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Pennsylvania

Special Education Hearing Officer

FINAL DECISION AND ORDER

Student's Name: J. G.

Date of Birth: [redacted]

ODR No. 17009-1516KE

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Fort LeBoeuf School District
865 Cherry Street
Waterford, PA 16441

Representative:

Pamela Berger, Esq.
434 Grace Street
Pittsburgh, PA 15211

Teresa Sirianni, Esq.
Biannely M. Diaz, Esq.
Marshall, Dennehay, Warner,
Coleman, & Goggin
600 Grant St., Suite 2900
Pittsburgh, PA 15219

Dates of Hearing: 12/10/2015, 1/19/2016, 3/17/2016 and 4/6/2016

Record Closed: 4/26/2016

Date of Decision: 5/10/2016

Hearing Officer: Brian Jason Ford, JD, CHO

Introduction

Parents bring this matter on behalf of their minor child, Student, asserting claims under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* against the District.¹ The Parents claim that the District has denied the Student a free appropriate public education (FAPE), specifically in regard to Reading, Writing, Math, and assistive technology.

To remedy these alleged denials, the Parents demand both compensatory education to remediate the harm caused by the denial of FAPE, and changes to the Student's Individualized Educational Plan (IEP) to ensure the provision of FAPE going forward. Regarding compensatory education, the Parents' demand starts on November 5, 2013, and goes through the present.² Regarding the IEP, the Parents demand that the Student's IEP be changed to include intensive, research-based instruction in reading and math, a writing goal, and appropriate assistive technology following an assistive technology assessment.

Issues

1. Was the Student denied a FAPE in the area of Reading and, if so, is compensatory education owed?
2. Must the Student's IEP be changed in regard to Reading to ensure the provision of FAPE?
3. Was the Student denied a FAPE in the area of Writing and, if so, is compensatory education owed?
4. Must the Student's IEP be changed in regard to Writing to ensure the provision of FAPE?
5. Was the Student denied a FAPE in the area of Math and, if so, is compensatory education owed?
6. Must the Student's IEP be changed in regard to Math to ensure the provision of FAPE?
7. What assistive technology does the Student currently need?

Findings of Fact

The entire record of this hearing was fully considered, but facts are found only as necessary to resolve the issues presented. Any fact below that does not include a citation is not in dispute.

Background and Kindergarten (2005-06 School Year)

1. The Student received Speech and Language services before entering kindergarten.

¹ Other than the cover page of this Decision and Order, identifying information is omitted to the extent possible.

² It is somewhat difficult to find a clear statement as to the period of time for which compensatory education is demanded. The clearest statement is in the Parents' Complaint, which was filed on November 5, 2015 and explicitly raises claims going back two years prior to the filing.

2. The Student enrolled in the District starting in kindergarten (2005-06 school year).
3. The Student was identified as a student with a speech and language impairment and continued to receive itinerant speech and language support services. S-25.
4. The Student received remedial reading, provided under Title I, five times per week during kindergarten. S-25.
5. Kindergarten teachers observed that the Student was not making progress, and the District proposed an evaluation. The evaluation was completed with an Evaluation Report (ER) in late June, before 1st grade. S-25.
6. The ER reported standardized, normative tests of the Student's intellectual abilities (the WISC-IV). The Student's full scale IQ was found with a standard score of 87 (the lower end of the average range), with higher scores in verbal comprehension and working memory. S-25.
7. The same ER reported standardized, normative tests of the Student's academic achievement (the WJ-III). S-25. The Student's scores on that assessment, combined with classroom performance and other reported information, led the evaluator to identify the Student as a student with a specific learning disability (SLD), particularly in reading, writing, math and oral expression. S-25.
8. The same ER identified some visual perceptual difficulties. S-27.
9. The same ER concluded that the Student continued to have a speech and language impairment.

First Grade (2006-07 School Year) and 2nd Grade (2007-08 School Year)

10. No significant evidence concerning 1st or 2nd grade was presented or is necessary for fact-finding.

Third Grade (2008-09 School Year)

11. The Student was reevaluated during 3rd grade to reassess the Student's need for Occupational Therapy (OT) and Speech/Language Therapy (S/LT). OT testing (the DVPT-2) was conducted and a Reevaluation Report (RR) was issued on April 15, 2009. General, unattributed remarks about the Student's speech and language needs were also included.³ S-24.
12. The RR concludes that the Student should receive OT services. Specifically, the Student required OT services to address writing problems. The evaluation suggests that the writing problems are connected to the Student's visual perception problems. S-24.

