This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

FINAL DECISION AND ORDER

Student's Name: K. D.

Date of Birth: [redacted]

ODR No. 16186-1415KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Catherine Merino Reisman, Esq. Reisman, Carolla, Gran, LLP 19 Chestnut Street Haddonfield, New Jersey 08033
Downingtown Area School District 540 Trestle Place Downingtown, PA 19335	Karl A. Romberger, Jr., Esq. Sweet Stevens Katz & Williams, LLP 331 Butler Avenue Post Office Box 5069 New Britain, Pennsylvania 18901

Dates of Hearing: 09/21/2015, 11/12/2015, 11/24/2015

Record Closed: 12/18/2015

Date of Decision: 01/04/2016

Hearing Officer: Brian Jason Ford

Introduction

Parents allege that the Downingtown Area School District (District) violated the educational rights of their child (Student), and seek compensatory education for the period of time that the Student attended the District and tuition reimbursement thereafter. The Parents' claims arise under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.; Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4.; and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, *et seq.*

Issues

1. Did the District violate the Student's right to a free appropriate public education (FAPE) from the start of the 2011-12 school year through December 31, 2014 and, if so, is compensatory education owed to the Student?

2. Are the Parents owed tuition reimbursement from January 1, 2015 through the end of the 2014-15 school year, the summer of 2015, and the 2015-16 school year?

Findings of Fact

This case presents a typical situation in which there is virtually no disagreement about the facts. Rather, the Parties hotly dispute what those facts mean, and how the law applies to them. Proceeding on a stipulated record would have been more efficient, but there may be very good reasons as to why the parties did not or could not reach comprehensive stipulations.

Pre-K

1. While in preschool, the Student was evaluated by the local Intermediate Unit. The resulting evaluation report (ER) indicated that the Student was under medical care for a "lazy eye," could not write some numbers without assistance, and was not performing at the same level as peers. J-3.

2. The ER concluded that the Student was not eligible for special education, but preschool teachers advised the Parents to request full-day kindergarten from the District. NT Vol III at 8-9.[1]

2011-12 School Year (Kindergarten)

3. The District offers a full-day, regular education kindergarten to students who require intensive intervention or RTII. NT at 262.

4. The District placed the Student into its full-day kindergarten program at the start of the 2011-12 school year. NT at 199-200.

[1] The transcript of this hearing was repaginated at the start of Volume III in the PDF version, which is the version that I used while drafting this decision. Citations to the transcript (NT) for Volumes I and II do not reference the volume number, but only the page number. Citations to Volume III reference both the volume and page number.

5. Approximately half way through the 2011-12 school year, the Student began to receive support and instruction from an Instructional Support Team (IST). NT at 262. The purpose of adding IST support was to more closely monitor the Student's performance and increase regular education interventions. NT at 262-263; P-2, P-3.

6. The Parents and IST team met in April of 2012 and decided that a special education evaluation was necessary. NT at 263. The Parents requested a special education evaluation on April 4, 2012. J-7.

7. The District issued a Permission to Evaluate (PTE) form on April 27, 2012. The Parents signed and returned the form the same day. J-8.

8. The District's school psychologist advised the Parents that they should wait until after Kindergarten to evaluate the Student. After Kindergarten, a broader range of testing is available (some tests are not designed to be administered to students who have not reached first grade). NT at 202, 264, Vol III at 12. The Parents agreed to wait. NT at 264.

2012-13 School Year (1st Grade)

1. The District evaluated the Student and drafted an ER, which was completed and presented to the Parents at a "feedback meeting" on August 29, 2012. J-10, J-12.

2. The ER included a classroom observation conducted the prior school year on April 30, 2012, input from the Student's Kindergarten teachers, parental input, and a summary of the Student's academic performance from Kindergarten (which was not numerically quantified, but was reported as low). J-12.

3. The District's school psychologist assessed the Student's cognitive ability using a WISC-IV. This revealed that the Student's Full Scale IQ was in the Low Average range. The Student's Verbal Comprehension and Working Memory were both in the Average range. However, the Student's Perceptual Reasoning and Processing Speed were both in the Borderline range. J-12.

4. The District's school psychologist determined that the Student met diagnostic criteria for ADHD based on the results of an ADHD Rating Scale: Home and School Version. J-12.

5. The District's school psychologist also had parents and teachers complete a BRIEF. Both parents and teachers rated the Student with clinically significant T-Scores on several scales. However, the psychologist did not draw any direct diagnostic conclusions from the BRIEF. J-12. The results of the BRIEF are consistent, however, with the ADHD diagnosis in that they suggest difficulties with impulsivity and organization. The same is true of a BASC-2 that was completed by teachers.[2]

6. The District's school psychologist assessed the Student's academic ability using select subtests of the WIAT-III. The Student scored in the Average range on the Oral Language Composite, although some scores were depressed by the Student's processing speed. The Student scored in the Below Average range in both the Total Reading and Basic Reading

[2] The Parents omitted a section of the BASC-2, and so some parental scores could not be obtained. J-12.

composites. The Student's early reading skills (the ability to recognize letters and their sounds) was tested at the "extremely low range." J-12.

7. On the same assessment, "[Student] was unable to read any of the common grade level sight words or nonsense words presented. A score could not be obtained on the Oral Reading Fluency subtest because [Student] was unable to read the passages presented." J-12.

8. On the same assessment, the Student was tested in the Below Average range for written expression, and the Student's alphabet writing fluency was in the 1st percentile (because, in part, the Student reversed several letters when writing them and could not write others). J-12.

9. On the same assessment, the Student scored in the Below Average range in both Mathematics and Math Fluency. J-12.

10. The ER concludes that the Student qualifies for special education with a primary disability category of Specific Learning Disability (SLD) and a secondary category of Other Health Impairment (OHI). J-12.

11. Immediately after the "feedback meeting," the Student's soon-to-be special education teacher sought to observe the Student in school. J-11.

12. The District convened an IEP team meeting and offered an IEP to the Parents on September 14, 2012. J-14. The Parents approved the IEP via a NOREP on September 17, 2012. J-15. The District received the signed NOREP on September 20, 2012. J-15.

13. The 2012 IEP summarizes the ER and includes several goals. Goals included:
    a. a baselined, measurable, objective goal for letter naming and letter sound fluency,
    b. a measurable, objective letter writing goal,
    c. a measurable, objective rhyming goal (which helps develop reading skills),
    d. a measurable, objective reading comprehension goal,
    e. a measurable, objective writing goal,
    f. a measurable, objective goal for starting and completing tasks,
    g. a measurable, objective math facts goal, and
    h. a measurable, objective math calculation goal. J-14.

