

**DELAWARE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING PANEL**

In the Matter of:)
)
REDACTED, (“*Student*”))
Complainant,)
) DE DP # 23-08
v.)
)
*DE Dept. of Adult & Prison)
Education Resources (“APER”)*)
Respondent.)

Hearing Panel:

Melissa L. Rhoads, Esq.
Diane Latocha, Educator Panelist
Matthew Stankis, Layperson Panelist

Representatives:

Stefanie Ramirez, Esq., counsel for Complainant
Laura B. Makransky, Esq., counsel for Respondent

DECISION

Preliminary Matters

The Complainant, REDACTED (hereinafter referred to as “Student”) through Student’s Counsel, filed a Due Process Complaint on October 24, 2022, against the Delaware Department of Adult & Prison Education Resources (hereinafter referred to as “APER”). On November 1, 2022, Student filed a

Motion to file an Amended Complaint to add an allegation of retaliation against Student in violation of Section 504 of the Rehabilitation Act. On November 2, 2022, APER filed a Response in Opposition to Student's Motion to File an Amended Complaint. APER asserted that the Hearing Panel did not have jurisdiction to hear claims brought under Section 504 of the Rehabilitation Act. The Hearing Panel permitted the filing of the Amended Complaint.¹ Said Order is incorporated herein by reference. The Amended Complaint was filed on November 9, 2022.

The hearing was conducted via Zoom over four days: January 23, 24, 26, and 27, 2023. The Complainant called five witnesses and the Respondent called four witnesses. The Hearing Panel finds all the witnesses credible, although the testimony of each witness has been given different weight. The parties introduced voluminous exhibits, which were also considered by the Hearing Panel and are cited to periodically throughout this Decision.

Subsequent to the hearing, both parties filed written closing arguments. All arguments, conclusions and proposed facts submitted by the parties have been considered.

¹ Student has conceded that the Hearing Panel does not have jurisdiction over the retaliation claim pursuant to Section 504 of the Rehabilitation Act.

Issues Presented:

The issues presented in the due process hearing are:

1. Did APER develop and implement an appropriate IEP that was designed to provide Student with a FAPE?
2. Did APER fail to respond appropriately to Student's behavioral needs related to Student's disabilities and therefore deprive Student of a FAPE?
3. Did APER fail to provide special education and related services in a placement that was the Student's least restrictive environment ("LRE")?
4. Did APER engage in procedural violations of the IDEA? If so, did those procedural violations rise to the level of a deprivation of a FAPE?
 - a. APER's failures related to evaluations of Student
 - b. APER's failures related to providing notice
 - c. APER's failures related to IEP development
 - d. APER's failures related to IEP meetings
 - e. APER's failures related to access to educational records
5. Did APER retaliate against Student?²

² The Hearing Panel considers this point to be moot as Student has conceded that the Hearing Panel does not have jurisdiction over the retaliation claim pursuant to Section 504 of the Rehabilitation Act.

6. Should APER be compelled to review and revise its policies and procedures to be consistent and compliant with the IDEA?
7. Should APER be compelled to provide Student's Counsel with a complete copy of Student's educational records?
8. Is Student entitled to compensatory education for APER's denial of a FAPE?
9. Is Student entitled to relief from January 4, 2019 – January 27, 2023?

Findings of Fact³

Based upon the testimony, and the evidence in the record, the Hearing Panel makes the following findings of fact:

Parties

1. Student was born on REDACTED. REDACTED is a REDACTED-year-old student diagnosed with Attention Deficit Hyperactivity Disorder, Anxiety, and Depression. T465, 625; A29; S6, 13.

³ Transcript is cited as T (page number). Student's exhibits are cited as S (exhibit #). APER's exhibits are cited as A (exhibit #). This is not intended to be a full summary of the facts, which would be repetitive and cumulative, but is the key facts relied upon specific to the issues before the Hearing Panel for decision.

2. Student is identified as a “Child with a disability” (hereinafter “eligible student”) as that term is defined in the Individuals with Disabilities Education Act (“IDEA”). Student was originally found eligible for special education and related services as child with a disability under the IDEA in May 2014. S29; A6. Prior to this, Student was receiving services under a Section 504 Plan. *Id.*
3. The Delaware Department of Education (“DDOE”) is the State Education Agency (“SEA”) as that term is defined in the IDEA.
4. DDOE provides special education and related services to eligible students who are incarcerated in a Delaware Department of Correction (“DDOC”) facility through APER.
5. APER, individually and as a workgroup of DDOE, is a public agency as that term is defined in the IDEA and is bound by the IDEA and its implementing regulations, as well as Delaware’s equivalent, at 14 *Del. C.* §3100, *et seq.*, and its implementing regulations.
6. The REDACTED High School (“REDACTED”) is a Delaware public high school which provides adults and out of school youth with the opportunity to earn and obtain a high school diploma. 14 *Del. Admin. C.* 915.1 Groves is administered by APER. T446.
7. REDACTED (“REDACTED”) is a DDOC facility.

8. Student entered REDACTED on REDACTED. T172.
9. When Student graduates with Student's high school diploma and is released back into the community in REDACTED, Student plans to own REDACTED own trucking business and wants to seek higher education for business management. T21, 420, 658-659, 669.