³ It seems that the S/LT remarks come from a Speech/Language pathologist, but that is not specified in the RR.

13. The RR also concludes that changes in Pennsylvania's special education regulations required the removal of Speech and Language Impairment as a secondary disability category, and the provision of SL/T as a related service.⁴ S-24.

4th Grade (2009-10 School Year) through 6th Grade (2011-12 School Year)

14. No significant evidence concerning 4th through 5th grades was presented or is necessary for fact-finding.

15. The Student transitioned to the District's middle school in 6th grade. Evidence concerning the Student's reading program (Read 180) and the Student's progress within that program was presented. But, because this period of time falls outside of the scope of this hearing, and because detailed fact-finding about the 6th grade reading program is unnecessary to resolve this case, I decline to make extensive fact-finding about this period of time.

7th Grade (2012-13 School Year)

16. The Student was reevaluated in 7th grade, resulting in a RR dated November 5, 2012. S-23.

17. The only new testing in the 2012 RR was a behavior rating scale (BASC-2) in which the Parent rated the Student in the average range in all domains. Teacher ratings are not reported. S-23. The record as a whole supports a finding that the Student exhibits no significant behavior problems.

18. The 2012 RR includes a narrative report from a reading tutor. The Student was being privately tutored in the Barton Reading and Spelling System. While the report describes the Barton System, and says a few words about the Student's work, it provides no objective data about the Student's reading ability. S-23.

19. The private reading tutoring was not connected to the Student's IEP, and (some speculative testimony notwithstanding) progress through the Barton system does not correspond to grade level. See, NT 323-24, 336-37, 344

20. The 2012 RR includes a narrative report from the OT therapist. That report describes the work that the OT therapist did, but provides no objective data about the Student's OT needs or abilities. S-23

21. The 2012 RR includes a narrative report from the Student's S/LT therapist. Although that report describes the Student's continuing struggles, it notes that the Student can correct articulation problems when prompted to do so. The S/LT therapist, for reasons that are not well explained, recommended discontinuation of S/LT as a service, but cautioned that the Student should be reminded to correct articulation errors as they occur. The report provides scant objective data about the Student's S/LT needs or abilities. S-23.

22. The 2012 RR includes an assessment of the Student's reading fluency. The Student was tested with material at the 2nd grade fall reading level (5 years below grade level). At that level, the Student could read 76 words correct per minute (the expected rate for a student at the end of 2nd grade is 100 words correct per minute). S-23.

⁴ Neither the appropriateness of using an RR to draw a legal conclusion, nor the accuracy of the legal conclusion are challenged in this hearing.

23. The 2012 RR includes an assessment of the Student's vocabulary. The Student was tested with material at the 3rd grade reading level (4 years below grade level). At that level, the Student accurately explained 15 of 20 vocabulary words, equal to the 3rd grade fall level. S-23.
24. The 2012 RR includes an assessment of the Student's reading comprehension. The Student was found to be at the 2nd grade spring instructional level (roughly 4.5 years behind). S-23.
25. The 2012 RR includes an assessment of the Student's math level. The Student was found to be at an end of 4th grade / start of 5th grade instructional level in mathematics (roughly 2 years below grade level). S-23.
26. The 2012 RR reports that the Student received reading instruction through a program called Read 180 during the 2011-12 school year, but the District switched to a program called Language! for the 2012-13 school year. S-23.
27. The 2012 RR includes a narrative report from the Student's classroom teacher. The teacher, who instructed the Student both in Read 180 and Language! hypothesized that the Student's reading fluency, and overall ability to read, was significantly hampered by the Student's visual tracking issues. S-23.
28. The 2012 RR includes behavioral ratings from two teachers (a BASC-2). In general, the Student was rated in the average range except for the School Problems. Both teachers endorsed statements that the Student almost always has eye problems. S-23.
29. The 2012 RR includes a standardized, normative test of the Student's intellectual abilities (WISC-IV). Similar to prior testing, this assessment placed the Student's full scale IQ in the Low Average range. However, this round of testing placed the Student's working memory in the Extremely Low range and Processing Speed in the Borderline range. This prompted the evaluator to calculate a General Ability Index (a score that reduces the impact of working memory and processing speed), and found a GAI in the Average range. S-23.
30. The 2012 RR includes a standardized, normative test of the Student's academic abilities (WIAT-III). This test placed the Student in the Low range (1st percentile) in every reading subtest and index. The Student also tested in the Low range (2nd percentile) in written expression. The Student tested in the Below Average range (4th percentile) in mathematics, with a *comparatively* high math problem solving score (14th percentile). S-23.
31. A discrepancy analysis showed a statistically significant difference between academic scores expected of an individual with the Student's cognitive profile, and the Student's actual academic abilities. This led the evaluator to conclude that the Student remained a Student with SLD. S-23.
32. The District offered an ESY program to the Student during the summer of 2013. The Student did not attend. NT at 75.

