurricular activities for the two sports including Student's unwelcome feelings of separation from peers. (N.T. 532-33, 708-09; P-73; P-73A; S-93.)

97. Behavior data was shared on a daily basis with the Parents during the 2023-24 school year, but did not include data for extracurricular activities. (N.T. 469-71.)

98. A meeting convened in February 2024 to revise Student's IEP, including accommodations for extracurricular activities. The Parents did not approve all of the proposed revisions. (N.T. 488-93.)

PDE Complaint July 2024

99. In July 2023 and July 2024, the Parents filed Complaints with the Pennsylvania Department of Education (PDE) related to the District's asserted failure to implement Student's IEP regarding extracurricular activities and cancellation of a September 2023 IEP meeting. (N.T. 714-15; P-25; P-44; S-49; HO-1 at 3 ¶¶ 48, 66.)

100. PDE issued Complaint Investigation Reports in December 2023 and September 2024. PDE ordered the District to convene a meeting of Student's IEP team to discuss Student's needs for participation in extracurricular activities and take certain corrective action. PDE expressly declined to address whether services were appropriate as

beyond its authority. The District complied with the directives. (P-25; P-27; P-57; P-76; HO-1 at 3, ¶ 50 .)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

In general, the burden of proof is viewed as comprising 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 U.S. 49, 62 (2005); *L.E. 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 leading 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 also charged with the responsibility of 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 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). This hearing officer found each of the witnesses who testified to be generally credible as to the facts, with some exceptions noted below. The weight accorded the evidence was not equally placed for a variety of reasons, including persuasive value as well as the specific perspectives of the witnesses along with their individual knowledge of Student. The extensive documentary evidence was accorded significant weight.

The testimony of the District representatives was quite persuasive with respect to Student's educational needs in light of behavioral and other

functioning at school. The District BCBA in particular provided cogent testimony about Student's behavioral presentation at school, its improvement over time, and the lack of any need for a behavioral aide during the current school year especially for extracurricular activities. This testimony was also consistent with and corroborated by recommendations in various IEPs and, as such, was accorded significant weight.

The Parent who testified understandably expressed, both verbally and nonverbally, genuine concern for Student. However, this witness did undermine to some degree the Parents' detailed descriptions of observations of District staff by not also recognizing the contemporaneous reactions of Student's teammates to certain actions they took (N.T. 725-26), something that was undoubtedly painful to hear (N.T. 156, 171, 286-87, 585-87) by all who were present at the hearing.[7] This witness also conveyed a serious concern with a nurse ever being separated from Student at school (N.T. 770-71) while also admitting that following Student in a vehicle during off-campus practice activities led to occasions when that Parent was not able to see Student for several minutes (N.T. 767-68). The witness' related testimony that following Student in a vehicle was safe was persuasively contradicted by other compelling testimony (*see* Findings of Fact ¶¶ 6, 69, 70 and citations therein). The presentation by Student to the school board was powerful in its honesty describing the reasons that Student did not want to use alternative routes and the negative impact they had for Student. The issues, however, must be decided based on the law rather than emotion.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. For example, Student's IEPs are extensive and contain significantly more content

[7] This observation is not intended to be a criticism and, indeed, may be perfectly understandable in light of the Parents' focus at the time; nonetheless, the District's response by closing practices was prompt and almost certainly necessary.

than is necessary to describe for purposes of this decision. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' comprehensive and focused closing statements.

General IDEA Principles: Substantive FAPE

The IDEA requires each of the states to provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE is comprised of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. More than two decades ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with the procedural obligations in the Act.

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 U.S. 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 U.S. 386, 399 (2017).

Individualization is unmistakably the central consideration for purposes of the IDEA. 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. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Additionally, a proper assessment of whether a proposed IEP meets the above standard 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). LEAs are also required to ensure that, "the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, [are] provide[d for] nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities." 34 C.F.R. § 300.107(a). Such activities explicitly include athletics. 34 C.F.R. § 300.107(b).

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family including parents have "a significant role in the IEP process." *Schaffer, supra*, 546 U.S. 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); *D.S. v. Bayonne Board of Education*, *supra*, 602 F.ed at 565.

> The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program. Among other things, IDEA requires the IEP Team, which includes the parents as members, to take into account any "concerns" parents have "for enhancing the education of their child" when it formulates the IEP.

Winkelman v. Parma City School District, 550 U.S. 516, 530 (2007).