IEPs and Evaluations Prior to Student Entering REDACTED

10. Prior to Student's incarceration, Student attended REDACTED in the REDACTED School District, which is an Intensive Learning Center for students with disabilities. T638. At the time Student entered REDACTED, Student had an IEP from November 2018 as well as a Positive Behavior Support Plan ("BSP"). S29; A6.

Provision of Special Education at REDACTED

11. Student entered REDACTED on REDACTED. T172.
12. The record is not clear when APER initially contacted Student to begin receiving special education services. The "Disclosure of Pupil's School Records" form is dated February 8, 2019, and is marked as being sent to Student's prior school on February 27, 2019. S6. REDACTED, REDACTED educational diagnostician ("ED") at that time did not initiate Student's file until March 22, 2019. T176-177; S2-4.

13. REDACTED administered the Test of Adult Basic Education (“TABE”) to Student on March 21-22, 2019. T228; S19. The record does not include evidence of any other assessment or evaluations completed at this time. Likewise, the record does not include evidence of an Individualized Education Program (“IEP”) or annual reevaluation completed prior to 2021. T282, 484.

14. In 2019, Student had the option of receiving special education and related services while working towards completion of REDACTED GED or pursuing a high school diploma. T492. Student worked towards completion of a GED from the week of March 29, 2019, until REDACTED waived REDACTED eligibility for special education and related services under the IDEA on February 19, 2020. T178, 297, 486-440, 629, 691; S5, 32.

15. During the time that Student was working toward completion of a GED, Student was receiving special education. T491, 691. It is unclear what special education APER provided to Student because there is no evidence of an IEP or ESR developed at this time to show what was provided.

16. In March 2021, Student was provided a “Permission to Evaluate Notice and Consent for Individual Evaluation” which identified at least nine

- different assessments to be completed. A7. T202-204. Student consented to the evaluation. *Id.* No assessments were completed at that time.
17. On April 27, 2021, APER sent the first invitation to meeting for purposes of determining Student's initial or continued eligibility for IDEA services.
18. That same day, on April 27, 2021, APER held an IEP Team meeting. T210; S12-18; A8. APER did not send Student an invitation to meeting prior to this IEP Team meeting and only provided it to Student at the meeting. T210, 515; S16; A8. Students were not typically notified ahead of time that they were having an IEP meeting. T516. REDACTED testified that REDACTED would consider it a "waiver" of the right to receive notice of an IEP meeting ten days before the meeting if a student agreed to meet on the day approached. T515. REDACTED would have them sign the waiver. *Id.* The meeting lasted 8 minutes. T454.
19. The IEP Team determined that Student remained eligible for services under the educational classification of Other Health Impairment. APER adopted Student's prior Evaluation Summary Report ("ESR") with only adding the diagnostic data from the TABE results.
20. A nurse was not present for the meeting. A8. There was "no process at that time" for a nurse to attend. T458.

21. A school psychologist was not involved in the meeting. *Id.*
22. Student's REDACTED was not invited to the meeting. T453, 462.
- Student was not asked during the meeting if Student would like Student's REDACTED to be invited. T453, 462.
23. Prior to Student's incarceration, Student's REDACTED had been involved in Student's education. T499.
24. Student indicated in REDACTED 2018 Age of Attainment form that Student wanted Student's mother to attend IEP meetings. T436.
25. Student was not aware until recently that REDACTED could request for REDACTED REDACTED to attend. T436, 603.

Behavioral History

26. Prior to Student's incarceration Student had IEPs which included supports to address Student's behavioral needs. In short, it included scaffold instruction/direction, preferential seating, check ins, extra time, refocusing, continuous parent contact, small group instruction, and direct instruction modeling. Student's November 14, 2018, IEP identified Student's need for positive behavior and intervention support ("PBIS") and included accommodations, modifications, and support in REDACTED IEP. S29; A6.

27. When Student entered REDACTED in January 2019, REDACTED

November 2018 REDACTED IEP was still current and valid; however, the testimony reflected it was not APER's practice to implement or adopt an IEP developed outside the community. T27, 610-613; S6. APER never adopts an IEP from outside the correctional facility because "we wouldn't have the resources most likely to support an IEP written outside of a correctional facility." T549. When APER developed Student's April 30, 2021, IEP, it did not include many of the behavioral supports provided in Student's 2018 IEP. S12; A9.

28. APER staff was aware that Student struggled with focusing for long periods of time and worked better in short durations. T744. REDACTED testified that REDACTED was "concerned student was not engaged" upon REDACTED observation of REDACTED receiving instruction. T131.

29. REDACTED and REDACTED were members of Student's IEP Team which determined the behavioral supports to be provided in Student's April 30, 2021, IEP, they testified the services included were either not what Student needed or not enough to meet REDACTED needs. T528, 779. Student's attendance issues were also documented by REDACTED and REDACTED. T455.

30. “IEPs weren’t written to meet Students’ needs, they were written so students could have access to education give the amount of resources [APER] had.” T490. “It was sort of a make it look good on paper type of situation.” T491.