8th Grade (2013-14 School Year)

33. Throughout 8th grade, the Student was enrolled in a regular education English class, which met 5 days per week, one period per day. Both text-to-speech and speech-to-text software was available in the classroom, although the Student did not use it because the Student did not want to stand out. S-31, NT at 380-381.

34. Throughout 8th grade, the Student was enrolled in Learning Support Reading (LS Reading), which met 5 days per week, one period per day. In LS Reading, the Student was instructed using the Language! program, which had started the year prior. S-31.
35. At some point early in 8th grade, the Student was placed in an additional section of LS Reading, which met 4 days per week, one period per day. In that LS Reading section, the Student was also instructed using Language!, but with a group working on a different level of the curriculum.⁵ NT at 357, 364-368.
36. No credible evidence was presented concerning the efficacy of instructing the Student, or any student, at multiple levels of multiple programs (Language! and the regular education program) at the same time.
37. Throughout 8th grade, the Student received no math in regular education, but rather received Learning Support Math (LS Math) 5 days per week, one period per day. The Student also received one period per week of Math Enrichment. NT 583, S-31.
38. Math instruction was provided using Number Worlds, a math program that started the year prior, and Mathletics, an online, teacher-guided math program. Number Worlds was instructed 4 days per week, and Mathletics was instructed 1 day per week.
39. The Student started 8th grade under an IEP developed the year prior, after the 2012 RR. The IEP was dated November 28, 2012. S-17.
40. The 2012 IEP was in place until a new, annual IEP was drafted and offered on October 29, 2013. S-15. The scope of this hearing starts exactly one week later, November 5, 2013.
41. The 2013 IEP included a reading fluency goal: "Given a bi-weekly unrehearsed reading prompt at the 4th grade level, [Student] will be able to read aloud 105 WCPM with 90% accuracy in 2 consecutive data collection sessions." S-15, S-20.
42. Progress data towards reading fluency goal was collected frequently. Until the fourth quarter, the Student was assessed at the 3rd grade level (a year below the goal's expectations). However, by the end of the school year, the Student mastered the goal, achieving 123 WCPM with 99% accuracy; 120 WCPM with 99% accuracy; and 111 WCPM with 97% accuracy at the 4th grade level on the final three probes of the year. S-20, S-8.
43. The 2013 IEP contained the following Reading Comprehension goal: "Given a quarterly reading passage at the 3rd grade Spring [*sic*] level, [Student] will correctly answer corresponding comprehension questions at the 3-F level, scoring at least 12 out of 20 questions (60% accuracy) correctly by the end of the fourth data collection session." S-20.
44. Progress data towards this goal was collected quarterly. The Student achieved the goal after scoring over 60% at the 3rd grade level in the 2nd and 3rd quarters (75% and 65% respectively). The goal was then increased to 60% accuracy at the 4th grade level. In the 4th quarter, the Student scored 50% (10/20) at the 4th grade level. S-20.

⁵ Language! is a leveled curriculum, in which students progress from level to level as they complete the program.