14. The 2012 IEP provides several modifications and specially designed instruction (SDI) to enable the Student to achieve the IEP's goals. J-12. The SDIs are consistent with the recommendations in the ER. *c/f* J-12, J-14.

15. The 2012 IEP concluded that the Student was not eligible for extended school year (ESY) services, but that the IEP team would review that determination by February 28, 2013. J-14.

16. The 2012 IEP places the student in a supplemental level of learning support. J-14. More specifically, the Student received three hours per school day of learning support instruction.

17. The Student was educated in accordance with the IEP from September 17, 2012 through the end of the 2012-13 school year. However, the Student's program was informally modified in January of 2013. The Student's special education teacher was not satisfied with the Student's progress with letter naming and letter sounds, and changed the Student's homework to reinforce those skills. At the same time, the special education teacher sent

home a packet of stories to reinforce the phonics program that the District had put in place for the Student. J-16.[3]

18. On February 25, 2013, the District determined that the Student qualified for ESY services in the summer of 2013. ESY eligibility was based on the conclusion that the Student would regress over the summer break and that summer programming would enable the Student to continue to make progress. Like when modifying the Student's homework, the special education teacher again noted the need for "consistent repetition" so that the Student could acquire skills. J-18, J-20.

19. The Student's special education teacher had concerns about the Student's visual and motion skills. On March 18, 2013, the District requested an Occupational Therapy (OT) screening from a private agency that the District contracts with for that purpose. The purpose of the screening was to determine whether an OT evaluation was necessary. J-21.

20. On March 25, 2013, the Student's IEP team reconvened to add ESY to the Student's IEP. J-23. Specifically, the District offered and the Parents accepted three hours of academic support, three days per week, from July 1, 2013 to August 1, 2013. J-23, J-24.

21. On June 3, 2013, the Student's IEP team reconvened to develop an IEP for the upcoming 2013-14 (2nd grade) school year. J-31.

22. The June 2013 IEP included updated data and teacher input from the 2012-13 school year. The IEP goals were mostly unchanged (changes are noted herein), but baselines were updated. Goals included:
    a. a baselined, measurable, objective goal for letter naming and letter sound fluency (this goal is unchanged, but the baseline went up from 11 to 24),
    b. a measurable, objective letter writing goal (this goal is unchanged and still not benchmarked),
    c. a measurable, objective rhyming goal - which helps develop reading skills (this goal is unchanged and still not benchmarked),
    d. a measurable, objective reading comprehension goal (this goal is different in that the level of the reading probe is now at the "first/second" grade level and the Student is not expected to answer both literal and inferential questions),
    e. a measurable, objective writing goal (this goal is different in that it expects the student to write more, going from 1 sentence to "1-3 sentences"),
    f. a measurable, objective goal for starting and completing tasks (this goal is the same),
    g. a measurable, objective math facts goal (this goal is the same), and
    h. a measurable, objective math calculation goal (this goal is different as it has moved from number correspondence to addition and subtraction). J-31.

23. The modifications and SDIs in the June 2013 IEP are mostly unchanged. However, the June 2013 IEP explicitly included "an evidence based multi sensory reading and writing program" for 2.5 hours in the Student's Language Arts class. J-31.

[3] The parties do not suggest that this type of change required an IEP revision. If they had, I would find that it does not. An IEP need not (and should not) program every moment of a student's day or pre-plan individual homework assignments. Rather, this finding illustrates that the Student's special education teacher was aware of the Student's actual progress, found that lacking, and took steps to improve the situation.

24. The Student remained eligible for ESY. J-31.

25. The June 2013 IEP continued to offer a supplemental level of learning support. J-31.

26. The Parents approved the IEP via a NOREP on June 3, 2013. J-32.

27. The Student had the same special education teacher in 1st and 2nd grade. On August 26, 2013, the Parents wrote to the special education teacher stating concerns with the ESY program. Specifically, the Parents were not happy with the communication from the ESY program and the Student's performance on work completed in the ESY program. The Parents also asked about testing for dyslexia and dysgraphia, and asked if the District offered the Wilson reading program. J-35.

28. The special education teacher responded that the District offered Wilson but only in intermediate grades, but the Student would receive a "program that has a similar methodical and sequential approach, but it is geared towards primary age students." J-35. The special education teacher also said that school psychologists do not diagnose dyslexia or dysgraphia, but offered to put the parents in touch with the school psychologist. J-35.[4]

2013-14 School Year (2nd Grade)

29. On September 5, 2013, the special education teacher wrote to the Parents, suggesting that the Student may benefit from a behavior chart. The teacher drafted a proposed chart and sent that to the Parents by email. The Parents approved it. J-36.

30. During the prior school year, the Student's reading program included Harcourt/Project Read. The District changed the Student's reading program to Fundations, a program developed by Wilson Reading, in response to unsatisfactory progress under the prior system. *See, e.g.* NT at 100.

31. The Student took Fundations placement tests on October 3, 2013 and placed at Level 1. The Student received instruction using Fundations for the remainder of the 2013-14 school year. NT 100-105.

32. Fundations, like Wilson itself, is a leveled program. The levels correspond to mastery of certain reading skills, as opposed to grade levels. When implemented with complete fidelity, students are not promoted to a new level without mastering the current level.

33. Similarly, within each Fundations level there are different units. Both parties agree that mastery is required before moving from level to level. No evidence was presented about what is required to move from unit to unit within the same level, or if that concept is even applicable. Regardless, the Student did not meet mastery criteria (80% or better) in seven of the 11 units taught in 2nd grade. J-121.

34. Significant evidence was presented regarding the Student's progress through the Fundations program. J-117, J-118, J-119, J-120, J-121. Notably, placement tests were administered on October 3, 2013 and August 27, 2014. Comparison of skills assessed at each point in time reveals the following:
    a. Name Letters: 75% / Level K to 95% / Level 1
    b. Sound to Letter Correspondence: 80% / Level 1 to 100% / Level 2

[4] The Parents' email at J-35 does not constitute a request for an evaluation.

c. Write Letters/Words: 70% / Level 1 to 80% / Level 1
d. Read Words: 20% (no level) to 48% / Level 1.

35. In addition to Fundations, the Student also participated in the District's regular education writing program, called "Being a Writer." NT at 117-118.

36. The OT screener completed in the prior school year suggested the need for an OT evaluation, which was completed. The Student's IEP was revised on November 25, 2013 to include the results of the OT evaluation and add OT goals and related services. The IEP was also changed to reflect the Student's receipt of Fundations. J-40.

37. On March 14, 2014, the District issued a NOREP, specifying what ESY services it was proposing for the summer of 2014. Specifically, the District offered academic support four days per week and OT for 30 minutes per week from June 30, 2014 through July 31, 2014.The Parents approved the NOREP. J-46.