Provision of Education at REDACTED

31. Student has been housed at REDACTED for the entire duration of REDACTED incarceration except between June 4 through June 17, 2021, when REDACTED was housed at REDACTED. T374-375. While at REDACTED, Student remained enrolled at REDACTED. T430.

32. REDACTED is defined as having two sides – the west side and the east side. T441, 501.

33. Student while a detainee (not yet sentenced) was housed on the west side. Generally, after sentencing, an individual would move to the east side.

34. When Student entered REDACTED on January 4, 2019, REDACTED was a detainee located on the west side. Student received education while on the west side between January 4, 2019, through approximately August 1, 2021, in a one-on-one setting. T 301, 500, 693.

35. While a detainee, Student’s only instructor was REDACTED and any education REDACTED provided to Student was strictly in a one-to-one setting. *Id.* During sessions, Student would be offered the choice of either

working on the interventions in REDACTED IEP or on course work toward REDACTED high school diploma. T222, 720.

36. One on one instruction on the west side took place in interview rooms described as:

[t]he interview room is about the size of a small walk-in closet, and it is divided in two parts by a, like concrete block half wall. And on the top half wall is a half inch thick sheet of Plexiglass... each side of the interview room is about...three feet by four feet. And there's a metal stool bolted to the floor on each side; the two sides are identical...And the only difference between the two sides is that the staff side has a... tabletop, where you can rest your materials, but the student's side doesn't have that."

REDACTED testified that when REDACTED worked with "students on the west side, like [Student], I would take a clipboard with me, and they would put it in their lap and work on their lap. So whatever they were doing, they would sort of hunch over and have to balance their materials or put some things on the floor and then bend over and pick them up. But whatever they were working on, they held in their lap and worked on it that way."

37. These sessions would be generally no more than 30- 45 minutes three times per week. REDACTED testified to the difficulties of the environment as: “[y]ou’re sitting in a room with a stool and no table... I didn’t want to do that [and t]hey didn’t want to do it either... we [could offer] them an hour and a half, but obviously knew there was very little chance of them having the stamina to be in that context for an hour and a half.” T559.

38. REDACTED and REDACTED testified that REDACTED students should be receiving a maximum of 8 hours per week (general education and special education, if applicable, combined) because that is the “total potential hours that [students] could have optimally received” based on what APER could provide at REDACTED. T310-311, 316, 424. A33.

39. Student waived REDACTED right to special education under the IDEA on February 19, 2020.

40. Based on the record, it appears that APER did not hold an IEP Team meeting, did not provide Student with information or explanation of REDACTED procedural safeguards, and did not provide REDACTED with a copy of REDACTED procedural safeguards. T702-703.

41. Student expressed an interest in restarting educational services on March 1, 2021. T179, S4.

42. Although Student initially had been pursuing REDACTED GED, upon REDACTED return to education, REDACTED was working toward obtaining REDACTED high school diploma.
43. On or around May 28, 2021, Student was sentenced. REDACTED was transferred to the east side shortly thereafter. REDACTED continued to receive all or almost all instruction in a one-on-one setting until REDACTED was placed on the educational unit.
44. During this time, in lieu of providing direct instruction, APER used zoom for virtual instruction and provided work packets to students. T179-180, 327, 391, 828. REDACTED testified that the work packets “were not generic” and would “address the specific needs of the student.” T395-396. In practice the work packets were not individualized. T762.
45. Student was placed on “Q-Pod” or the education unit on or around January 7, 2022, and was able to be attending an additional two general education sessions each weekday for approximately one hour.
46. The morning session on Q-Pod is led by one or two teachers; the teachers do not do direct teaching and instead walk around, take attendance, and assist students with help as needed. T649-650, 741.
47. The morning session is followed by a study group period where students are to continue their schoolwork, but it is more of a free time where some

- students continue working with peer “tutors” and others play cards or other activities. T651,738-730.
- 48.The afternoon session mirrors the format of the morning. T739-740.
- 49.These sessions are held at group tables in a common area. T648,741.
- 50.REDACTED described working on Q-Pod as “trying to learn in, like a gym at the YMCA.” T44,783.
- 51.During the course of REDACTED incarceration, Student was transferred to REDACTED for a period of two weeks. There was no meeting to discuss the change in placement and no educational programming provided to Student during that time. T284.

Least Restrictive Environment

- 52.Student’s Least Restrictive Environment (“LRE”) as set forth in Student’s prior IEPs has never been a one-on-one setting.
- 53.When APER conducted Student’s April 30, 2021 IEP meeting, there was no discussion as to what Student’s LRE should be. T488.

Education Records

- 54.Student requested a copy of Student’s education records on February 22, 2022, by providing consent for Community Legal Aid Society (“CLASI”) to request copies of REDACTED educational records from APER on REDACTED behalf. S7. This authorization was provided to

- APER on April 21, 2022, along with a letter requesting Student's records.
- S6-7. APER refused to provide copies of Student's records to CLASI. S6.
55. Student requested REDACTED own records on June 2, 2022. T87, 644; S4; A17.
56. On June 16, 2022, APER provided a copy of the records to Student, believing that Student was able to provide them to whoever Student wished. T 87,644; S4; A17. The records were in a stack, not bound in a folder or envelope. T646-647.
57. No emails were contained in the educational records provided to Student. T644. There was testimony that it is not typical to put emails in student records. T803.