45. The 2013 IEP contained the following Math goal: "Given 4th grade math assessments evaluating numbers and operations, [Student] will solve 13 out of the 16 questions correctly on two consecutive assessments administered monthly." S-20.
46. Progress data towards the Math goal was taken monthly and reported quarterly. The Student met the Math goal in the 2nd quarter after scoring 14 and 15 questions correctly on consecutive probes. While those probes were administered, the teacher also probed the Student at the 5th grade level. At the same time that the Student scored 15/16 on the 4th grade level, the Student scored 11/16 at the 5th grade level. Consequently, the goal was revised for the Student to score 10 of 16 questions correctly (62.5%) at the 6th grade level. S-20
47. With one notably low outlier, the Student scored between 11/16 (68.8%) and 13/16 (81.3%) on monthly Math probes at the 6th grade level in the 2nd and 3rd quarters of 8th grade. S-20
48. The Student was absent a total of 19.5 days during 8th grade. S-30.
49. The District offered ESY to the Student for the summer of 2014. As a district wide practice, ESY teachers and IEP case managers determine which programs or activities would be implemented that summer. NT at 247, 287-288.
50. In this case, the Student was offered ESY for 2 days per week, 3 hours per day, from June 24 to July 31 (12 sessions total). S-11. During that time, the Student would participate in a co-taught classroom with another 8th grader, a 10th grader and a 12th grader. During this time, all of those students would follow the same schedule and receive instruction in an online reading program called "Reading A-Z." The ESY teacher would also provide Math instruction.
51. The ESY teacher received the Student's IEP in May, and intended to provide reading instruction using Reading A-Z at the Student's instructional level, based on the Student's IEP. NT at 297-301.
52. The Student attended 5 of the 12 ESY sessions. After that, the Parents hired one of the Student's Learning Support teachers from the Student's elementary school years as a tutor to provide tutoring for the Student in reading. The Student and tutor read a novel together. Reading the novel was the extent of the reading instruction provided by the tutor. NT at 60-61.

9th Grade (2014-15 School Year)

53. The 2014-15 school year (9th grade) started under the 2013 IEP, as revised.
54. Starting in the 2014-15 school year, the District moved to block scheduling.
55. In the District, high school starts in 9th grade.
56. At the start of 9th grade, the Language! program was abandoned, and Read 180 was reinstated. The Student received Read 180 instruction 5 days per week for the entire school year. In the second half of the school year, the Language! program was reinstated. For the second half of the year, the Student was instructed using both Read 180 and Language!. NT 242, 451-467.

57. Language! instruction in the second half of 9th grade was co-taught to a group of 7 students (including the Student), all of whom were at somewhat different reading levels. Group lessons were given, and then individual work was provided at each student's level. *Id.*
58. There are no LS Math classes offered in the high school, and the Student did not continue to receive LS Math for this reason. Instead, the 8th and 9th grade teachers coordinated before the start of 9th grade. Based on that collaboration, the District offered "Integrated Math I," which is a pre-algebra class and the most basic math class offered at the high school level in the District. NT at 63-64, 395, 467, 582.
59. Because of the move to block scheduling, Integrated Math I was offered in the first semester only. The Student took Algebra I in the second semester. The Student was placed into Algebra I to prepare the Student for the Keystone testing (state performance assessments). The Student was not placed into Algebra I for any other reason. *Id.*
60. The Student's IEP team reconvened and drafted an annual IEP for the Student dated October 28, 2014. S-18
61. As a District practice, in high school, progress data towards IEP goals is taken only three times per year. Goals were drafted with that data collection schedule in mind. See S-18.
62. The 2014 IEP included the following Reading Fluency goal: "Given an unrehearsed reading prompt at the 4th grade level, [Student] will be able to read aloud 132 words correct per minute with 100% accuracy by the 3rd of 3 data collection sessions." S-18.
63. Given the timing of the IEP, the first Reading Fluency probe in 9th grade was taken while the 2013 IEP was in place. The second and third probes were taken with the 2014 IEP in place. On the first probe, the Student read 60 WCPM at the 2nd grade fall level (this was taken in September, showing significant regression after the summer of 2014). On the second probe, the Student read 121 WCPM at the 3rd grade spring level. On the third probe, the Student read 109 WCPM at the 4th grade fall level. While this progress was significant, the goal was not reached. S-18.
64. The 2014 IEP included the following Reading Comprehension goal: "Given a reading passage at the 3rd grade Spring level, [Student] will correctly answer corresponding 30 comprehension questions at the 3rd grade level, scoring at least 15 out of 20 questions correctly by the end of the 3rd of 3 data collection sessions." S-18.
65. Again, given the timing of the IEP, the first Reading Comprehension probe in 9th grade was taken while the 2013 IEP was in place. The second and third probes were taken with the 2014 IEP in place. On the first probe, the Student correctly answered 8 questions after reading a 2nd grade fall level passage. On the second probe, the Student correctly answered 6 of 12 questions after reading a 2nd level fall passage. On the third probe, the Student correctly answered 17 of 20 questions after reading a 3rd grade spring level passage. Consequently, the goal was met. S-18
66. The 2014 grade IEP contained the following Math goal: "Given 5th grade math assessments evaluating common core math concepts, [Student] will solve 24 out of 30 questions correctly by the 3rd of 3 data collection sessions." S-18.
67. Again, given the timing of the IEP, the first Math probe in 9th grade was taken while the 2013 IEP was in place. The second and third probes were taken with the 2014 IEP in place.

