

*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: V.L.

Date of Birth: [redacted]

ODR No. 17354-1516KE

### CLOSED HEARING

Parties to the Hearing:

Parent[s]

Catasauqua Area School District  
201 N. 14th Street  
Catasauqua, PA 18032

Representative:

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Dates of Hearing: 03/14/2016, 03/29/2016

Record Closed: 04/19/2016

Date of Decision: 05/02/2016

Hearing Officer: Brian Jason Ford, JD, CHO

## **Introduction and Procedural History**

This matter concerns the educational rights of Student, a student in the Catasaquua Area School District (District). The hearing was requested by the parents (Parents), who allege that the District denied the Student a free appropriate public education (FAPE) from the second semester of the 2012-13 school year through April 1, 2016. The Parents demand compensatory education to remedy the alleged denial of FAPE during that period of time.

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The Parents filed their Complaint on February 10, 2016. The initial hearing session was scheduled for March 14, 2016. ODR sent notice of the initial hearing session on February 18, 2016. The District filed a Response to the Complaint on February 19, 2016. I sent an email to counsel for both parties, explaining my hearing procedures and notifying the parties that the matter was placed into ODR's electronic exhibits pilot program on February 22, 2016.<sup>1</sup> The parties participated in an unsuccessful resolution meeting on February 23, 2016. The resolution period expired on March 11, 2016.

The hearing convened as scheduled on March 14, 2016. Although the hearing proceeded efficiently, two sessions were needed in order to present all relevant evidence. The second session was scheduled shortly after the first concluded, and convened on March 29. The parties then sought an extension of the decision due date to draft and file written closing briefs in lieu of oral closing statements.

I pause here to note that a comprehensive record concerning nearly six school years was concisely presented over two hearing sessions. Counsel for both parties are commended for the efficacy with which they presented their cases. Both Counsels' clarity of writing, particular in both parties' closing briefs, is also exemplary.

### **Issues**

Based on the Parents' closing brief, some issues presented during the hearing were resolved after the final hearing session. When the hearing started, the question of what educational services the Student currently needs was presented. In the Parents' closing brief, they indicate that an IEP was implemented on April 1, 2016. They abandon demands for compensatory education beyond that point, and no longer seek an order directing the District to provide specific services. This is worth highlighting for several reasons: First, this development is indicative of the parties' willingness to work with each other despite this hearing. Second, this illustrates how time does not stop when a hearing is requested. Too often, parties fail to continue developing a student's educational plan simply because a hearing has been requested. I am glad that the parties in this case chose to move forward despite this hearing.

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<sup>1</sup> The same email explained how the parties could opt out of the pilot. The parties did not opt out, and I commend their willingness to participate.

The remaining issues, derived from the Parents' closing, are:<sup>2</sup>

1. From the second semester of the 2012-2013 school year through implementation of an April 1, 2016 IEP, did the District offer and provide FAPE to the Student by offering and implementing IEPs that were reasonably calculated to provide a meaningful educational benefit to the Student at the time they were offered?
2. If the Student was denied FAPE from the second semester of the 2012-2013 school year through implementation of the April 1, 2016 IEP, is compensatory education owed as a remedy?

### **Findings of Fact**

#### **Early Intervention**

1. The Student was identified as a student with a Speech and Language Impairment in an Evaluation Report (ER) dated June 7, 2010. S-6.
2. The Student received early intervention services, specifically Speech/Language Therapy (SL/T) and Occupational Therapy (OT), from the intermediate unit in which the District is located.<sup>3</sup> NT 433, S-4.
3. In April of the 2009-10 school year (pre-kindergarten), the District reevaluated the Student and determined that the Student continued to qualify for S/LT and OT. S-3. See also S-1, S-2, S-4, S-5, S-6, S-7.

#### **Kindergarten (2010-11 School Year)**

4. The Student enrolled in the District for kindergarten for the 2010-11 school year.
5. The Student continued to receive SL/T and OT during kindergarten in accordance with an IEP dated June 7 2010.<sup>4</sup> S-1, S-2, S-9.
6. The Student's kindergarten teacher was dually certified in both special education and regular education. NT 433.
7. Progress reports were sent to the Parents in November of 2010, and February and June of 2011. These reports describe the Student's progress as "slow and steady" and "adequate," but do not provide data, or any objective measure of the Student's progress. S-10, S-11.
8. On April 21, 2011, the Student's kindergarten teacher referred the Student to an Instructional Support Team (IST). NT 433-434, S-12. IST provides a higher level of monitoring and coordination for regular education students.

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<sup>2</sup> I cannot hear issues that are not properly presented. All of the issues presented in the Parents' closing are properly presented in their complaint. I rely upon the Parents' characterization of the issues in their closing because that reduces and focuses the scope of this matter.

<sup>3</sup> Parents have not raised any issues regarding the Student's SL/T services, and confirmed that non-issue in their closing brief.

<sup>4</sup> The District is commended for evaluating the Student and getting an IEP in place before the Student transitioned from early intervention to school age services.