Student Progress

58. There was little evidence to show Student progress.
59. Testimony and evidence relied upon by APER as it pertains to whether Student made progress was limited to: Student "passing" REDACTED classes and making "good grades."

Discussion

1. Did APER develop and implement an appropriate IEP that was designed to provide Student with a FAPE?

An LEA is required to provide a free appropriate public education (hereinafter referred to as FAPE”) to students requiring special education. They are further required to provide “an educational program reasonably calculated to enable a child to make progress in light of child’s circumstances. *K.D. v. Downingtown Area Sch. Dist.*, 904 F.3d 248 (3d Cir. 2018) (quoting *Endrew F.*, ex rel. *Joseph F. v. Douglas City Sch. Dist.*, RE-1 137 S. Ct. 988, 1001 (2017)). “Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Id.* At 255 (quoting *Endrew F.*, 137 S.Ct. at 999).

In determining if a FAPE was provided, the first area of inquiry is whether the IEP is appropriate and enables a child to make progress in light of the child’s circumstances. The IEP need not provide the maximum or optimal services but must be tailored to provide appropriate goals and supports to allow the child to make reasonable progress. See *C.F. v. Radnor Twp. Sch.*, District No. 17-4765, 2019 U.S. District LEXIS 41264 at 24-24 (E.D. Pa. Mar. 14, 2019) citing *Parker*

C. through Todd v. W. Chester Area Sch. Dist., 2017 WL 2888573 at *7 (E.D. Pa. July 6, 2017); See also *Coleman v. Pottstown Sch. Dist.*, 983 F. Supp. 2d 543, 563 (E.D.Pa. 2013) (citing *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 729-30 (3d. Cir. 2009)) (stating that “maximal or optimal educational services or results are not guaranteed under the IDEA”). What a school district must do, however, is “identify goals for meaningful improvement relating to a student’s potential.” *Coleman*, 983 F. Supp. 2d at 563 (citing *P.P. ex rel. Michael P.*, 585 F.3d at 729-30).

Each IEP must include an assessment of the child’s current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide. *Ridley Schl. Dist. v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2010) (quoting *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (internal quotation marks omitted); see 20 U.S.C. § 1414(d)(1)(A).

The April 30, 2021, IEP included three goals for Student – one related to math, one relating to reading, and one related to writing (CEA3). S12, A9. The data used to develop the IEP is identified as “teacher made assessments” and “transitional surveys/observations/discussions.” S13. A9. The only data specifically included in the IEP is the 2019 TABE scores. *Id.*

The math applications and reading comprehension goals were deficient:

1. The statement identified as the PLEP is not based on or informed by any data current at the time of development in violation of 14 *Del. Admin. Code* §925.7.1.1. (The IEP shall include “[a] statement of the child’s present levels of academic and functional performance[.]” The PLEPs were based off of the TABE scores which were more than two years old.
2. The statement identified as the PLEP along with benchmarks and annual goal are inconsistent, unmeasurable, and vague in violation of 14 *Del. Admin. C.* §925.7.1.2 (The IPE shall include “[a] statement of measurable annual goals...designed to meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child’s other educational needs that result from the child’s disability[.]”)
3. There was no description of how progress would be measured as required by 14 *Del. Admin. C.* § 925.7.1.3 (The IEP shall include “[a] description of how child’s progress toward meeting the annual goals... will be measured [.]”);
4. There is no statement of the program modifications or supports for school personnel to be provided in violation of 14 *Del. Admin. C.* §925.7.4 (The IEP shall include “a statement of the program or modifications or

supports for school personnel that will be provided to enable the child” to make progress toward annual goals.

The academic goal related to writing (CEA3) was not included to meet an identified educational need, but rather to address the issue that Student would not otherwise receive any accommodation or modification of this assignment. T538, 543, 725-726.

REDACTED, APER’s ED at the time, testified “IEP’s weren’t written to meet students’ needs, they were written... so that students could have access to education given the amount of resources that we had.” T553. REDACTED, Student’s teacher, testified that “it wasn’t really possible for it to [meet Student’s needs]... because there was only so much that we were, like, physically realistically able to provide each week based on staffing.” T763.

It does not appear to the Hearing Panel that Student’s IEP was designed to provided Student with a FAPE, as it was not drafted to address Student’s needs as identified in Student’s evaluation in order to enable Student to make progress. Further Student’s goals were not created with an eye toward meaningful improvement relating to Student’s potential. More concerning is that they do not appear to have been measured at all.

Creating an IEP based on “available resources” is not the standard. The Hearing Panel is concerned that APER needs to improve overall delivery of service

for all students receiving special education including, but not limited to: evaluations, goal writing, progress monitoring, and student feedback regarding process. Testimony by APER employees openly admitting that IEPs “weren’t written to meet students’ needs” and further admitting that IEPs were drafted based on what APER could provide as opposed to what a student specifically required/needed is problematic. There was no identifiable system internally to self-audit special education files and ensure that IEPs are timely and appropriately developed, implemented, and meaningfully utilized. Therefore, the Hearing Panel finds that APER denied Student a FAPE when it failed to provide an IEP that considered existing evaluations or that was reasonably calculated to enable Student to make meaningful progress.