On the first probe, the Student correctly answered 24 of 30 math problems correctly at the 3rd grade winter level. On the second probe, the Student correctly answered 25 of 30 math problems at the 4th grade spring level. On the third probe, the Student correctly answered 19 of 30 math problems at the 4th grade spring level. Although the goal was not mastered, this indicates progress. S-18.

68. The Student had access to a laptop computer in school. The laptop had speech-to-text, text-to-speech, and textbook reading software installed. NT at 460-61, 602, 607, 623
69. The District ran assistive technology trials with the Student, offering first an Apple iPad, which runs the iOS operating system, and then a Nexus tablet, which runs the Android operating system. An assistive technology consultant opined that the Nexus tablet is a better choice, because the District had deployed Google for Education (a suite of online tools including communication and file-sharing software), and the Android operating system better integrates with Google for Education. NT at 603-605.
70. The Nexus tablet included text-to-speech, speech-to-text, and book reading software. Unlike the laptop, textbooks were not pre-loaded onto the Nexus tablet. Also, the software on the Nexus tablet was not the same software as on the laptop or iPad. In contrast, iPad included mobile versions of some of the same software that was installed on the laptop. Regardless of the particular software or platform, none of the software operated perfectly. See, e.g. NT 607-608, 633-634.
71. The Student was absent a total of 12 days during the 9th grade. S-30.
72. Based on a regression/recoupment analysis (particularly focusing on the initial reading probes in September of 2014), the District offered ESY in the summer of 2015. The Parents declined that offer, and the Student worked in the family's business instead. S-30, NT at 77.
73. In the summer of 2015, the Student was evaluated for and diagnosed with Irlen Syndrome. Irlen Syndrome is a visual processing disorder. For students with Irlen Syndrome, text on a page can appear to move or be blurry. While Irlen Syndrome cannot be remediated, symptoms can be effectively treated with tinted glasses.⁶
74. The Parents informed the District about the Student's diagnosis in the summer of 2015, and the District sought more information. The District learned that, according to the practitioners who evaluated the Student, the Student will be able to see words best either when printed on blue paper, with a blue tinted overlay over text, or with blue tinted glasses. S-35.
75. After receiving this information, the District purchased overlays for the Student, that would travel with the Student from class to class and to a vocational-technical program planned for

⁶ I take judicial notice that in 2010, the American Academy of Ophthalmology (AAO), the American Academy of Pediatrics (AAP), the American Association for Pediatric Ophthalmology (AAPOS), and the American Association of Certified Orthoptists (AACO) issued a joint statement finding serious flaws, inconsistencies, and outright false conclusions in studies supporting the use of tinted lenses to correct reading problems. That joint statement was reaffirmed in 2014 by the AAP, AAPOS, AACO, AAO, and the Hoskins Center for Quality Eye Care. Despite this, for purposes of this case, both parties agree that the Student reads better with tinted lenses. Further, in this case, there is evidence that the Student performs significantly better with tinted glasses.