Full participation in the IEP process does not mean, however, that parents are the sole decision-makers on the team. *See, e.g., Blackmon v. Springfield R-XII School District,* 198 F.3d 648, 657-58 (8th Cir.1999) (noting that IDEA "does not require school districts simply to accede to parents' demands without considering any suitable alternatives" and that failure to agree on placement does not constitute a procedural violation of the IDEA). As has previously been explained by the U.S. Department of Education,

> The IEP team should work towards a general agreement, but the public agency is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE). It is not appropriate to make IEP decisions based on a majority "vote." If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint.

Letter to Richards, 55 IDELR 107 (OSEP 2010); *see also* 64 Fed. Reg. 48 at 12472 (1999) (same). It is also important to recognize that a parent's restrictions on an LEA's ability to communicate directly with Student's medical providers may impede a collaborative IEP process and, where applicable, the student's receipt of FAPE. *See, e.g., Oconee County School District v. A.B.*, 2015 U.S. Dist. LEXIS 85226, 2015 WL 4041297 (M.D. Ga. 2015).

General Legal Principles: Section 504 Claims

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).

Section 504 requires "meaningful access" to federally funded programs such as schools through provision of reasonable accommodations. *Berardelli v. Allied Services Institute of Rehabilitation Medicine,* 900 F.3d 104, 110 (3d Cir. 2018) (citing *Alexander v. Choate*, 469 U.S. 287, 301 (1985)). Nonetheless, the obligation to provide FAPE has been considered to be substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). The two statutes as well as the ADA do intersect, but as the Third Circuit recently observed, they are not the same. *LePape v. Lower Merion School District*, 103 F.4th 966, 978 (3d Cir. 2024). The IDEA itself notes that claims under Section 504 (and the ADA) are not limited by the IDEA. 20 U.S.C. § 1415(l); *see also id*. The IDEA, thus, places no restrictions Section 504 claims. *Le Pape, supra,* 103 F.4th at 979. "The statute's administrative exhaustion requirement applies *only* to suits that 'see[k] relief ... also available under' IDEA." *Luna Perez v. Sturgis Public Schools,* 598 U.S. 142, 147, 143 S. Ct. 859, 864, 215 L. Ed. 2d 95 (2023).

Where a party raising claims under these statutes based on the same facts does not assert any legal distinction among them as applied to the case, the differences need not be separately addressed in all cases. *B.S.M. v. Upper Darby School District,* 103 F.4th 956, 965 (3d Cir. 2024). However,

as the Parents contend, and unlike FAPE under the IDEA, FAPE under Section 504 "is defined to require a comparison between the manner in which the needs of disabled and non-disabled children are met, and focuses on the 'design' of a child's educational program." *Mark H. v. Lemahieu*, 513 F.3d 922, 933 (9th Cir. 2008). Additionally, 34 C.F.R. § 104.33 "requires a comparison between the treatment of disabled and nondisabled children, rather than simply requiring a certain set level of services for each disabled child. … [S]chool districts need only design education programs for disabled persons that are intended to meet their educational needs to the *same degree* that the needs of nondisabled students are met, not more." *Id*. at 936–37 (emphasis added).

The *LePape* case did stress that, "[t]he ADA 'does not require a public entity to take any action that it can demonstrate would result [1] in a fundamental alteration in the nature of a service, program, or activity or [2] in undue financial and administrative burdens[,]' though it must still 'ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.'" *LePape, supra*, 103 F4th 966, 974 n. 2 (citing to 28 C.F.R. § 35.164). Further, and as the Fourth Circuit cogently summarized consistent with other circuit courts,

> Congress intended the states to balance the competing interests of economic necessity, on the one hand, and the special needs of a handicapped child, on the other, when making education placement decisions. 20 U.S.C. § 1412(3); *Doe v. Anrig*, 692 F.2d 800, 806 (1st Cir.1982) (in determining appropriate placement of an individual handicapped child, the child's needs must be weighed against the realities of limited public monies); *Pinkerton v. Moye*, 509 F. Supp. at 112 ("competing interests must be balanced to reach a reasonable accommodation").

Barnett by Barnett v. Fairfax County School Board, 927 F.2d 146, 154 (4th Cir. 1991). Not insignificantly, the *Barnett* Court also rejected the argument made under Section 504. *Id.*

The Parents' Claims

The first issue is whether the District denied Student FAPE under the IDEA. The record is overwhelmingly clear that Student's IEPs during the time periods in question required a behavioral aide and nursing support within a five minute response time for extracurricular activities (*see, e.g.,* HO-1 at ¶¶ 24, 25, 27, 35, 40, 56, 57, 71, 75; *see also* Findings of Fact herein *passim*), yet these provisions were not strictly followed in the fall of 2023, the spring of 2024, and arguably the fall of 2024. The concession of a District administrator (N.T. 1220) about these provisions more than preponderantly supports this conclusion based on the record as a whole, and the failure to implement Student's IEPs in these respects amounts to a deprivation of FAPE. The appropriate remedy is discussed *infra*.