9. The IST referral was prompted by the teacher's concerns about the Student's academic and communications difficulties. The teacher specifically noted the Student's inability to retain letters and sounds, difficulty learning numbers and rote counting, and trouble retaining previously learned skills. S-12.
10. On May 11, 2011, less than a month after the IST referral, the Parent formally asked the District to reevaluate the Student, and the District issued the appropriate paperwork to start a reevaluation. S-13.

### **First Grade (2011-12 School Year)**

11. In September of 2011, with the reevaluation pending, the District invited the Parents to an annual IEP team meeting. S-16.
12. On September 13, 2011, the IEP team convened and decided to continue the June 2010 IEP through a new IEP dated September 6, 2011. S-17, S-18.<sup>5</sup>
13. On October 7, 2011, the District completed its reevaluation and issued a Reevaluation Report (RR). S-19.
14. The RR reported the results of a standardized, normative intelligence test (the WISC-IV). According to that test, the Student's General Ability Index (GAI) is in the low-average range.<sup>6</sup> S-19 at 9
15. The same test revealed that the Student's ability to sustain attention, concentrate, and exert mental control are weaknesses and, as a result, it may be more difficult, time-consuming, and draining for the Student to process complex information, and may result in more errors on academic tasks as compared to peers. S-19 at 9.
16. The same test revealed that the Student's ability to process simple, routine visual information without making errors was in the low-average range as compared to peers. S-19 at 9.
17. The RR reported the results of a standardized, normative test of academic achievement. (the WIAT-II). Based on that testing, the evaluator was able to draw conclusions about the Student's academic achievement in Reading, Mathematics, and Written Language. S-19.
18. The Student's reading scores were very low, placing the Student in the 9th percentile compared to the normative sample. The Student tested higher in phonics skills than word reading skills, possibly indicating a vocabulary deficit, but both sub-scores were low. Phonics (technically, pseudo-word decoding) was in the low-average range while "word reading" was in the borderline range (5th percentile). S-19 at 10-11.
19. In mathematics, the evaluator cautioned against summarizing the Student's math abilities with a single number. Even so, all math test scores were low. The Student's "numerical

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<sup>5</sup> I note that the June 2010 IEP (S-9) and the September 2011 IEP (S-18) are not identical, but the September 2011 IEP is clearly a continuation of the prior IEP. This is made explicit in the September 6, 2015 NOREP at S-17.

<sup>6</sup> The evaluator found that discrepancies in various sub-tests resulted in a full scale IQ score that underestimates the Student's abilities and, therefore, the GAI is a more meaningful measure. S-19 at 7.

operations” score (number identification, counting, basic addition and subtraction) placed the Student in the 14th percentile, while the Student’s “math concepts” score (basic math concepts, measurement, and one-step problems) was in the 8th percentile. S-19 at 11.

20. In written language, the Student tested in the borderline range, outperforming only 4% of the normative population, with consistent performance in all written language sub-tests. The testing required the Student to do both simple tasks, like writing the alphabet from memory and writing the Student’s own name, as well as more complex tasks, like combining sentences. S-19 at 11.
21. The evaluator used the tests of the Student’s intellectual ability and academic achievement to conduct a discrepancy analysis. The evaluator found a significant difference between the Student’s ability and achievement in several reading and math sub-tests. S-19 at 11. This discrepancy ultimately prompted the evaluator to conclude that the Student has a learning disability and should receive a primary disability category of Specific Learning Disability (SLD). S-19 at 14.<sup>7</sup>
22. As part of the evaluation, two of the Student’s teachers and the Student’s mother completed behavior rating scales. Both teachers and the Student’s mother endorsed characteristics often associated with ADHD: Combined Type. S-19 at 12-13.
23. The results of the behavior rating notwithstanding, the evaluator did not suggest that the Student should be categorized as a student with an Other Health Impairment (OHI). S-19.
24. As part of the evaluation, the District completed an adaptive behavior rating scale. The Student’s adaptive behaviors were found to be in the average range. S-19 at 14.
25. Based on input from both S/LT and OT, the evaluator concluded that the Student was still properly categorized as a student with a Speech/Language Impairment, but now as a secondary category. S-19.
26. On November 4, 2011, the Student’s IEP team met. An IEP was presented and approved by the Parents via a NOREP. S-21, S-22.
27. The November 2011 IEP includes a broad description of the Student’s current school performance, and several new reading and math goals. S/LT and OT goals from the prior IEP were also continued. S-22.
28. Specifically regarding reading, the IEP included goals that called for the Student to listen to a word and then break it into phonemes, voice nonsense words, read first grade level passages with fluency and accuracy, read sight words, and answer reading comprehension questions after listening to a story at the pre-primer level. S-22.
29. All of the reading goals were measurable and objective. None included baselines, but several indicated when baseline data collection would start. Most of the reading goals were to be measured using the DIBELS system, which is a set of tools to measure early literacy skills. S-22.