10th grade, and printed on blue paper for the Student as much as possible. NT 271, 411-413, 464.

10th Grade (2015-16 School Year)

76. The 2015-16 school year (10th grade) started under the 2014 IEP.
77. At the start of 10th grade, the Student enrolled in a vocational-technical school, and spends most of the school day there. The Student attends the District's high school for two class periods per day. Specifically, the Student took Reading Skills and Biology in the first semester. In the second semester, the Student took English II in Learning Support and Algebra-I (for the second time). S-31, NT *passim*.
78. Reading Skills is a prep class for the Keystone exams. The Student received neither Read 180 nor Language! while attending Reading Skills.
79. Prior to placement in English II, the Parents were given the choice between that class and another Language! class. The Parents chose English II.
80. In October of 2015, the Parents had the Student assessed by a private evaluator, resulting in an "Academic and Executive Functioning Evaluation" (or independent educational evaluation - IEE), provided to the Parents the same month. The Parents shared the IEE with the District shortly after it was issued. P-2.
81. The IEE included a standardized, normative test of the Student's intellectual abilities (WISC-V). While the Student generally scored higher on this test than in prior testing, the results were similar. The IEE placed the Student's full scale IQ in the Average range (more similar to the kindergarten ER than the 2012 RR). The evaluator also calculated a GAI, which also was in the Average range (similar to the 2012 RR). P-2
82. The same IEE reported standardized, normative tests of the Student's academic achievement (the WJ-III, the same test as used in the kindergarten ER). However, for academic achievement, the WJ-III was used only to assess the Student's Math Calculation (computation) and Math Fluency (as many addition, subtraction, multiplication, and division facts as possible in 3 minutes).⁷ The Student was found to be in the 1st percentile in both subtests, relative to same aged peers in the normative sample. P-2.
83. The same IEE reported the results of a normative reading test (GORT-5). Per that test, the Student's reading rate (speed), accuracy, and fluency (speed and accuracy together) were all found to be in the 5th percentile. The same test found the Student's reading comprehension to be in the 16th percentile. P-2.
84. The same IEE reported the results of a normative phonics test (TOWRE), which called for the Student to sound out unfamiliar words, and recognize sight words, both with speed and accuracy. The Student's Sight Word Efficiency was found to be in the 7th percentile. The Student's Phonemic Decoding Efficiency was found to be in the 4th percentile. P-2

⁷ The evaluator used other parts of the WJ-III to draw conclusions about the Student's executive functioning. As the Parents raise claims only concerning reading, writing, and math, I will not draft detailed findings of fact concerning executive functioning.

85. The IEE included program recommendations, most of which were general in nature.⁸ The IEE included the following reading recommendations: "The Reading Pen II", books available via the internet, not forcing the Student to read out loud, having teachers agree to a maximum of time the Student should spend on an assignment, "Read: OutLoud Bookshare.org Edition Text Reader", and a "Livescribe SmartPen". The evaluator also recommended that teachers emphasize phonics rules, and encourage the Student to read newspapers and magazines. P-2
86. The IEE included the following math recommendations: a graph paper to help keep all numbers lined up, additional space on math papers, avoiding copying problems from the board, use of scratch paper during exams, extended time on activities and tests, and math remediation. P-2
87. The IEE included the following writing recommendations: copies of notes, outlines and study guides given to the Student in advance, computer-assisted instructional techniques and keyboard skill development, unlimited or extended time allotment for standardized tests and written classroom assignments, and "consider abridging" the amount of material that must be completed for lengthy assignments. P-2.
88. Around the same time that the IEE was completed, the District was conducting its own reevaluation of the Student, which was completed with an RR on October 23, 2015. The record as a whole suggests that the Parents requested this evaluation sometime in the summer of 2015. The District invited the Parents to attend a meeting to discuss the RR, but the Parents declined the invitation. For this reason, the District still considers the RR to be in draft form. S-3, S-4, see, e.g. NT at 160.
89. Although the 2015 RR was still in draft form, evidence concerning its development and findings were presented. The 2015 RR included standardized, normative tests of the Student's intellectual abilities and academic achievement. Those tests were, in general, completely in line with the 2012 RR and very similar to the IEE. The 2015 RR also included behavior ratings, which were completely consistent with prior testing. S-2.
90. The Parents requested this due process hearing on November 5, 2015.
91. The parties have not met to finalize the 2015 RR, or draft a 2015 IEP, because this matter is in due process.⁹
92. While technically still working under the 2014 IEP, progress will be measured three times during the 2015-16 school year. While detailed progress monitoring for the 2015-16 school year was not presented or was not yet taken at the time of this hearing, testimony suggests that the Student's reading ability has improved noticeably since the Student started using tinted glasses. NT at 414-423.
93. The Student continued to have access to a Nexus tablet during the 2015-16 school year, although the battery was frequently dead in school - largely due to poor communications and coordination between home and school about where the tablet should be charged.