38. The IEP team reconvened on May 29, 2014, to develop an IEP for the upcoming 2014-15 school year. J-51.

39. Present levels were updated in the May 2014 IEP to reflect the Student's progress since the 2013 IEP. Notably, the Student consistently achieved very high scores on both literal and inferential comprehension questions after hearing a passage read aloud, and had also mastered the rhyming goal. The IEP also states that the Student was earning an average of 87% in end of unit phonics tests (i.e. Fundations levels), but that the Student was re-tested when not obtaining passing scores. The Student had mastered the letter sounds goal, but had not mastered the letter naming fluency goal.[5] The IEP also reports substantial progress in writing, math and on-task behavior, but with the use of prompts and supports. J-51.

40. The letter naming fluency goal remained in the IEP, but the baseline increased from 24 to 34, and a nonsense word reading fluency goal was added. J-51. The letter writing goal was removed. J-51.

41. The comprehension (both literal and inferential) goal remained, but the student was expected to answer questions about passages at the second grade level. In the prior year, the goal was set at the "first/second" grade level.

42. The writing goal was increased. When the May 2014 IEP was drafted, the Student could write 3 sentences with prompting "to assist capitalization, punctuation and spelling" – essentially mastery of the prior year's goal. The expectation now was for the Student to complete three to five sentences. However, the IEP does not state the level of assistance that the Student should receive when progress towards the goal is measured. J-51.

43. The time on task goal remained, but was now baselined. The baseline shows that the goal was nearly mastered. The goal calls for mastery at the 90% level and the Student was performing at the 80% level. J-51.

[5] Letter naming *fluency* does not measure whether a student knows the names of letters, but rather whether the Student can quickly provide the name of a letter. Failure to meet a letter naming fluency goal does not suggest that the Student does not know the names of the letters of the alphabet.

44. The math goal was modestly increased, and a baseline was added showing that the Student had mastered the prior math goal. J-51.

45. OT goals added in the prior revision were maintained. J-51.

46. Modifications, SDIs, and related services remained substantively unchanged, and the District continued to recommend supplemental learning support. J-51. A recommendation for a functional vision assessment was added to the SDIs. J-51.

47. The District offered the May 2104 IEP with a NOREP on May 29, 2014. J-52.

48. The special education teacher sent an email to the Parents on June 4, 2014. In that email, the special education teacher requested a meeting, acknowledged that the Parents had concerns about the IEP, and that she (the teacher) would like to make additional changes. The special education teacher recommended that the Parents check a box on the NOREP to request an informal meeting. This, the teacher said, would prevent the IEP as written from going into effect 10 days after the NOREP was issued. J-54.

49. The Parent followed the special education teacher's recommendation by checking the box on the NOREP to request an informal meeting. The Parents returned the NOREP to the District on June 6, 2014. J-52.

50. An informal meeting convened on June 13. 2014. Testimonial evidence about what occurred during that meeting is contradictory. There is no evidence that the May 2014 IEP was revised after the meeting, despite the special education teacher's email of June 4, 2014.

51. The District issued a NOREP on June 13, 2014, re-offering the May 2014 IEP. The NOREP was not returned, and so the IEP became effective on June 23, 2014. J-56.

52. Parents hired the special education teacher to tutor the Student, at Parents' expense, during the summer of 2014. NT Vol. III at 17-18. The Student also attended the District's ESY program in the summer of 2014. J-61.

53. On July 21, 2014, the Parents obtained an independent educational evaluation (IEE) at their own expense. Specifically, the evaluation was a private, neuropsychological evaluation. The District was unaware of this action. The evaluator, a doctoral level certified psychologist, made no contact with the District. J-66.

54. The evaluator drafted a Neuropsychological Evaluation Report. It is not clear when the Parents obtained that report. J-66.

Independent Educational Evaluation[6]

55. For reasons described below, I give very little weight to the IEE at J-66. It is not disputed that the Student's IQ is intact, that the Student's academic abilities relative to same-aged peers as measured on norm-based testing is significantly impaired, and that the Student has attentional difficulties that impact upon the Student's executive functioning skills. Similarly, it is not disputed that the Student's disability is exceptionally severe. To the extent that the IEE reaches the same conclusions, I accept it.

[6] Refer to the section below on witness credibility for more.

56. The IEE is the first document to diagnose the Student with Developmental Dyslexia, Mathematics Disorder, and Cognitive Disorder, NOS (using ICD-9 diagnostic criteria). To the extent that these medical diagnoses are consistent with the District's eligibility determinations under the categories of SLD and OHI, I accept them as well. J-66.

57. To the extent that the IEE makes broad, sweeping conclusions that the District's programming is inappropriate for the Student, cannot be made appropriate for the Student, and that the Student can be educated only in a specialized school, I reject it. *See, e.g.* J-66 at 18-19, where the report uses language that is very obviously code for saying that a private placement is necessary.

2014-15 School Year (3rd Grade) – Start of School Year through Private Placement

58. The student was assigned to a different special education teacher for the 2014-15 school year. On August 25, 2014, the special education teacher completed paperwork to start a functional vision evaluation, as was required by the SDIs in the Student's IEP. J-51, J-62, J-63. The Parents consented to the evaluation. J-64. The evaluation was conducted by the local intermediate unit.

59. On September 22, 2014, the Parents sent an email to the District, saying for the first time that they obtained an IEE and were working with an educational advocate. A copy of the IEE was attached to the email. J-65. The Parents requested a meeting to discuss the IEE. The Parents also expressed a hope that the District would not require further testing, but asked the district to promptly issue a PTE if more testing was necessary. J-65.

60. On September 24, 2014, the Parents sent another email to the District, saying that their evaluator would observe the Student in school on October 9, 2014.[7]

61. On September 26, 2014, the intermediate unit completed the functional vision evaluation and sent a report to the District. Based on the report, the Student qualified for vision services, and the intermediate unit recommended adding vision support to the Student's IEP. J-72, J-74.

62. In response to the Parents' request for a meeting, the District convened the Student's IEP team on October 6, 2014. J-75. The Parents were invited to that meeting on September 29, 2014. The District received confirmation that they would attend on September 30, 2014.

63. On October 1, 2014, the District issued a PTE form. According to the form, a review of existing data (the functional vision evaluation and the IEE) prompted the District to obtain additional data. The District requested to administer "selected subtests" of intellectual function assessments, academic achievement tests, an FBA and an assistive technology assessment. J-76. The Parents consented to the evaluation the same day. J-76.