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<sup>7</sup> The RR lists the primary disability category as “Learning Disability.” In context, that clearly refers to the SLD category.

30. Regarding writing, the IEP included a goal for the Student to dictate and then copy sentences. This goal was measurable and objective, but not baselined. S-22.
31. Also regarding writing, two of the continued OT goals called for the Student to properly form letters and write the Student's name. While these were continuations from prior IEPs, no baseline data was reported. S-22.
32. Regarding math, the IEP included goals for the Student to complete simple addition problems, and complete simple subtraction problems. These goals were measurable and objective, but not baselined. S-22.
33. As modifications and specially designed instruction (SDI), the IEP offered individualized, direct reading instruction in a Learning Support (LS) classroom. S-22 at 33. While testing accommodations were provided, the IEP does not list any SDI specifically targeting math. In sum, the IEP offered an itinerant level of learning support. S-22.
34. On April 3, 2012, the IEP was revised. The Student had mastered the pre-primer level listening comprehension goal, and so a new goal was added calling for the same, but at a primer level. S-23.
35. On May 24, 2012, the IEP was revised again. The Student had mastered the primer level listening comprehension goal, and so a new goal was added calling for the same, but at a 1st grade level. S-23.
36. The District monitored the Student's progress toward IEP goals. By the fourth marking period of the 2011-12 school year, the Student had mastered the phoneme segmentation goal. S-24.
37. The Student's progress towards the nonsense words goal was inconsistent. The goal called for the Student to produce 58 sounds per minute when presented with nonsense words to read. When first assessed in November of 2011, the Student could produce 21 sounds per minute. In each subsequent probe, the Student bounced within the 30 to 40 sounds per minute range - indicating both improvement and a plateau. S-24 at 3, 4.
38. The Student did not make progress towards the 1st grade reading goal. By the end of the fourth marking period, the Student could read only 4 words per minute when presented a 1st grade reading level passage (accuracy is not reported). The goal called for 47 words per minute with 90% accuracy. The Student scored best – relatively – on a probe taken on February 3, 2012 (11 words per minute with 46% accuracy). The subsequent regression is not explained on the progress report. S-24 at 5.
39. The Student made progress towards, but fell well short of mastering, the sight words goal. The goal called for the Student to read sight words with 5 seconds at 90% accuracy. Sight words were presented in several units, each containing a set of different sight words. Progress was reported using Unit 2, Unit 4, and Unit 5 words. In Unit 2, the Student improved from 8% to 36%. In Unit 4, the Student improved from 17% to 21%. In Unit 5, the Student improved from 27% to 35%.<sup>8</sup>

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<sup>8</sup> The record does not explain whether these units are sequential, or why one unit was stopped before the sight words were mastered.

40. The Student did not master the sentence copying goal, which set an expectation for the Student to dictate a sentence of 5 words or more, and then copy that sentence with 100% accuracy on two consecutive trials. The Student did achieve 100% accuracy three times; first on January 6, 2012, next on March 27, 2012, and again on April 25, 2012, but these were not consecutive trials. The Student's performance on this goal was highly variable. S-24 at 9-10.
41. As noted above, the Student mastered listening comprehension goals, which were then increased by two levels by the end of the first grade year. S-24 at 11-12.
42. The Student did not master the simple addition goal, which called for the Student to answer nine out of 10 simple addition problems correctly on three consecutive trials. While the Student was able to answer nine or 10 questions correctly on three separate occasions (March 2, May 3, and May 15, 2012), those were not consecutive trials and, moreover, the Student's performance was completely scattershot (e.g. going from 40% to 0% to 100% to 0% on consecutive probes). S-24 at 13-14.
43. The Student regressed in terms of the simple subtraction goal. As with the addition goal, the Student was to answer nine out of 10 simple addition problems correctly on three consecutive trials. Technically, the Student mastered this goal on May 3, 2012. The student answered all 10 questions correctly. The prior trial was nine out of 10, and the trial before that was 10 out of 10. However, perhaps acknowledging the variability of scores apart from those three probes, the District continued testing – which was appropriate under the circumstances. The final three probes of the school year were 70%, 50% and 50% respectively. S-24 at 15-16.

### **Second Grade (2012-13 School Year)**

44. The Student started the 2012-13 school year under the November 2011 IEP, which was set to expire in November 2012.
45. The Student's IEP team met on November 8, 2012. The District presented an IEP during that meeting, and the Parents approved the IEP via a NOREP. S-28, S-29.
46. The November 2012 IEP reports the Student's present education levels, mostly by copying from the prior IEP. S-29.
47. Regarding reading, the IEP includes three goals. First the Student was to independently read grade level text (presumably 2nd grade level) and then respond to reading comprehension questions with 80% accuracy (the goal does not say over how many trials). S-29 at 14.
48. The second reading goal called for the Student to read a 1st grade level passage at a rate of 47 words per minute with 90% accuracy as measured by a DIBELS tool on two consecutive trials. S-29 at 15.
49. The third reading goal called for the Student to read words off of the Dolch list (a list of high frequency words) using both sight recognition and phonics. The Student was to read words starting at the primer level and going through the 2nd grade level within three seconds with 80% accuracy on three consecutive trials. S-29 at 16.