2. Did APER fail to respond appropriately to Student’s behavioral needs related to Student’s disabilities and therefore provided Student of a FAPE?

At the time Student was incarcerated, Student’s November 14, 2018 IEP from REDACTED included several identified needs and supports related to Student’s behavior. S27, A6. The specific needs identified were: (1) ability to meet the demands of a full school day and (2) attention to task/task completion. *Id.*

The first need related to Student's struggles with attendance and the second related to his struggles with focus, attention, and classroom engagement. *Id.*

Student's April 27, 2021 ESR appears to be REDACTED November 14, 2018 ESR with the additional of REDACTED 2019 TABE scores. S29, S17; A6, A8. No evidence was offered to show that APER considered PBIS or any other behavioral support. Testimony at the hearing reflected such services were not available due to lack of resources and staff.

APER staff, including REDACTED, REDACTED, REDACTED, and REDACTED all testified to seeing Student's continued struggles with attendance and executive functioning skills. T39, 79, 130-131, 188, 266-268, 456, 643, 709-710, 744.

Student was not provided with a BSP to address Student's behavioral needs. The sole behavioral goal was not measured and the IEP did not include any method of support for Student to achieve it. Therefore, the Hearing Panel finds that APER denied Student a FAPE when it failed to respond to Student's behavioral needs related to Student's disabilities.

3. Did APER fail to provide special education and related services in a placement that was Student's least restrictive environment ("LRE")?

The IDEA requires that students with disabilities be educated with their nondisabled peers “to the greatest extent possible.” 24 C.F.R. §300.114(a)(2). Therefore, an LEA is required to provide a continuum of placements to meet the multiple needs of students with disabilities.

Student’s April 30, 2021 IEP never determined what would be Student’s LRE. Student’s specially designed instruction, as provided for in REDACTED April 30, 2021 IEP, was written for and provided one-on-one because at the time the IEP was drafted Student was a detainee and that was the only option APER provided for detainees. T301,500,504,544. Despite the fact that provision of education solely in a one-on-one setting has never been Student’s LRE. This was not the result of an individualized determination. There was no evidence presented of a bona fide security interest or compelling penological interest concerning Student to justify the instruction in a one-on-one setting.

This restrictive educational environment was provided not as a result of review of prior placements, evaluations, or any determination that this was an appropriate environment for Student, but rather by default. The IEP Team never discussed what an appropriate learning environment for Student would be. One on one instruction on the west side took place in interview rooms described as:

[t]he interview room is about the size of a small walk-in closet, and it is divided in two parts by a, like concrete block half wall. And on the top half wall is a half inch thick sheet of Plexiglass...each side of the interview room is about...three feet by four feet. And there's a metal stool bolted to the floor on each side; the two sides are identical...And the only difference between the two sides is that the staff side has a...tabletop, where you can rest your materials, but the student's side doesn't have that.

REDACTED testified that when REDACTED worked with “students on the west side, like [Student], I would take a clipboard with me, and they would put it in their lap and work on their lap. So whatever they were doing, they would sort of hunch over and have to balance their materials or put some things on the floor and then bend over and pick them up. But whatever they were working on, they held in their lap and worked on it that way.”

Although the DDOC is the authority to determine where Student is housed, REDACTED housing location and educational placement are not the same. T195-196, 377-378, 504, 519-520, 551.

Student would have benefitted from a less restrictive environment. Therefore, the Hearing Panel finds that APER deprived Student of a FAPE when

APER provided Student education in a more restrictive environment than was appropriate for Student academically or necessary for State security reasons.

4. Did APER engage in procedural violations of the IDEA? If so, did those procedural violations rise to the level of deprivation of a FAPE?

The IDEA requires that state educational agencies include certain procedural safeguards to ensure parents are permitted to participate in the IEP process and are aware of their rights under IDEA. *T.R. v. Sch. Dist. of Phila. L.R.*, 4 F. 4th 179 (3d Cir. 2021). IDEA only permits relief for procedural violations when they rise to the level of a denial of FAPE. In the 2004 IDEA amendments, Congress noted that a procedural violation may rise to the level of a denial of FAPE when it:

1. Impeded the child's right to a free and appropriate public education;
2. Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
3. Caused a deprivation of educational benefits. (*T.R.* at 184, *citing* Pub. L. No. 108-446, sec. 101, §615(f)(3)(E)(ii), 118

Stat. 2647, 2722 (codified at 20 U.S.C.S. §1415(f)(3)(E)(ii)); 34 C.F.R. §300.513(a)(2) (parroting statute); see, e.g. *C.H. v. Cape Henlopen Sch. Dist.*, 606 F. 3rd 59, 66-67 (3d. Cir. 2010). See also Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 *Harv. J. on Legis.* 415, 439-42 (2011) (describing history of 20 U.S.C.S. § 1415(f)(3)(E)).