As a prong of the related final issue, the Parents also ask that the District be ordered to retain the behavioral aide in Student's IEP. The record does not support continuation of this specific related service and, indeed, more than preponderantly establishes that Student no longer needs a behavioral aide. The team including the Parents have agreed over time to fade the support of an aide entirely, in part to promote Student's independence, and there is no justification in this case to maintain this item of specially designed instruction in light of Student's strengths and needs during the current school year especially during extracurricular activities. The District will be required to convene an IEP meeting to discuss and develop a plan for a brief period of transition from the behavioral aide to an instructional aide across all settings where such support remains necessary to support Student.

The second issue is whether the District discriminated against Student over the same period of time, specifically in failing to ensure that Student was not treated differently than other students during first and second sports. The crux of the Parents' contention here is that, by requiring that Student use alternative routes, Student was not afforded the same participation as teammates because of Student's disability. This discrimination claim under Section 504 in this case is separate from the denial of FAPE issue, and thus requires its own analysis.

The Parents assert that Student was not permitted to participate with teammates during first and second sport seasons over the 2023-24 and 2024-25 school years to date in all off-campus activities.[8] Citing to, *inter alia*, an Office for Civil Rights (OCR) Dear Colleague Letter, they contend that the alternative routes were discriminatory against Student based on Student's disability. Review of that Letter reveals that this guidance confirms that, "[t]he provision of unnecessarily separate or different services is discriminatory," but also that,

> Students with disabilities who cannot participate in the school district's existing extracurricular athletics program – even with reasonable modifications or aids and services – should still have an equal opportunity to receive the benefits of extracurricular athletics. When the interests and abilities of some students with disabilities cannot be as fully and effectively met by the school district's existing extracurricular athletic program, the school district should create additional opportunities for those students with disabilities.

[8] They also objected to the use of the term "accommodations" because Student's needs are much more broad. Yet, even cases involving Section 504 review such claims as accommodations, as did the PIAA in its rules as applied to Student. In any event, challenges to the term itself elevate form over substance at best.

Dear Colleague Letter on Extracurricular Athletics, Office for Civil Rights (January 13, 2013).[9]

The record evidence convincingly establishes that Student must be within line of sight of a District staff member at all times;[10] that a nurse must be within a five-minute response time of Student; and that Student's precise location must be known to the District at all times. The Parent who testified conceded that following Student in a vehicle did not permit the driver to have a line of sight of Student in the off-campus practice areas. The evidence as a whole simply does not support their demand for other means to permit this activity for Student, including use of a bicycle or other vehicle and GPS technology. In balancing the needs of Student, which could lead to death in the event of a manifestation of the medical condition beyond five minutes, with the inherent and unknown difficulties in seeking to maintain the required line of sight and nurse response, no plan of accommodation suggested by the Parents – even with a series of capable individuals accompanying Student in the event one or more is injured where reliance on GPS signals are not always sufficiently accurate – can come even close to overcoming the dangers of failing to ensuring the life of a child. For these reasons, the alternative routes were necessary for Student and, accordingly, were and are not discriminatory under Section 504. The alternative routes, when compared to other teammates' off-campus practice activities, meet Student's needs to the same degree under all of the circumstances present in this case with the District quickly responding to

[9] This document is available at https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-201301-504.pdf (last visited January 30, 2025).

[10] The District posits that there has never been a "line of sight" requirement in Student's IEPs (District closing at 3 ¶ 15). However, as the Parents have countered, it is impossible based on these facts for Student's safety to be ensured through the plan for emergency medication to be followed without inferring such a condition as part of Student's IEP.

and addressing the brief period of teammate reluctance in the fall of 2024 that clearly cannot be attributed to the District.

It is, of course, certainly possible that a plan of reasonable accommodations could be developed that permit Student to participate in all off-campus practice activities. The refusal of Student's physician, and the Parents, to permit a conversation about a potential plan has effectively obstructed the IEP team from making adequately informed decisions about the extracurricular activity participation. Unless and until Student's physician who has provided orders for the emergency medication confirms in a meaningful verbal conversation with District representatives and the Parents that any specific plan would be appropriate, the District cannot be expected to ensure Student's safety as requested by the Parents. The attached order will so provide, but the District must prevail on this issue.