64. The IEP team met on October 6, 2014 with the Parents' advocate in attendance. The IEP was revised to include vision accommodations and include a verbatim copy of the functional

[7] This email, and the email of September 22, mark an abrupt and dramatic shift in the Parents' writing, probably attributable to the influence of their advocate or of the evaluator. For example, the Parents did not ask the District if the evaluator could observe. Rather, they told the District that the evaluator would be observing. To its credit, the District took this email as a request, and said that it would accommodate the observation, provided that the evaluator complied with its visitation policies. J-73.

vision assessment. The IEP also referenced the IEE, noting that a copy was available in the Student's file. The results of the independent testing are not reported in the IEP. J-77.

65. On October 9, 2014, the District offered the October 2014 revised IEP via a NOREP. The Parents checked boxes on the NOREP both approving and disapproving the IEP, with a note to see an attached letter, written by their advocate. Neither the NOREP nor the letter specify which parts of the IEP are approved or disapproved. Rather, the letter explains that the Parents checked both boxes because they were "hopeful" that the Student would make progress but "remained significantly concerned about the appropriateness of [the Student's] programming". J-81.

66. The District conducted an FBA, as approved by the parents in the PTE, in part to determine whether the Student required a 1:1 aide. There is conflicting testimony about whether or when the Parents suggested that an aide may be appropriate for the Student. The District determined that the Student did not need a behavior support plan, but would benefit from an aide. The Parents rejected this offer, fearing that it would make the Student stand out. J-79, J-92, NT at 103, 160.

67. The District completed its own reevaluation report (RR) on November 25, 2014. In addition to providing updated information from the classroom, the RR repeated the WISC-IV and the WIAT-III, which then can be compared to the ER from 2012. J-91.

68. According to the new WISC-IV administration, the Student's full scale IQ had gone up into the Average range. The Student's Verbal Comprehension and Working Memory both remained in the Average range. Perceptual reasoning had improved significantly, from the borderline range to the average range, and processing speed had increased from the borderline range to the low average range. C/f J-91, J-12.

69. According to the new WIAT-III administration, The Student remained in the Average range on the Oral Language Composite, although some scores were depressed by the Student's processing speed. The Student scored in the Low [Average] range, an increase from the Below Average range seen in the prior testing[8] in the Total Reading composite. The Basic Reading composite stayed in the Below Average range.

70. On the same assessment, the Student's early reading skills improved from a standard score of 59 (in the 0.3 percentile) to a standard score of 83 (in the 13th percentile). While a classification is not reported in the 2014 administration, the percentile scores suggest a rather significant improvement – but in *early* reading skills. C/f J-91, J-12.

71. On the same assessment, word reading scores decreased somewhat from a standard score of 78 (7th percentile) to 70 (2nd percentile). Pseudo word decoding increased somewhat from a standard score of 76 (6th percentile) to a standard score of 85 (16th percentile). C/f J-91, J-12.

72. On the same assessment, reading comprehension and oral reading fluency were both tested below grade level. As such, the validity of the scores is questionable, as is the ability to compare the 2014 testing to the 2012 testing. However, albeit at a reduced grade level,

[8] The Parents note that the Student's standard score in Total Reading fell from 78 to 68. This does not account for the change in the normative sample, based on the Student's age in the new administration, which actually places the Student in a stronger position relative to same-aged peers in 2014 as compared to 2012.

the District was able to obtain an oral reading fluency score (something that was not possible in the prior testing). C/f J-91, J-12.

73. On the same assessment, the Student's scores in written expression remained in the Below Average range, as did the mathematics and math fluency scores. C/f J-91, J-12.

74. The RR includes many recommendations to the IEP team. J-91.

75. The IEP team convened again on December 15, 2014. J-99. The IEP drafted during that meeting includes many changes. The present levels section was updated to reflect the RR and current classroom performance. J-99

76. The nonsense word fluency goal completely overtakes the letter naming goal in the December 2014 IEP. The baseline for that goal increased from 35 to 46, and the goal remained at 68. C/f J-77, J-99

77. The Comprehension goal remained the same. C/f J-77, J-99.

78. The writing goal remained at three to five sentences, but now the expectation was to have a topic sentence, supporting details, and a concluding sentence. The goal does not specify what level of prompting will be used when measuring data. C/f J-77, J-99.

79. A new math goal was added calling for the student to correctly complete 21 problems at the 2nd grade level on three out of four bi-weekly, timed math tests. The baseline was 14 problems correct. J-99.

80. The vision and OT goals were maintained. C/f J-77, J-99.

81. New reading fluency and reading comprehension goals were added. The new reading goal called for the Student to read 67 words per minute with 85% accuracy on the first grade level (from a baseline of 13 words per minute with 81% accuracy). The new comprehension goal is tied to "maze" assessments that are part of the Student's curriculum. The goal called for the Student to improve from one correct response to eight correct responses on three out of four probes. J-99.

82. A new goal was added to improve the Student's ability to complete worksheets and assignments within the allotted time, using a checklist of steps to follow. J-99.

83. Modifications and SDIs were revised to include the following:
    a. Direct, evidence based, multisensory reading instruction for 45 minutes per day with an additional 10 minutes of 1:1 assistance for reinforcement.
    b. Direct, evidence based math instruction for 60 minutes per day.
    c. Direct instruction using an evidence based writing program for 45 minutes per day.

84. Other modifications, SDIs and supports remained in place. J-99.

85. At the time the December 2014 IEP was drafted, the Parents' evaluator had recommended abandonment of the Student's current reading program. While the IEPs do not spell out brand-name programs, the District was proposing to discontinue Fundations and add both

SRA/Corrective Reading and FastForward. These are research-based programs that provide phonics and reading comprehension instruction.[9] *See, e.g.* NT 151, 167, 271-76.

86. The day after the IEP team convened, December 16, 2014, the Parents sent a letter to the District by email stating several concerns. The Parents described the Student's progress as "minuscule." They stated their agreement with the IEE, which recommended a "drastic" change in programming with "language-based instruction across [the Student's] entire day." J-101.

87. The District offered the December 2014 IEP with a NOREP also dated December 15, 2014. The Parents received that NOREP on December 19, 2014. The Parents disapproved the IEP on December 23, 2014. With the NOREP, the Parents sent a lengthy letter providing the District with ten days' notice of their intent to withdraw the Student, place the student at private school for students with disabilities (Private School), and seek tuition reimbursement.