Multiple procedural violations may rise to the level of a denial of FAPE even if the violations taken individually do not. *R.E. v. N.Y.C. Dep't. of Educ.*, 694 F. 3d 167, 190 (2d Cir. 2012) citing *Werner v. Clarkstown Cent. Sch. Dist.*, 363 F. Supp. 2d 656, 659 (S.D.N.Y. 2005). As the determination of whether a specific procedural failure rises to the level of deprivation of a FAPE is fact specific, the Hearing Panel will address each of the alleged violations separately.

a. APER's failures related to evaluations of Student

Once a student is identified as eligible for services under the IDEA, the LEA must conduct a reevaluation at least once every three years. 20 U.S.C. §1414(a)(2); 34 C.F.R. §300.303; 14 *Del. Admin. C.* §925.3.0. Student's most recent eligibility determination and evaluation prior to incarceration was October 13, 2017. S29; A6. APER contents it was unable to conduct a reevaluation in 2021 because the school psychologist was unable to meet with the Student in person due

to Covid-19 related concerns. T204,243; S19; A7. However, guidance released earlier from OSERS during the Covid-19 pandemic provided recommendations for conducting reevaluations during the pandemic because “SEAs, LEAs, and IEP Teams are not relieved of their obligation to provide FAPE to each child with a disability under IDEA. *Part B Implementation of IDEA Provision of Services in the Current Covid-19 Environment Q&A Document* pp 2, 6-7 (OSERS, September 28, 2020).

APER further failed to treat Student’s request for special education and related services in 2021, after waiving them in 2020 as a request for an initial evaluation. APER was required to complete a full evaluation and eligibility determination within 45 school days or 90 calendar days, whichever was sooner. S19; A7; 14 Del. C. Admin C. §§925.2.1 and 2.3; 14 Del. Admin. C. §925.5.0. and 6.0. APER did not do this.

APER also failed to conduct triennial evaluation as required by the IDEA.

For all the reasons stated above, the Hearing Panel finds that APER’s failures related to evaluations of Student deprived Student of a FAPE.

b. APER’s failures related to providing notice

An LEA must provide parents with notice no less than ten school days before it holds an IEP meeting (five school days before a meeting to conduct MDR) 14 Del. Admin. §§925.9.1 and 926.1.3.1 or “proposes or refuses to initiate or

change the identification, evaluation, or educational placement. . . or the provision of FAPE to [a student]”. The April 27, 2021, April 30, 2021, and September 30, 2021 Invitations to Meeting were provided to Student the day of the meeting. S9,11, 16; A8-10.

Additionally, Student wanted Student’s REDACTED to attend Student’s IEP meetings. Due to lack of invitation, lack of notice, lack of clearance, and other alleged logistical obstacles, Student’s REDACTED was first included in an IEP Team Meeting in January 2023 and REDACTED participation was limited as the meeting was held over Zoom and it was difficult for Student’s REDACTED to meaningfully participate as REDACTED had trouble hearing who was speaking.

The Hearing Panel finds that same day notice is not “notice.” The hearing panel finds that this procedural violation rises to the level of a deprivation of FAPE as Student (and Student’s REDACTED) was not able to prepare for, and therefore fully participate in, the meeting that would develop an IEP for Student.

c. APER’s failures related to IEP development

The IDEA requires that where a student with disabilities transfers to a new public agency within the same state, the receiving public agency, in consultation with the parent, must (1) temporarily place the student in a setting which appears to be most suited to the student’s needs and (2) either adopt the prior IEP or develop, adopt, and implement a new IEP within sixty days of enrollment. 34

C.F.R. §200.323(e) and 14 *Del. Admin. C.* §925.10.4. Student entered HRYCI on January 4, 2019. T172. APER did not have an IEP in place for Student until April 30, 2021. S12; A9. There is no record of APER holding an IEP Team Meeting or otherwise providing Student with special education in 2019 or 2020.

Once an IEP is adopted, the LEA must “ensure that...the IEP team reviews the child’s IEP...not less than annually[.]” 34 C.F.R. §200.324(b) and 14 *Del. Admin. C.* §925.11.7. The record shows that APER did not hold an IEP Team meeting again from April 2021 until January 19, 2023. T127, 273.

The Hearing Panel finds that Student was denied a FAPE as a result of the failure of APER’s to adopt, develop, implement, and review Student’s IEP on the schedule and with the frequency as required by the IDEA.

d. APER’s failures related to IEP meetings

An LEA is responsible for ensuring that the “parents of each [student] with a disability are members of any group that makes decisions about the educational placement of their [student].” 34 C.F.R. § 300.327; 14 *Del. Admin. C.* §926.1.4. Student’s IEP Team did not discuss the appropriate LRE for Student at the April 2021 IEP Meeting. T377-378; A3-4. Student’s LRE was not determined at that meeting. *Id.* Also, despite acknowledging and testifying that Student’s educational programming would change, APER did not hold an IEP Team meeting nor provide prior written notice upon Student’s transfers which included: 1) to disciplinary

housing, 2) from the west side to the east side of REDACTED, 3) from the east side to Q-Pod at REDACTED, and 4) to and from REDACTED. T195-196, 250, 528.