Remedies

The remaining issues relate to relief. Because the District denied Student FAPE in certain respects described above, the next issue is the relief to be provided. The Parents seek compensatory education, which 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 alternative qualitative 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 Authorit*y, 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). Under either method, however, compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts have a tendency to favor the second qualitative approach. However, the difficulty in looking at what would make the child "whole" is that the evidence to support such an award is often lacking. In *J.K., supra*, the Court reviewed a number of decisions across the country that describe the "individually tailored" result of a qualitative analysis of compensatory education.

> [W]hile a child is entitled to compensatory education for the period equal to the period of education, but excluding the time reasonably required for the school district to rectify the problem, the *amount* of compensatory education to be awarded for each school day during the period of deprivation should be reasonably calculated to provide the educational benefits the child should have received in the first place. Thus, 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.

J.K., supra, 39 F. Supp. 3d at 608 (emphasis in original; quotation marks omitted). This standard provides an alternative where, as here, necessary evidence to support a "make whole" remedy is absent.

The District posits that the Parents have not established anything beyond a *de minimis* failure to implement the IEP (District Closing at 10). This contention fails to consider the gravity of the potential harm to Student that could have, but thankfully has not, arisen during the time periods in question when an adult had Student in line of sight and a nurse was within a five minute response time. The Parents have not, however, established that the lack of behavior data collected during extracurricular activities would have been meaningful in light of the expectations during practice, so this implementation failure does not amount to an educational deprivation.

Giving consideration to (1) the unknown frequency that the IEP was not implemented with respect to the adult and nurse support during some off-campus practice activities during both sporting seasons in light of the practice schedules, and (2) the severity of the harm that may have foreseeably resulted, this hearing officer concludes that two hours per week of compensatory education for each week that practices for either sport included off-campus activities balances these interests and is the appropriate equitable remedy to be awarded.

The award of compensatory education is subject to the following conditions and limitations. Student's Parents 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 Parents. The hours of compensatory education may be used at any time from the present until Student turns age twenty one (21). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents; 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.

Next, the Parents seek reimbursement for certain expenditures which, unfortunately, have not been clearly outlined in the record (*see, e.g.,* Parent Closing at 14, 20). This remedy shall therefore be denied.

Finally, the Parents ask for a directive to the IEP team to make specific revisions to the IEP. Those relating to the alternative routes cannot be granted. The one that seeks a meeting convene to discuss a transition plan should the behavioral aide be removed from Student's IEP (Parent Closing at 14) is reasonable, and shall be made a provision in the attached order since the evidence has established this provision is no longer necessary.

CONCLUSIONS OF LAW

1. The District denied Student FAPE in certain respects during the 2023-24 school year and fall of 2024, and Student is entitled to compensatory education.
2. The Parents are not entitled to reimbursement for any expenses incurred because of the FAPE denial.
3. The District did not discriminate against Student based on Student's disability.

4. The District must convene a meeting of Student's IEP team to discuss revisions made necessary following this decision.

5. The District shall not be ordered to permit Student to participate in off-campus practice activities along with all teammates, but the team must discuss other possibilities that would help Student not feel separated from peers during those activities.

ORDER

AND NOW, this 31st day of January, 2025, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's special education program for Student over the 2023-24 school year and the fall of 2024 was not fully implemented, and Student was deprived of the opportunity for FAPE.

2. Student is awarded two hours of compensatory education for each week that the District's scheduled practices for first or second sport included off-campus activities during the 2023-24 school year and the fall of 2025. The terms and conditions in the attached decision apply as though set forth herein at length.

3. The District did not discriminate against Student in violation of the provisions of Section 504 during the time period in question.

4. Within seven (7) calendar days of the date of this Order, the District shall convene a meeting of Student's IEP team to discuss

immediate implementation of a plan to transition to an instructional aide rather than a behavioral aide along with continued fading of that support as appropriate.

5. Within twenty one (21) calendar days of the date of this Order, the District shall convene a meeting of Student's IEP team to discuss possible changes to the alternative routes including means of teammate participation that were provided for Student in the spring of 2023 and the fall of 2024.

6. Unless and until Student's physician who provides that orders for administration of the emergency medication for Student participates in a verbal conversation with District representatives and the Parents about Student participating in off-campus practice activities for first and second sports, and provides written recommendations for the District to successfully and safely do so over a specified period of time, the District may continue to provide alternative routes for Student for those activities in the spring of 2025 and into future school years.

7. The District is not ordered to take any further action.

8. Nothing in this decision and order should be read to preclude 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 and DISMISSED. Jurisdiction is RELINQUISHED.

/s/ Cathy A. Skidmore

_____

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 30370-24-25

Sent to counsel for both parties this date as required by 34 C.F.R.

§ 300.515 by electronic mail message as requested by counsel consistent with 22 Pa. Code § 14.162(n).