2014-15 School Year – Private Placement

88. None of the witnesses who testified at the hearing have any affiliation with the Private School. None of the witnesses have observed the Student in the Private School.[10]

89. Documents from the Private School were admitted via stipulation. NT at 29. These include:
    a. "Occupational Therapy Weekly Documentation" (P-30), which catalogues the OT services that the Student received at the Private School from January 15, 2015 through February 19, 2015,
    b. "Student Program and Progress Report - Third Trimester" (P-31), which provides a narrative assessment of the Student's progress in each class, with annual goals for some classes.
    c. "Annual Occupational Therapy Report/Comprehensive Evaluation" (P-32), dated May 19, 2015. This report recommends continuation of OT two times per week for an unspecified amount of time each session.
    d. Various AIMSweb reports comparing the Student's performance upon entering the Private School and at the end of the school year. These reports all show modest progress.
    e. Notes and work from a reading tutor (P-34) which show the Student's exemplary performance in the Wilson Reading System.

90. The Parents enrolled the Student in the Private School's summer tutoring program on June 10, 2015. P-36, P-38.

2015-16 School Year (4th Grade)

91. The Student continued attending the Private School in the 2015-16 school year, and currently attends the Private School as of the date of this decision.

[9] The Parents note that these programs are not endorsed by certain foundations, but provide no credible evidence to contradict the District's testimony on the efficacy of these programs.
[10] It is easy to assume that the Parents have observed the Student in the Private School, but there is no evidence if they did or, if they did, what they observed.

Credibility

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit,* 2003 LEXIS 21639 at *28 (2003); *See also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

In this case, except as noted, all witnesses testified credibly in that they answered questions to the best of their abilities, were explicit in what they could and could not recall, and sought clarification when appropriate.

Unfortunately, the Parents' expert's credibility was tarnished. The expert went beyond the role of an evaluator and became an advocate for the Parents. Based both on the evaluator's report and the evaluator's testimony, as a whole, I conclude that the evaluator knew that the Parents wanted to place the Student in a private school, and drafted the IEE in an effort to help the Parents obtain that goal. When questioned about why the evaluator did not seek input from the District, the evaluator responded that she did not want to be prejudiced by the District's opinions. Perhaps this is wise. However, remaining willfully ignorant of the District's programming after the evaluation while, at the same time, concluding that the District cannot educate the Student is incomprehensible. The evaluator made sweeping (and often wrong) assumptions about what the District can do, and then relied upon those assumptions to assist the Parents to reach a *placement* goal (as opposed to making programmatic recommendations). In doing so, the evaluator purposefully avoided actions that would have corrected inaccuracies, quickly concluded that the Student required a private school, and then took an active part in the Parent's effort obtain that goal.

Similarly, the evaluator's hyperbolic rhetoric also diminished her credibility. Reading the IEE in isolation leaves the impression that the Student's progress in the District was "nonexistent" (the Parents' words describing the Student's progress as measured by the IEE – reasonable language to summarize that document). J-80. While nobody can fault the Parents for challenging the meaningfulness of Student's progress, rounding that progress down to nothing is not helpful, and detracts from the Parents' case.

Importantly, nothing suggests that the evaluator's testing is invalid. Rather, the conclusions that the evaluator drew from the testing and review of the District's documents cannot be given credence. The evaluator was not simply trying to paint an accurate picture of the Student to inform an IEP team. Rather, the evaluator was actively advancing the Parents' position and working to help them achieve their goal.

Finally, it must be noted that in special education hearings it is a near universal truth that school evaluations are used by schools as evidence to support their positions and that private evaluations are used by parents as evidence to support their positions. Whoever conducts the evaluation, it must start with an assessment of the Student's needs. That assessment is then used to make programmatic recommendations and, in some cases, placement recommendations. But when an evaluator starts with a program or placement goal, and then interprets data to help achieve that goal, the evidentiary value of that evaluation is significantly diminished, whichever side presents it.

Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parents the party seeking relief and must bear the burden of persuasion.

Statute of Limitations

Recently, the Third Circuit addressed the IDEA's statute of limitation in *G.L. v. Ligonier Valley Sch. Dist. Auth.*, No. 14-1387, 2015 WL 5559976, at *11 (3d Cir. Sept. 22, 2015). Debate about the proper interpretation and application of that case, particularly at the due process level, has raged since. However, that debate is inapposite in this case, and the District's arguments about untimely claims are moot. The District argues that claims arising before April 23, 2013 (two years before the Parents filed their complaint) are barred. The District raises this argument for the first time in its closing statement. But the IDEA's statute of limitations is an affirmative defense. If it is not raised, it is waived. I am aware of no law, regulation, or jurisprudence that says when affirmative defenses must be raised in a due process hearing, and I will not specifically resolve that issue here. Rather, in the absence of guidance, I conclude that affirmative defenses must be raised sometime before the conclusion of the evidentiary hearing.[11] As a result, I will consider the full scope of the Parents' claims and demands, which go back to September of 2011.

Free Appropriate Public Education (FAPE)

As stated succinctly by former Hearing Officer Myers in *Student v. Chester County Community Charter School*, ODR No. 8960-0708KE (2009):

> Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412;

[11] The District further argues that the Parents had actual knowledge of their potential claims at every moment, and knew of the District's actions forming the basis of their complaint as those actions occurred. Both arguments would have been on point for a *Ligonier* analysis, had the IDEA's statute of limitations been raised. I further note that there is strong evidence in favor of the District's assertion concerning the Parents' knowledge.

Board of Education v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer a meaningful educational benefit to the Student in the least restrictive environment.

Compensatory Education

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

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

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia,* 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach was endured by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and, more recently, the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* and explaining that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA.").

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

> "… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the

> evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. *See also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.,* 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila*., Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F., Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006)*; *M.L. v. Marple Newtown Sch. Dist.,* ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.,* ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

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

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona.* If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education is warranted. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Tuition Reimbursement

To determine whether parents are entitled to reimbursement from their school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). This is referred to as the *"Burlington-Carter"* test.

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).The steps are taken in sequence, and the analysis ends if any step is not satisfied.

Section 504 / Chapter 15

"Eligibility" under Section 504 is a colloquialism – the term does not appear in the law. That term is used as shorthand for the question of whether a person is protected by Section 504. Section 504 protects only "handicapped persons," and the question of whether a student is a handicapped person calls for an inquiry into how that term is defined. The definition is provided in the Section 504 regulations at 34 CFR § 104.3(j)(1): "Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."

The test is somewhat more defined under Chapter 15. Chapter 15 defines a "protected handicapped student" as a student who:

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

See 22 Pa. Code § 15.2.

If a student is a handicapped person, Section 504 prevents school districts from discriminating on the basis of disability by denying the student participation in, or the benefit of, regular education. *See* 34 C.F.R. Part 104.4(a). Unlike the IDEA, which requires schools to provide special education to qualifying students with disabilities, Section 504 requires schools to provide accommodations so that students with disabilities can access and benefit from *regular* education.

Chapter 15 also defines a service agreement as a "written agreement executed by a student's parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected handicapped student."