The Hearing Panel finds that APER's failure related to holding IEP meetings denied Student a FAPE.

e. APER's failures related to access to educational records

LEAs "must permit parents to inspect and review any educational records" and "must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing... and in no case more than 45 days after the request has been made. 34 C.F.R. §200.613 and 14 *Del. Admin. C.* §3130; 14 *Del. Admin. C.* §926.1.2; 14 *Del. Admin. C.* §927.13.

The Hearing Panel finds that APER's failures related to Student's access to educational records denied Student a FAPE. The Hearing Panel's decision concerning Student's right to production of educational records is discussed more fully below in Response to Issue # 7.

5. Did APER retaliate against Student?

The Hearing Panel considers this point to be moot as Student has conceded that the Hearing Panel does not have jurisdiction over the retaliation claim pursuant to Section 504 of the Rehabilitation Act.

6. Should APER be compelled to review and revise its policies and procedures to be consistent and compliant with the IDEA?

Student asks this Hearing Panel to compel APER to review and revise its policies and procedures to be consistent and complaint with IDEA. No policies were submitted as evidence, and there was limited testimony concerning such potentially non-compliant APER policies. As such, although the Hearing Panel does agree it would be in everyone's best interest if APER were to conform its policies and procedures to be compliant with the IDEA, the Hearing Panel does not believe that it is in a position to order APER to review and review policies.

7. Should APER be compelled to provide Student's Counsel with a complete copy of Student's educational records?

APER's argument that APER is prohibited by law to provide a student's educational records to a representative or legal counsel is without merit. APER

asserts that the Delaware legislature specifically and intentionally excluded the rights conferred upon educational representatives and legal counsel the right to obtain copies of records. The Hearing Panel disagrees.

Although the pertinent legislation does not specify that Student or Parent may obtain copies through a representative, the Hearing Panel does not believe the omission of the words “either personally or through a representative” was intended to prevent Students or Parents from authorizing counsel to request records in furtherance of legal representation. In the present matter, Student, an incarcerated student, was given a stack of copies of Student’s educational records believing that Student could provide them to whoever Student wanted. T87, 644. It is unconscionable that APER provided educational records in an unsecure manner to an incarcerated student, who had no privacy, while simultaneously refusing to provide those records to Student’s counsel under the guise of being prohibited to do so by the privacy rights required by FERPA. Therefore, the Hearing Panel finds that Student authorized Counsel to request Student’s records and was entitled to receive the records, and APER’s refusal to provide the records to Student’s Counsel at Student’s request was a deprivation of FAPE.

8. Is Student entitled to compensatory education for APER’s denial of a FAPE?

The Hearing Panel finds that student is entitled to compensatory education for all of the reasons stated above in this Decision. The Hearing Panel's determination as to compensatory education is set forth more fully below in "Relief."

9. Is Student entitled to relief from January 4, 2019 – January 27, 2023?

The IDEA requires that a due process complaint alleging a violation of FAPE include a description of the nature of the problem and facts underlying the problem. The party requesting the due process hearing is precluded from raising issues at the hearing which were not raised in the due process complaint. Student sufficiently alleged FAPE violations occurring both before and after the filing of the complaint and amended complaint. The allegations are deficiencies in the IEP itself as well as in the provision of education to Student, all of which are continuing in nature. APER is properly on notice of the issues raised by Student. Evidence at the hearing demonstrated that the conditions complained of by Student have not been rectified and continued at the time of the hearing.

The United States Court of Appeals for the Third Circuit in *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601 (3d Cir. 2015) reaffirmed the standard for awarding compensatory education, holding that a child’s right to compensatory education accrues from the time the LEA knew or should have known of the injury to the child, and that the child is entitled to compensatory education equal to the period of deprivation. The court summarized the IDEA’s statute of limitations to require that once a violation is reasonably discovered by the parent, any claim for that violation, however far back it dates, must be filed within two years of the “knew or should have known” date. *Id.* at 620-21.

Student did not know, nor should he have known, of APER’s failure to meet REDACTED needs until June 16, 2022, when APER first provided Student with a copy of REDACTED educational records. As such, the Hearing Panel finds Student’s complaint in this matter to be timely and that Student’s award of compensatory services to include the time period from January 4, 2019 through January 27, 2023.

Findings

The Hearing Panel finds that APER violated Student’s Rights under the IDEA as follows:

1. APER failed to develop and implement an appropriate IEP that was designed to provide Student with a FAPE.
2. APER failed to respond appropriately to Student's behavioral needs related to Student's disabilities and therefore deprived Student of a FAPE.
3. APER failed to provide special education and related services in a placement that was Student's least restrictive environment.
4. APER engaged in myriad of procedural violations of the IDEA which resulted in a deprivation of FAPE.

Relief

Some of the violations noted above can be addressed with a specific remedy and are done so in the Order below. However, the deprivation of a Free Appropriate Education in the Least Restrictive Environment is best remedied with an award of compensatory education.