50. The November 2012 IEP included one math goal, calling for the Student to complete a computation worksheet with addition, subtraction, multiplication, “or” division problems within five minutes with 80% accuracy on three consecutive trials. S-29 at 17.
51. The OT handwriting goal, which originated in kindergarten, continued unchanged, as did the S/LT goals. S-29.
52. Modifications and SDIs remained unchanged from the November 2011 IEP to the November 2012 IEP, however, it was noted that direct reading instruction and “increased opportunities” for small group reading and math instruction could occur both in LS and regular education classes. S-29 at 22.
53. While in 2nd grade, the Student was included in the regular education classroom for all subjects, and was pulled out only for testing and progress monitoring every two weeks. As such, the Student received reading, math and language arts instruction in the regular classroom. NT at 166-169.
54. In April of 2013, the Parent had the Student assessed by an audiologist, who diagnosed the Student with an auditory processing disorder. S-30. In sum, the audiologist’s report suggests that the Student has difficulty understanding speech in noisy environments. *Id.*
55. Progress monitoring during the 2012-13 school year states that the Student mastered the grade-level reading goal on January 12, 2013. It is unclear why mastery was found on that date. The goal calls for the Student to score 80% or better on reading comprehension questions, which happened on the very first probe (November 14, 2012). Regardless, data was collected throughout the school year and, while there was some variability and low outliers, the Student generally scored very well (over 90% in most cases). S-31 at 1.
56. The progress reporting for the grade-level reading goal is not credible, as it is belied by the Student’s trivial progress in reading 1st grade level passages. I do not accept that the Student *independently read* 2nd grade level passages and then correctly answered reading comprehension questions, as the Student made no progress in 1st grade reading during the same period of time. Specifically, the 1st grade reading goal called for the Student to read 47 words correct per minute with 90% accuracy. On the first probe (November 12, 2012), the Student could read 19 words per minute. On the last probe (May 13, 2013), the Student could read 28 words per minute (little more than half way to the goal - which still would have had the Student reading a year below grade level). On probes throughout the school year, the Student’s rate was generally in the teens, and accuracy is not reported. S-31 at 2.
57. Regarding the sight reading goal, the Student mastered the pre-primer and primer word lists. It is not explained why the pre-primer list was used, as the goal called for the Student to start with the primer list. The goal also set an expectation that the Student would reach the end of the 2nd grade list, but the Student did not move past the primer list during the school year. S-31 at 3.
58. The Student also fell well short of the math goal, and the progress reporting towards that goal is not meaningful. Four probes are reported, one in each marking period. The Student’s scores on those probes were 50%, 33%, 30% and 41%, respectively. Since the goal calls for tests of addition, subtraction, multiplication, *or* division, and since no other information is reported, it is impossible to say what was measured. It is only possible to say that the Student did not do well on whatever was tested. S-31 at 4.



59. Progress reports were also drafted for the OT handwriting goal, but no objective data is reported. S-31 at 5.

### **Third Grade (2013-14 School Year)**

60. The Student started the 2013-14 school year under the IEP of November 2012.

61. The Student's IEP team reconvened on November 5, 2013. The District proposed an IEP during that meeting and the Parents accepted the IEP via a NOREP. S-34, S-35.

62. The November 2013 IEP has no math goal. S-35.

63. The November 2013 IEP has three reading goals. As with the prior IEP, there was a reading fluency goal, a reading comprehension goal, and a sight word goal.

64. The first reading goal was a reading fluency goal, calling for the Student to read 50 words per minute with 95% accuracy "with a 1st grade text and progressing to a 2nd grade text" over 3 consecutive trials. S-35 at 21.

65. The second reading goal was a reading comprehension goal, calling for the Student to read and respond to grade level text, scoring 70% or better on reading comprehension questions. This is similar to the prior reading comprehension goal, except the "grade level" now means 3rd grade, and the expected comprehension score was reduced from 80% to 70%. S-35 at 22.

66. The third reading goal was a sight word goal, calling for the Student to read sight words within 5 seconds with 90% accuracy, starting with 1st grade level words and ending with 3rd grade level words. S-35 at 23.

67. The November 2013 IEP included two writing goals. The first called for the Student to write "in a logical way" with a "recognizable beginning, middle, and end." S-35 at 24. This would be mastered if the Student scored 70% or better on monthly teacher-made writing prompts. *Id.* The second writing goal called for the Student to use appropriate conventions, including correct spelling, punctuation and capitalization and "correct grammar when writing". Mastery was to be measured by the same criteria. *Id.* The IEP included a sample rubric on which the Student's writing would be assessed. S-35 at 25.

68. The same S/LT goals were repeated in the November 2013 IEP as they were in all prior IEPs. However, the OT handwriting goal was removed. S-35.