⁸ Executive functioning recommendations were provided, but are not addressed in this decision. See Footnote 7.

⁹ As explained to counsel during the first hearing session, the cessation of IEP development after a due process request is utter folly.

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 *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parents are the party seeking relief and must bear the burden of persuasion.

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, all witnesses testify credibility in that all recalled events or expressed opinions to the best of their abilities. All testimony was generally consistent with documentary evidence, although there were differences concerning how documentary evidence should be interpreted. Those differences are legitimate, and do not make any witness more or less credible.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a “free appropriate public education” to a student who qualifies for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

More specifically, in *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034. 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district’s efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether “the individualized educational program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.”

Benefits to the child must be ‘meaningful’. Meaningful educational benefit must relate to the child’s potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit).

However, a school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. See *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), cert. denied, 488 U.S. 925 (1988). The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than "trivial" or "*de minimus*" benefit is required. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), cert. denied 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts "need not provide the optimal level of services, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a "basic floor of opportunity"). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. See, e.g., *J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

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 endorsed 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 the child 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.

Discussion

Reading

While the Student made progress towards IEP goals, those goals were shockingly low. The District’s satisfaction in bringing the Student up so that the Student is only six (6) years below grade level is appalling. The record in its entirety makes it plainly clear that the District selected reading programs for the Student based on what the District had at hand, and without regard to

the Student's needs. Moreover, the district was content to keep the Student in the same programs (or a hodgepodge of the same programs) year after year, pointing to what may arguably be called a "year's worth" of progress in a year's time – which, of course, does nothing to close the gap between the Student's intellectual abilities and academic performance, to say nothing of the gap between the Student and peers. Given the Student's average cognitive abilities, far more should have been expected. This is, unambiguously, a denial of FAPE.

At the same time, the record is silent as to what services should have been provided all along, or where the Student would be now but for the detail of FAPE. This lack of evidence creates a tension in the above-described case law. Cases clearly establish that details of FAPE must be remedied, and that compensatory education is the appropriate remedy when FAPE is denied. Those same cases compel me to look for evidence of how the Student can be put in the position that the Student would be in but for the denial. Alternatively, those cases compel me to look for the hours of service that was denied. In this case, either calculation requires me to invent numbers out of whole cloth, given the lack of evidence presented by the Parents. The case law regarding the burden of proof suggests a conclusion that the Parents' failure to put on evidence regarding how much compensatory education is owed (under either calculation) should result in a determination that the Parents have established the District's liability, but not entitlement to the remedy they demand. This stands at odds with cases requiring a remedy when FAPE is denied.

In balancing this tension, I look to cases that establish my authority to fashion unique remedies to ensure that denials of FAPE are remediated. *See, e.g. Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712 (3d Cir. Pa. 2010). Compensatory education is almost always awarded as a number of hours. Without evidence to calculate hours, I will instead focus on the Student's actual needs. In doing so, I will award compensatory education in the form of services, particularly direct reading instruction.

To remediate the detail of FAPE in reading, the District shall provide direct instruction to the Student, either one-to-one (1:1) or in a small group of students with similar needs and abilities, using a reading remediation program of the District's choosing, provided that the program is research based, and delivered in strict adherence to publisher's guidelines. The District shall not use an "eclectic" approach, or any other methodology that combines several reading programs, but rather shall select a reading program based on the Student's current performance and cognitive profile, and then shall implement that program with strict fidelity. The District may change the reading program, with the Parents' consent, if data establishes that the program is not effective for the Student. That program shall be available to the Student every day that school is in session, for however long a period the program's publisher recommends, until either 1) the Student consistently reads independently at grade level, 2) the Parents remove the Student from the program or 3) the end of the school year in which the Student turns 21 years of age.