Compensatory education is a judicially created remedy that has emerged from IDEA's authority for a court to grant relief it "determines appropriate." 20 U.S.C. §1415(i)(2)(C)(iii). The remedy is to be determined on a case-by-case basis. It is the responsibility of each court to determine the appropriate relief "to

ensure that a student is fully compensated for a school district's past violations of his or her rights under the IDEA and develop an appropriate equitable award.”

D.F. v. Collingswood Borough Bd. Of Educ., 694 F.3d 488, 498-499 (3d Cir. 2012), citing *Ferren C. v. Sch. Dist. Of Phila.*, 612 F.3d 712 (3d Cir. 2010) (upholding compensatory education funds as appropriate under IDEA), and *Heather D. v. Northampton Area Sch. Dist.*, 511 F. Supp. 2d 549, 562 (E.D. Pa 2007) (utilizing fund as compensatory education remedy). An educational trust fund may be utilized by an individual over the age of 21 to compensate for denial of FAPE. *Ferren C.* at 719-720.

The Hearing Panel believes that given the circumstances in this case, an award of a certain number of hours of compensatory education to be provided by APER to Student will not be adequate. APER's own testimony as to the lack of resources, lack of staff, and other logistical and physical barriers make it clear that Student will not be able to receive a sufficient amount of compensatory education in addition to the appropriate education to which Student is entitled. Student has expressed an interest in acquiring a CDL. T605-60. An educational trust for compensatory education services may be utilized for behavior support and academic or vocational instruction. *Heather D. v. Northampton Area Sch. Dist.*, 511 F. Supp. 2d 549, 560 (E.D. Pa. 2007).

Therefore, the Hearing Panel finds that a compensatory education fund should be established to benefit Student. Such fund shall be used for Student's use both during REDACTED imprisonment to further access to higher education or vocational instruction and after Student's release for higher education or vocational instruction. Student shall have access to the compensatory education fund for a period of time beginning upon the rendering of this decision and ending five years after Student's term of incarceration has ended.

The amount of money with which the trust should be funded is calculated as follows:

The Hearing Panel finds that APER's "failure to provide specialized services permeated Student's academic and emotional well being and pervaded Student's entire day, therefore full days of compensatory education are warranted. *Jana K. v. Annville Cleona Sch. Dist.*, 511 F.Supp.3d 584, 609 (M.D. Pa 2014) A full time 12th grade student would receive 1032 hours of education from a LEA per school year. 14 Del. C. § 1049(a)(1). The Hearing Panel acknowledges that this provision pertains to school districts. However, given the absence of a similar provision pertaining to APER, and given the fact that APER serves as the LEA for the DDOC, the Hearing Panel believes that the hours set forth therein logically apply to APER. APER's school year is 12 months. 1032 hours divided by 12 months equals 86 hours per month. Student spent 36 months as a student of

APER's from the time Student arrived on January 4, 2019, until the final date of the hearing on January 27, 2023 (excluding the 12-month period where Student waived services).⁴ Thirty-six months times 86 hours equals 3,096 hours. As stated above, the Hearing Panel does not believe that an award of hours of compensatory education will provide the intended relief. Therefore, the Hearing Panel calculates the following sum of money in accordance with the prevailing Third Circuit rate for compensatory education of \$75 per hour. *Rayna P. v. Campus Cmtv. Sch.*, No. 16-63, 2018 U.S. Dist. LEXIS 135739 (D. Dist. Aug. 10, 2018) Multiplying 3,096 hours by \$75.00, the Hearing Panel finds that Student is entitled to \$232,000.⁵

Order

Based upon the foregoing, it is HEREBY ORDERED as follows:

1. APER is hereby Ordered to immediately provide a full copy of Student's educational records to Student's Counsel.
2. APER is hereby Ordered to place \$232,000 into a compensatory education fund for the benefit of Student. Such fund shall be for Student's use both during Student's imprisonment to further Student's access to higher education or vocational instruction, and after Student's

⁴ The Hearing Panel notes, as did Student's attorney, that this date is chosen as an end date for calculation purposes only, and not intended to imply that APER began providing FAPE upon conclusion of the hearing.

⁵ This calculation excludes the time period where Student waived services.

- release for higher education or vocational instruction. Student shall have access to the compensatory education fund for a period of time beginning upon the rendering of this Decision and ending five years after Student's term of incarceration has ended.
3. The Hearing Panel does not address Student's retaliation claim as Student has conceded that the Hearing Panel does not have jurisdiction.
 4. The Hearing Panel does not have jurisdiction to determine attorney fee awards, and therefore declines to make a finding on this issue. However, the Hearing Panel does find that Student is the Prevailing Party.
 5. All other relief requested by the instant due process complaint is hereby denied.

Notice of Right to Appeal

The decision of the hearing panel is a final order unless a party seeks judicial review. Any party aggrieved by the decision of the Hearing Panel has the right to seek judicial review in the U.S. District Court or the Delaware Family Court within ninety (90) days of the date of this written decision, as provided in 20 U.S.C. § 1415(i)(2) and 14 *Del. C.* § 3142.

/s/ Melissa L. Rhoads, Esq.

PANEL CHAIRPERSON

Diane Latocha

Diane Latocha, Educator Panelist

/s/ Matt Stankis

Matt Stankis, Layperson Panelist

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