69. The modifications and SDI in the November 2013 IEP were changed. A reading intervention program and phonics instruction were added in the LS classroom. S-35 at 28.

70. Throughout 3rd grade, the Student continued to receive reading and math instruction in the regular education classroom, using the same regular education curriculum as every other student in the class. In addition, the Student received 30 minutes of phonics instruction per day, and 15 minutes of instruction in sight words, reading fluency, and comprehension twice per week. NT at 342, 344, 360.

71. Progress monitoring for the 2013-14 school year reported progress on goals in the November 2012 IEP until November of 2013. Progress on goals from the November 2013 IEP were reported thereafter. S-36.

72. I give no credence to progress reported for the November 2012 reading comprehension goal for the reasons stated above, but I note that progress is reported at S-36 at 1.
73. Progress towards other November 2012 goals was essentially flat. The Student achieved no more mastery of those goals than at the end of the 2011-12 school year. S-36 at 2-4.
74. The Student did not meet the November 2013 reading fluency goal. According to progress monitoring, the Student read a 1st grade level passage at 50 words per minute or greater on three consecutive occasions (March 2nd and 31st, and April 11, 2014), but accuracy is not reported. Starting on April 11, the District presented 2nd grade level passages. The Student read far less than 50 words per minute on 2nd grade passages for the remainder of the school year. Again, accuracy is not reported.
75. According to progress monitoring, the Student mastered the November 2013 reading comprehension goal just as the school year was ending. I give no weight to this evidence for the same reasons as in the November 2012 IEP. I do not accept that the Student read 3rd grade level passages and then accurately answered reading comprehension questions while, at the same time, the Student had barely obtained proficient reading fluency at the 1st grade level.<sup>9</sup> S-36 at 6.
76. The Student made significant progress towards the sight word reading goal, having mastered the third grade sight word list by the end of the school year. S-36 at 7.
77. Progress towards the two writing goals was not reported independently. Rather, the Student's marks on writing prompts, as measured by the rubric embedded into the IEP, were reported. The Student's scores were erratic, scoring below 70% on slightly more than half of the assignments. Information supporting the scores, related to either goal, is not reported. S-36 at 8.

#### **Fourth Grade (2014-15 School Year)**

78. The Student started the 2013-14 school year under the IEP of November 2013.
79. With the Student's last evaluation nearly three years past, the District discharged its statutory obligation by proposing a reevaluation on September 10, 2014. S-39. The Parent immediately consented to the reevaluation. *Id.*
80. The District evaluated the Student and drafted an RR dated October 7, 2014. S-41. The 2014 RR included re-administrations of the same standardized, normative tests of intellectual ability and academic achievement that were conducted in the 2011 RR (the WISC-IV and WIAT-III).

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<sup>9</sup> There are two alternatives, neither of which makes this evidence any more acceptable. First, if the Student was given unlimited time to read and then answer questions, perhaps the Student's reading fluency makes the data less dubious – but such an accommodation would also make the data less meaningful. Second, the 2013 version of the goal does not explicitly state that the Student must read independently, and specifies that the Student should be assessed after direct instruction. Perhaps this means that the Student did not read independently before answering comprehension questions. In which case, this is not a *reading* comprehension goal.

81. The WIAT-II was used in 2011 and the WIAT-III was used in 2014. In this case, the record as a whole supports a finding that scores on the 2011 WIAT-II can be compared to scores on the WIAT-III.
82. Regarding intellectual ability, unlike the 2011 administration, the evaluator did not report a GAI in 2014. Rather, the evaluator reported the Student's full scale IQ (FSIQ), which was in the "borderline" range at the 2nd percentile. However, discrepancies in sub-tests that prompted the evaluator to caution against the FSIQ and favor the GAI in 2011 were not present in 2014. With the exception of Perceptual Reasoning, the subtests were not significantly discrepant in 2014. It must be noted, however, that the Student scored in the 1st percentile in the Working Memory sub-test, which may also bring the FSIQ into question. S-41 at 10.
83. With the important exception of reliance on the lower, 2014 FSIQ score, the evaluator's interpretation of the WISC-IV results is substantially consistent with the results of the 2011 administration. That is, the Student's deficits and the impact of those deficits on the Student's education remained unchanged. This is not surprising, as intellectual ability remains fairly consistent over time. S-41.
84. Regarding academic achievement, the Student scored in the "Low" or "Below Average" range in every test and subtest of reading, writing, and mathematics. S-41.
85. Subtests of the WIAT-III were reported in 2014 that were not reported in 2011. It is not clear whether that reflects the new version of the test, or the more summary nature of the report in 2011. C/f S-19, S-41.
86. Regarding reading, on comparable sub-tests, the Student's test scores remained stagnant or fell across the board, as illustrated in the following chart:

| Subtest               | Standard Score / Percentile Rank 2011 | Standard Score / Percentile Rank 2015 |
|-----------------------|---------------------------------------|---------------------------------------|
| Word Reading          | 76 / 5                                | 68 / 2                                |
| Reading Comprehension | 83 / 13                               | 83 / 13                               |
| Pseudoword Decoding   | 86 / 18                               | 65 / 1                                |