After providing these definitions, Chapter 15 explains what schools must do for protected handicapped students at 22 Pa Code § 15.3:

> a "school district shall provide each protected handicapped student enrolled in the district, without cost to the student or family, those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities."

From this point, Chapter 15 goes on to list a number of rules describing what must happen when a schools or parents initiate evaluations to determine if students are protected handicapped students.

After evaluations, Chapter 15 goes into more detail about service agreements. In doing so, Chapter 15 first sets out rules for what must happen when parents and schools are in agreement at 22 Pa Code § 15.7(a):

> If the parents and the school district agree as to what related aids, services or accommodations should or should no longer be provided to the protected handicapped student, the district and parents shall enter into or modify a service agreement. The service agreement shall be written and executed by a representative of the school district and one or both parents. Oral agreements may not be relied upon. The agreement shall set forth the specific related aids, services or accommodations the student shall receive, or if an agreement is being modified, the modified services the student shall receive. The agreement shall also specify the date the services shall begin, the date the services shall be discontinued, and, when appropriate, the procedures to be followed in the event of a medical emergency.

When parents and schools cannot reach an agreement, a number of dispute resolution options are available, including formal due process hearings. 22 Pa Code §§ 15.7(b), 15.8(d).

Jurisdiction to Hear ADA Claims and ADA Standard

The District does not directly challenge my authority to hear ADA claims. However, my authority to hear ADA claims is not clear, and so I am compelled to address that issue.

Often, 34 CFR §300.507(a)(1) is cited as the basis of ODR's jurisdiction. This is an oversimplification. The referenced regulation establishes the right of a parent or public agency to request a due process hearing to resolve IDEA disputes. Were that the sole basis of ODR's jurisdiction, ODR would have no authority to hear claims arising under Section 504. ODR's authority to hear Section 504 claims is well-established.

It is instructive, however, to examine the basis of ODR's jurisdiction to hear IDEA claims as a starting point for an analysis of ODR's authority to hear ADA claims. Although the IDEA establishes the right to a due process hearing, much is left to the states to create a system of administrative dispute resolution. In Pennsylvania, the Commonwealth's special education regulations empower the Secretary of Education to establish such a system. *See* 22 Pa. Code § 14.162. Pursuant to this authority, Pennsylvania created ODR both to adjudicate IDEA claims, and to provide resources for parents and educational agencies to resolve educational disputes for children served by the early intervention system, students who are gifted, and students with disabilities.

As with the IDEA, Pennsylvania also has its own regulations for the implementation of Section 504. These regulations cite back to the Commonwealth's special education regulations, establishing that ODR has jurisdiction over Section 504 claims.

Unlike the IDEA and Section 504, there is no clear statute or regulation that serves as the basis of ODR's jurisdiction to hear ADA claims. This conspicuous lack of authority strongly suggests that ODR has no ADA jurisdiction.

In light of the nonexistent state-level statutory basis for ODR's ADA jurisdiction, it is remarkable that the IDEA's federal regulations impose an administrative exhaustion requirement on ADA claims whenever the IDEA is implicated. Whenever a parent or student may seek relief under both the IDEA and the ADA, the student or parent must exhaust the IDEA's administrative procedures before bringing an ADA civil action. 20 U.S.C. § 1415(l) provides:

> Rule of Construction
>
> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

See also, 34 C.F.R. § 300.516.

I do not construe this language as a requirement to pursue ADA claims within an IDEA hearing. Rather, this provision stops ADA civil actions until IDEA claims are administratively exhausted. As discussed in detail below, however, my interpretation of this language is not compatible with current case law.

This case presents the circumstances anticipated at 20 U.S.C. § 1415(l). The Parent's ADA claims are entirely derivative of their Section 504 claims. Whether or not I dismiss the ADA claims, I will hear all of the same evidence. Moreover, the Parents are not seeking remedies under the ADA in addition to remedies under the IDEA and Section 504, with the exception of declaratory relief. Consequently, resolving this jurisdictional issue will have no impact whatsoever on what will actually happen during the hearing.

Perhaps in recognition of this practical consideration, a number of judges have concluded that when parents assert ADA violations that are coextensive with IDEA violations, they are required to pursue the ADA claims during the special education due process hearing:

> Parents of children with disabilities are not limited to suing local educational authorities under the IDEA and may pursue actions under other laws, including the ADA and Section 504. However, "when parents choose to file suit under another law that protects the rights of handicapped children—and the suit could have been filed under the [IDEA]—they are first required to exhaust the [IDEA's] remedies to the same extent as if the suit had been filed originally under the [IDEA's] provisions." *Mrs. W. v. Tirozzi*, 832 F.2d 748, 756 (2d Cir.1987); *see also* 20 U.S.C. § 1415(l).

R.B. ex rel. L.B. v. Board of Educ. of City of New York, 99 F.Supp.2d 411, 415 (S.D.N.Y., 2000).

See, also, Hesling v. Avon Grove School Dist., 428 F.Supp.2d 262, 276 -277 (E.D. Pa., 2006):

> In count five of her complaint, Ms. Hesling asserts an attendant claim under §1983 for violation of the IDEA (as well as claims under §1983 for violations of

> the ADA and Section 504, discussed infra). She seeks both monetary damages and declaratory relief for violation of § 1983. Here again, some of the relief Ms. Hesling seeks is available under the IDEA and exhaustion is therefore required for Ms. Hesling to proceed with this claim. *Cf. W.B.,* 67 F.3d at 495 (finding that money damages are available in a § 1983 action premised on a violation of the IDEA, but "observ[ing] that the exhaustion requirement may not be circumvented by casting an IDEA claim as a § 1983 action predicated on IDEA").

Another clear indication that ODR has jurisdiction to hear ADA claims is found in *Swope v. Central York School District*, 796 F.Supp.2d 592 (M.D. Pa. 2011). In *Swope* the parent requested a due process hearing, and raised only IDEA claims during the hearing. After the hearing, the parent raised derivative Section 504 and ADA claims for the first time in the district court. The district court dismissed the Section 504 and ADA claims because Parent had not included those claims in the due process complaint. In doing so, the district court explicitly rejected the parent's argument that administrative exhaustion of ADA claims was not required because the hearing officer lacked jurisdiction over the ADA. To the contrary, as in the *Hesling* case, the court concluded that administrative exhaustion was required if some of the relief demanded under the ADA was also available under the IDEA. *Id* at 599-600.

It would be exceedingly weird for a court to force parents to present ADA claims within a special education due process hearing if ODR had no jurisdiction over ADA claims. Such a result would place parents in an awkward position: they would have to present ADA claims to hearing officers knowing that those hearing officers had no jurisdiction to hear those claims, or risk losing the right to bring an ADA civil action at the conclusion of the due process hearing.