This remedy both remediates the denial of FAPE, and addresses the Parents' demand for reading programming going forward.

Math

The Student received no learning support in math since 8th grade – not because the Student no longer needed the support, but because the District does not offer LS math in high school. As such, the entirety of the Student's math program from the start of 9th grade was driven by the District's convenience (and the District's desire to perform well on the Keystone exams), as opposed to the Student's needs. This, by itself, is a denial of FAPE. The Student's needs must

drive the Student's program, which cannot be limited by what the District finds convenient. The last reliable data about math presented in this matter shows that the Student was four (4) years below grade level, despite average intelligence. This also represents a widening gap, as compared to the 2-year delay found in the 2012 RR. Despite the widening gap, the significant remediation that was needed was not offered. Far more should have been expected in the IEP goals, and special education to remediate a growing math deficiency should have been offered.

As with reading, no evidence was presented to show where the Student would be now but for the detail of FAPE in math, or what math special education the Student should have received all along. This creates the same tension as with reading, and I will resolve it in the same way.

To remediate the detail of FAPE in math, the District shall provide direct instruction to the Student, either one-to-one (1:1) or in a small group of students with similar needs and abilities, using a math remediation program of the District's choosing, provided that the program is research based, and delivered in strict adherence to publisher's guidelines. The District shall not use an "eclectic" approach, or any other methodology that combines several math programs, but rather shall select a math program based on the Student's current performance and cognitive profile, and then shall implement that program with strict fidelity. The District may change the math program, with the Parents' consent, if data establishes that the program is not effective for the Student. That program shall be available to the Student every day that school is in session, for however long a period the program's publisher recommends, until either 1) the Student consistently demonstrates the ability to do math independently at grade level, 2) the Parents remove the Student from the program or 3) the end of the school year in which the Student turns 21 years of age.

This remedy both remediates the denial of FAPE, and addresses the Parents' demand for math programming going forward.

Writing

Unlike reading and math, little evidence was presented concerning the Student's writing ability. Moreover, the record is somewhat confused as to what the parties mean when they discuss "writing." A small amount of evidence was presented concerning the Student's physical ability to write. A small amount of evidence was presented concerning the Student's ability to draft text with proper grammar and conventions. In either aspect, the quantum and weight of evidence concerning writing was not preponderant to support a denial of FAPE in this domain.

Assistive Technology

It is striking that the private IEE suggested much of the same assistive technology that the District was already providing to the Student. It is equally striking that the District completely ignored other assistive technology recommendations in the IEE. However, the basis of those recommendations and the evaluator's qualifications to make assistive technology recommendations are lacking in evidence. Even so, what evidence there is suggests a need for an assistive technology evaluation.

Much was made about the Nexus tablet, and where the power cord for the tablet should be located. The District cannot argue that the Student's assistive technology needs are satisfied completely by the tablet, and then take no responsibility for keeping the tablet charged and useable. I will, therefore, order the District to purchase a second charger for the tablet, at a cost not to exceed twenty dollars (\$20) so that the Student will have a charger both at home and in

school. That this obvious solution was not identified by the parties, and that time was spent in a hearing on this issue, is troubling.

ORDER

Now, May 10, 2016, it is hereby **ORDERED** as follows:

1. The District denied the Student a FAPE in Reading.
2. To remedy the denial of FAPE in Reading, the District shall provide reading remediation to the Student, in accordance with the accompanying Decision.
3. The District denied the Student a FAPE in Math.
4. To remedy the denial of FAPE in Math, the District shall provide reading remediation to the Student, in accordance with the accompanying Decision.
5. Within 10 days of this Order, the District shall propose an Assistive Technology evaluation for the Student. The evaluation shall proceed in accordance with IDEA timelines once consent is granted by the Parents.
6. The District shall purchase a second charger for the Nexus tablet, in accordance with the accompanying Decision.

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

/s/ Brian Jason Ford
HEARING OFFICER