87. Regarding writing, in 2011, the Student received a standard score of 73 (4th percentile) in "Written Expression." No "Written Expression" score is reported in 2014, but the Student received a standard score of 70 (2nd percentile) in "Spelling" and a standard score of 63 (1st percentile) in "Sentence Composition". C/f S-19, S-41
88. Regarding math, the Student's 2011 Mathematics Composite standard score was 75 (5th percentile). In 2014, that score fell to 59 (0.3 percentile). C/f S-19, S-41.
89. Importantly, both the WIAT-II and the WIAT-III rate the Student in comparison to same-aged peers. Therefore, if the Student's score remained constant, it means that the Student progressed as much as peers, although starting and ending below them. Regression indicates that the Student did not keep pace with peers and fell even further behind, either failing to gain skills that peers developed, losing skills, or both.

90. In addition to the WIAT-III, the 2014 RR reported scores from a "Reading A to Z" assessment, which assesses both reading fluency and comprehension. According to that assessment, the Student could read beginning 1st grade text with 91% accuracy and 90% comprehension. S-41.
91. The 2014 RR reported the results of an Adaptive Behavior Assessment System II (ABAS-II), which is a set of rating scales that both Parents and teachers completed to evaluate the Student's adaptive skills in three domains: conceptual (communication, functional academics, self-direction, etc.), social (social skills, friendships, manners, etc.), and practical (eating, dressing, grooming, etc.). S-41 at 18-19.
92. The Student's mother rated the Student in the "Borderline" range in the conceptual, social, and practical domain, resulting in a General Adaptive Composite in the "Extremely Low" range (standard score 69). S-41 at 7. Teacher ratings were significantly higher than the Student's mother, but still low overall. The teacher rated the Student in the "Extremely Low" range for Conceptual, in the "Below Average" range for Social and in the "Average" range for Practical, resulting in a General Adaptive Composite in the "Below Average" range (standard score of 85). S-41 at 20.
93. Taking the Student's school performance and updated test scores into account, and especially focusing on the Student's FSIQ and adaptive skills, the evaluator changed the Student's primary disability category from SLD to Intellectual Disability (ID). S-41 at 22.
94. The evaluator kept Speech/Language Impairment as a secondary disability category. S-41 at 22.
95. The Student's IEP team convened on November 4, 2014. The District offered an IEP with a NOREP during the meeting, and the Parent approved the IEP via the NOREP on November 13, 2014. S-43, S-44.
96. The November 2014 IEP included an updated present levels section, reporting the Student's progress monitoring on prior goals and a summary of the 2014 RR. S-44.
97. The November 2014 IEP re-introduced the math goal from the November 2012 IEP, equally ambiguous as to what math skill would be assessed. S-44 at 27.
98. The sight words goal from the November 2013 IEP was repeated in the November 2014 IEP, except starting at the 3rd grade level and with a reduced accuracy expectation (90% to 85%). S-44 at 26.
99. The reading comprehension goal changed significantly. The November 2013 IEP called for the Student to independently read grade level text and then answer comprehension questions with 70% accuracy. The November 2014 IEP called for the Student to independently read a story at the 2nd grade level, and then score 80% or better on three consecutive comprehension assessments. S-44 at 25.
100. The S/LT goals were updated in the November 2014 IEP. S-44 at 28.
101. The reading fluency and writing goals in the November 2013 IEP were removed in the November 2014 IEP, and were not replaced. S-44.

102. The November 2014 IEP removed the Student from the LS classroom and placed the Student into a Life Skills classroom on a supplemental basis (representing an increase in time outside of the regular education classroom). S-44.
103. Modifications and SDI in the November 2014 IEP removed both the reading intervention program and phonics instruction because both of those took place in the LS classroom. Apart from those deletions, the modifications and SDI remained the same. S-44 at 30.<sup>10</sup>
104. Progress towards the three goals in the November 2014 IEP was monitored. Regarding reading comprehension, the Student mastered the goal at the beginning, middle and end of 1st grade level. Second grade material was not introduced during the 2014-15 school year (4th grade) relative to that goal. S-45 at 14.
105. Regarding sight words, the Student did well (always above 80% and usually above 90%) with the 3rd grade list. However, the teacher noted that the Student can be inconsistent, getting random words incorrect between testing. This prompted the teacher to assess the Student at all levels (pre-primer through 3rd grade) on May 21, 2015. The Student scored above 80% on all levels. S-45 at 15.
106. Progress reporting on the math goal breaks out the Student's work, explaining what was actually assessed. In December of 2014 and January of 2015, the Student scored 100% on tests of addition facts up to 20, with and without a number line. In February and March 2015, the Student scored a 98% and 96% respectively on tests of subtraction facts. In April, early May and late May, the Student scored an 84%, 86% and 85%, respectively, on tests with both addition and subtraction. The Student obtained similar scores, with one low outlier, on tests mixing addition up to 20 and subtraction with regrouping. Multiplication and division were not tested. S-45 at 16.
107. In June of 2015, the Parents had the student evaluated by a pediatric neurologist. The pediatric neurologist drafted a summary report on June 3, 2015.<sup>11</sup> S-48. The summary report recommends that the Student should receive special education as a student with SLD in reading and math, with a secondary category of Speech/Language Impairment. *Id.* This recommendation was derived from the doctor's review of the Student's records and a conversation with the Student's mother. *Id.*
108. The pediatric neurologist recommended that the Student receive a comprehensive independent educational evaluation (IEE). S-48. Sometime shortly after the Parent received the summary report, the Parent requested an IEE at the District's expense.