The *Swope* court never explicitly says that ODR has jurisdiction to hear derivative ADA claims (meaning that the ADA claims arise out of the exact same actions or omissions as the IDEA and § 504 claims, and the same relief is sought). However, the only logical way to read *Swope* – the only way that avoids an absurd result – is that parents do not get two bites at the apple. If relief is available under the IDEA or Section 504, parents may not double their total remedy by seeking the same relief a second time through an ADA civil action. For this reason, ADA claims that are derivative of IDEA or Section 504 claims must go to ODR first. That way, a hearing officer may award all of the relief that a parent may be entitled to at the administrative level, satisfying all administrative exhaustion requirements in one fell swoop.

The focus on the coextensive relief available for derivative ADA claims is apparent not only in *Swope*, but also in every other case in Pennsylvania to consider the issue. All of the case law on this issue clearly indicates that when the entirety of the demanded relief can be obtained administratively, all claims must proceed through a due process hearing before going to court. In *Batchelor v. Rose Tree Media Sch. Dist.*, 2013 U.S. Dist. LEXIS 44250(E.D. Pa., 2013), the court dismissed ADA and Section 504 claims for failure to exhaust administrative remedies because the parents could obtain all relief through an IDEA due process hearing. This focus on the availability of relief at the administrative level is further emphasized in *Gaudino v. Stroudsburg Area Sch. Dist.*, 2013 U.S. Dist. LEXIS 102382 (M.D. Pa., 2013). In *Gaudino,* the court found that a parent could bring a civil action under the ADA and Section 504 without first going through ODR *only because the parent was seeking relief that is not available under the IDEA. Id* at 23-24.

The most blunt statement on the issue is found in *D.F. v. Red Lion Area Sch. Dist.*, 2012 U.S. Dist. LEXIS 6925, 2012 WL 175020, (M.D. Pa., 2012):

> Defendants contend, and Magistrate Judge Methvin agreed, that because Plaintiffs did not raise their ADA or Rehabilitation Act claims at their due process hearing, that those claims are now barred. Plaintiffs counter that they were not required to exhaust their ADA and Rehabilitation Act claims at the IDEA due process hearing because the IDEA claims raised at the due process hearing were nearly identical to the ADA and Rehabilitation Act claims. The Court cannot agree. The statute and case law make clear that "IDEA-related claims brought under the ADA or the Rehabilitation Act [must] be submitted in the first instance to administrative review." *R.R. v. Manheim Twp. Sch. Dist.*, 412 F. App'x 544, 549-50 (3d Cir. 2011); *see also Swope v. Cent. York Sch. Dist.,* No. 1:10-cv-02541, 796 F. Supp. 2d 592, 2011 U.S. Dist. LEXIS 65804, at *19 (M.D. Pa. June 21, 2011)

D.F. at *18

Apart from one unpublished decision, this issue has not been addressed by Pennsylvania state courts. The unpublished decision, however, is in total agreement with the referenced federal cases. *Collins v. State,* 2013 Pa. Commw. Unpub. LEXIS 797(Pa. Commw. Ct. 2013).

In sum, there is no explicit statutory or regulatory foundation for ODR's jurisdiction to hear ADA claims. However, every court in Pennsylvania to have considered the issue has concluded that when ADA claims are entirely derivative of IDEA or Section 504 claims, the ADA claims must go through ODR before going to court. Although my reading of the applicable statutes and regulations may differ from the analysis of the various courts (particularly in regard to 20 U.S.C. § 1415(l); 34 C.F.R. § 300.516), I will not substitute my own legal analysis for the analysis of every judge to consider the issue.

Regarding what the Parents must prove in an ADA claim, I note again that I only have jurisdiction to the extent that the ADA claims and remedies overlap completely with the other claims in this case. That is, the Parents are entitled to no more remedy (other than declaratory judgment) by proving their ADA claim in addition to the others. With that recognition, the Parents correctly argue in their closing brief that the substantive law governing educational matters under these statutes "is functionally identical to that applied in the context of a claim under IDEA." *K.K. ex rel. L.K. v. Pittsburgh Pub. Sch.*, 590 F. App'x 148, 152 (3d Cir. 2014) (not precedential); *M.M. v. Sch. Dist. of Philadelphia*, 2015 U.S. Dist. LEXIS 148632, at 10 (E.D. Pa. Nov. 3, 2015).

Discussion

Compensatory Education

For the period of time that the Student was educated by the District, there is no real dispute about the Student's actual progress. Evidence of the Student's progress was collected and reported by the District, and both parties point to that evidence (both testing results and the changing baselines in IEP goals) as proof of the Student's skills.

While there is no dispute about what quantum of progress the Student achieved, or even that the amount is small, the parties interpret the evidence differently. The Parents argue that the Student's progress was trivial or *de minimis*, while the District argues that the progress was meaningful relative to the Student's severe disabilities.

The District argues, however, that the pertinent question is not how much progress the Student made, or whether that progress was meaningful. Rather, the District argues that the pertinent question is what the District did in response to the Student's progress. I do not agree that the Student's actual progress is irrelevant, but the District is correct that the law prohibits Monday morning quarterbacking. If the IEPs were reasonably calculated to provide a meaningful educational benefit at the time they were offered, and if the District modified the Student's program when it had reason to know that modification was necessary (via procedurally-compliant mechanisms), the law is satisfied. The Student's progress, therefore, creates a timeline against which the District's actions may be judged.

The District also urges me to draw a distinction between normative or norm-referenced testing (which assesses the Student's ability relative to a sample population intended to represent the Student's peers) and criterion based or criterion-referenced testing (which assesses a Student's ability to perform particular skills). There are important differences between these types of tests, and those differences have been recognized by courts and Hearing Officers. *See, e.g. J.N., et. al. v. South Western Sch. Dist.,* Civ. A. 14-0974, 2015 WL 5512291 (M.D. Pa. Sept. 15, 2015). The District correctly argues that norm-referenced testing measures the severity of the Student's disability, while criterion-referenced testing measures the Student's academic skills.

Norm-referenced testing yields statistically standardized scores that place students on a bell curve. Generally, if a student tests in middle of the bell curve two years in a row, the student has made progress. In essence, the Student has kept up with peers. At the low end of the curve, obtaining the same score year two years in a row may indicate regression. The opposite is true at the top end of the curve, where obtaining the same score year two years in a row may indicate greater progress than peers over time.[12] In my experience, norm-referenced testing is rarely identical year to year, but this general principle provides a good rule of thumb.