#### **Fifth Grade (2015-16 School Year)**

109. The Student's IEP team met on September 17, 2015 and revised the Student's IEP. S-49, S-50. Two revisions were made; one in the parental concerns section, the other to SDI.

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<sup>10</sup> The November 2014 IEP added SDI as part of the Student's SL/T program, which is not at issue in this case.

<sup>11</sup> The summary report is not, and is not intended to be, a comprehensive report like the others described above. Rather, this is a bulleted description of the doctor's work and recommendations. S-48.

110. Regarding parental concerns, the IEP was revised to note the request for an IEE, and to document that the Parents and District agreed that the District would reevaluate the Student in lieu of an IEE, and then reconvene the IEP team.<sup>12</sup> S-50 at 17.
111. Regarding SDI, one accommodation was added to give the Student short breaks between sections of science and social studies tests. S-50 at 34.
112. The day after the IEP team meeting, September 18, 2015, the student was again seen by the pediatric neurologist, who drafted another summary report. S-51. The second summary report is substantively similar to the first, but includes more detailed recommendations about social skills instruction and reports that the Student was “singled out” and “bullied” because the Student attended a Life Skills classroom. S-51.
113. The pediatric neurologist’s source of information concerning the bullying is unknown. See S-51.
114. The Student’s IEP team reconvened on October 30, 2015. S-55. At this time, the reevaluation contemplated in the September 2015 IEP revision had not occurred. However, the Student’s IEP was set to expire.
115. The most significant change in the October 2015 IEP was that the Student was removed from Life Skills and placed back into Learning Support. This fact is muddled because the SDI section in the IEP was copied verbatim, indicating that SDIs would be provided in Life Skills. S-55 at 24. However, the IEP incorporates the shift. S-55 at 28. As explained below, however, the transition out of Life Skills did not happen until January 2016.
116. Regarding reading, the October 2015 IEP’s goals were revised, but essentially focused on the same skills as in prior IEPs with an adjusted grade level. The IEP included the following:
- a. “Given a 2nd/3rd grade reading passage, [Student] will independently read and answer corresponding comprehension questions with 90% accuracy as documented by data collected on completed worksheets every 2 weeks.” S-55 at 20.
  - b. “Given a 2nd/3rd grade reading passage, [Student] will produce a fluency rate of 70/60 WPM with 95% accuracy as documented by 3 consecutive running records every 2 weeks.” S-55 at 20.
  - c. “Given a list of high-frequency sight words, [Student] will increase sight word vocabulary from a baseline level list number, as documented by monthly assessments.” S-55 at 21.
  - d. “When expected to answer a question on [Student’s] daily journal entry form, [Student] will answer the question by writing a complete sentence with no more than 2 prompts following the rules of capitalization, punctuation, and grammar, as evaluated by classroom sentence writing rubric.” S-55 at 21.
  - e. “When expected to write a 3-5 sentence paragraph, [Student] will dictate/write a paragraph focusing on the areas of content, organization, and use of conventions, with

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<sup>12</sup> The question of whether this response is a violation of the District’s obligations at 34 C.F.R. § 300.502(b)(2) was not raised.

no more than 3 prompts, as evaluated by the Pennsylvania Writing Assessment Domain Scoring Guide.” S-55 at 21.