Criterion-referenced testing is different. These tests assess how well a student can perform various skills. These tests do not determine how a student is performing relative to peers, but how well the student performs whatever task is required by the assessment. Those tasks relate to academic skills. As such, looking at criterion-referenced test scores over time reveals what skills a student has gained.

I accept the distinctions between norm-referenced and criterion-referenced testing that the District advances. I further acknowledge that at least one court in this jurisdiction has concluded that criterion-referenced testing is a more valid indicator of progress than norm-referenced testing. *J.N. v. South Western Sch. Dist., supra*. I also agree that standardized testing alone does not paint a complete picture of any student's progress. In fact, it would be unfair to use standardized tests – or even several standardized tests – as the only measurement of a student's performance over time. Rather, performance on school work and in class can yield a more complete picture of a student than single snapshot in time. This type of evidence is not always presented with the tidy numbers and graphs of standardized tests, but when professional educators testify credibly, their testimony should be given weight.

In this case, the District was continuously aware of the Student's slow progress, and frequently tried to improve the Student's programming. In Kindergarten, the Student came in to a full-day regular education program. The Student was not performing as well as peers, but the only evaluation existing at that time said that the Student did not qualify for special education. The District was aware of the Student's performance as its full-day kindergarten follows an RTII

[12] The Parents' expert and District's school psychologist seem to agree on this point.

model. In response to this knowledge, the District had implemented IST support by midyear, and recommended a special education evaluation by April. The District's school psychologist urged the Parents to delay the evaluation until first grade, but the ER was ultimately completed on September 17, 2012, just as 1st grade was starting.

The 1st grade IEP (September 2012) was reasonably calculated to provide a meaningful educational benefit at the time it was offered. There is no evidence to the contrary. The Parents argue that even if the IEP's goals were appropriate, the IEP failed to provide sufficient SDIs for the Student to achieve those goals. If so, the IEP is not appropriate. *G.W. v. Methacton Sch. Dist.*, No. 14072-1213 KE, at 16-17 (Ford, 2013). However, unlike in the *G.W.* case, there is no evidence to support the Parents' position. The Parents point to the Student's actual progress as evidence of the insufficiency of the SDIs, but that is exactly the type of retrospective analysis that case law prohibits. Moreover, to the extent that the Student's actual progress suggested that action was required, the District acted. *See* Findings of Fact 17, 18 and 19, above.

In subsequent IEPs, the Parents point to repeated goals as evidence both of the triviality of the Student's progress and of the District's inaction in response to data. While this is the Parents' strongest argument, I respectfully disagree with it. Repeated goals are often a hallmark of inaction and stagnation. In this case, however, the goals targeted fundamental skills, and their repetition was purposeful. The District did not simply hand out the same IEP year after year. It updated each IEP to reflect the Student's levels, and revised baseline information to reflect the Student's progress towards goals that were kept in place over time.

The Parents also point to the repetition of goals to argue that the District lowered expectations in response to the Student's slow progress. Again, I respectfully disagree – and for the same reasons. The IEP goals were purposefully kept in place. This was an active choice on the District's part; an expression of the challenge of teaching even fundamental skills to the Student. More importantly, the District continued to adjust the Student's program in response to the Student's performance.

In 2nd grade, the District revised the Student's SDIs to implement Fundations. Evidence preponderantly establishes the reasonableness of that choice.[13] It was also reasonable for the District to give Fundations time to work. Fundations testing suggested progress, albeit slow, over time. J-117, J-118, J-119, J-120, J-121. Similarly, the District took action when it perceived potential OT and vision needs. Both of those hunches ultimately proved correct.

In 3rd grade, the District took action when it received the IEE. Although the District disagreed with the IEE, it considered it to the extent required by law. The District cites to *J.D. v. New York City Department of Education*, Civ. A. 14-9424, 2015 WL 7288647, 115 LRP 53991 (S.D. N.Y. Nov. 17, 2015) to stand for the proposition that school need only consider, and need not adopt, private evaluations. I agree. An IEP that does not incorporate every recommendation from a private evaluation may still be appropriate. In this case, evidence that the District took the IEE seriously is more than preponderant. In fact, the IEE prompted the District to reevaluate the Student, and modify the Student's programming. By December, the District was proposing significant changes to the IEP, all in an effort to increase the Student's rate of progress. While the District's final IEP fell short of what the Parents were hoping for, there is no credible or

[13] Schools have considerable discretion to make curricular choices, and that extends to selecting reading programs for IEPs. A school cannot select a reading program if it has reason to believe that the program will not work (because the IEP must be reasonably calculated to confer a meaningful benefit).

preponderant evidence in the record that establishes the inappropriateness of the final IEP. The fact that the SRA/Corrective Reading program is not endorsed by the What Works Clearinghouse is not determinative. The District was able to clearly articulate why it selected the programs that it selected, and how those programs related to the Student's needs.

My findings are similar in regard to ESY. I am not persuaded that the District's offers were inappropriate relative to the purposes of ESY programming. Further, the District took action in response to the Parent's criticisms of the ESY programs. Finally, the Student was not available for ESY after enrolling in the Private School, as the Parents selected the Private School's summer program.

For the foregoing reasons, I find that each of the IEPs were appropriate because they were reasonably calculated to provide a meaningful educational benefit to the Student when they were issued. Moreover, I find that the District appropriately responded to the Student's actual performance as it altered the Student's program over time. Consequently, compensatory education is not owed.

In making this conclusion, I do not belittle the Parents' perception of the Student's progress. "Slow and steady" is often code for stagnation and regression. Bluntly, I understand that the Parents want the Student to read, have every expectation that the Student will read, and are legitimately frustrated by the pace of the Student's journey to reading. I genuinely understand the Parents' position. Unlike family law matters, my task is not to determine what program is best for the Student. If it were, the results of this decision may be different. Rather, my task is to determine if the District's programming was legally appropriate. In this case, I find that it was.

Tuition Reimbursement

The Parents' demand for tuition reimbursement fails at the first prong of the *Burlington-Carter* test. The District's last-offered IEP was appropriate for reasons described above, which ends the analysis.

Section 504 / ADA

Schools satisfy their obligations under Section 504 to IDEA-eligible students if they comply with IDEA requirements. I have found, above, that the District did not violate the IDEA in this case. Consequently, Section 504 is also not violated.

Similarly, I find no ADA violation, as those claims overlap the IDEA and 504 claims, neither of which were substantiated.

An order consistent with the foregoing follows.

ORDER

Now, January 4, 2016, it is hereby **ORDERED** as follows:

1. The District did not violate the Student's right to a FAPE from the start of the 2011-12 school year through December 31, 2014.

2. The Student is not owed compensatory education.

3. The Parents are not owed tuition reimbursement.

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

/s/ Brian Jason Ford
HEARING OFFICER