117. Regarding math, the IEP included one goal, substantively identical to the goal in the prior IEP: “When expected to complete computational math worksheet (containing addition, subtraction, and multiplication equations), [Student] will achieve 85% accuracy on 3 consecutive probes as documented by completed worksheets.” S-55 at 22.
118. The reading goals and math goal contained several short term objectives. S-55.
119. The SDIs were unchanged from the prior revised September 2015 IEP. S-55 at 24.
120. The Parent approved the IEP via a NOREP on December 23, 2015. S-54.
121. The District’s offer of Life Skills in September 2015 (when the IEP was revised) and the offer of Learning Support a month later, and the timing of the Parents’ ultimate acceptance in December 2015 are all connected. In the District, middle school starts at 5th grade. In middle school, Learning Support was only provided in the regular education classroom. The Life Skills classroom was the only location for Student to be educated in a smaller setting with slower paced instruction at a different level. NT at 318. Ultimately, the District concluded that it should open a new classroom for the Student and other similarly-situated students. The new classroom opened in January 2016. NT at 475-476
122. The Student was placed into the new classroom, technically a Learning Support classroom, in January 2016.
123. Sometime between the IEP revision in September 2015, and November 2015, the District agreed to fund the IEE that the Parent requested five months prior in June 2015. This resulted in a School-Based Neuropsychological Report dated December 10, 2015 (2015 IEE). S-56.
124. The 2015 IEE included a comprehensive review of the Student’s records, in-school observations, interviews with the Parent, guidance counselor and several teachers, a clinical interview with the Student, and a host of assessments and rating scales. S-56 at 6-7.
125. To measure academic achievement, the independent evaluator used the WJ-IV Test of Achievement, a different test than the District used, but still a highly-regarded, standardized, normative assessment. On the cluster scores, the Student’s standard score fell from prior testing, although it is not clear if the tests can be compared directly. Regardless, in Reading, the Student received a standard score of 55, corresponding to a 1.4 grade level. In Mathematics, the Student received a standard score of 42, corresponding to the K.9 level. S-56 at 43.
126. To measure intellectual ability, the independent evaluator used the WJ-IV Test of Cognitive Abilities. As with academic achievement, this is a different test than the District used, but still a highly-regarded, standardized, normative assessment. On this assessment, the Student received a standard score of 57 as a rating of the Student’s general intellectual ability. However, there was significant discrepancy between the subtests contributing to that score. In the narrative interpretation of the test results, the independent evaluator made no comment as to any one score accurately reflecting the Student’s intellectual ability. S-56.

127. Comparing the two WJ-IV tests, the independent evaluator concluded that there was a significant discrepancy between the Student's intellectual ability and academic achievement. While both were quite low, a student with the Student's cognitive profile was expected to have better academic achievement. This prompted the evaluator to conclude that the Student is properly classified as a student with SLD, not ID. S-56 at 23.
128. More specifically, the independent evaluator concluded that the Student had mixed dyslexia and mixed dysgraphia. S-56.
129. The independent evaluator diagnosed the Student with moderate ADHD (combined type), SLD in reading, written expression, and math, and generalized anxiety disorder. S-56
130. Consistent with the testing results, the independent evaluator concluded that the Student was reading at the beginning to middle first grade level, and was writing at the end of kindergarten to beginning of first grade level. S-56 at 28.
131. To address the Student's learning disabilities, the independent evaluator recommended both direct, small group instruction and explicit, directive, teacher-directed instruction in both reading and math. The evaluator gave examples of research-based programs that could be effective for the Student. S-56.
132. The independent evaluator also concluded that the Student's needs related to ADHD must be addressed as a student with Other Health Impairment (OHI) through counseling and behavioral interventions. S-56.
133. The independent evaluator affirmatively concluded that her test results were similar to the District's prior results. S-56.
134. The Parents filed their Complaint initiating this due process hearing on February 10, 2016.
135. On February 24, 2016, the District offered an RR, which references and incorporates portions of the 2015 IEE. S-63.
136. The RR changes the Student's primary eligibility category to OHI, and secondary eligibly category to SLD.
137. Throughout 5th grade, both while the Student was in Life Skills and after, the District implemented a researched based, leveled reading program. NT at 303-304, 319, 384, 389. Coincidentally, this program is one of the programs recommended in the IEE. Evidence suggests that the Student is making some progress within the reading program. S-62; NT at 305-306

## **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 Parent 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 testified 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 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.

## **Discussion**

### ***Use of the IEE***

The IEE was entered into evidence without the evaluator testifying. The District argues that I should disregard the IEE to whatever extent it does not support the District because the report was not subject to cross examination. This argument is well taken, but I will not disregard the report outright. For the most part, the Student's test results as reported in the IEE are consistent with the District's own testing. The independent evaluator interpreted those results somewhat differently compared to the District, but the independent evaluator also recommended certain interventions that the District implemented (particularly regarding reading in 5th grade).

More importantly, my use of the IEE is greatly diminished because of how the issues shifted after the hearing concluded. The IEE includes a large amount of information about the Student's needs beyond reading, writing and math. There is also information and recommendations about social behaviors, executive functioning, memory, and more. All of that may be relevant to the question of what the Student currently needs. According to the Parents, the parties have resolved that question on their own. I, therefore, need not consider those aspects of the IEE in order to resolve this case.

### ***Denial of FAPE***

There is no doubt that the Student's Intellectual Disability classification and Life Skills placement greatly upset the Parents, starting the cascade of events culminating with this due process hearing. The IDEA's disability categories, however, are best viewed as eligibility criteria. Students who satisfy one or more of the categories, and who also require SDI, are IDEA-eligible. Once a student is IDEA eligible, a focus on categories is often misplaced. A student's program and placement are not formulaically derived from the Student's category (or diagnosis or anything else). Rather, a careful examination of the Student's educational needs must be used to craft an IEP that is reasonably calculated to provide a FAPE when it is offered. The question of whether the Student received a FAPE hinges on what the Student's needs were and how the District addressed those needs, not the name of the Student's disability or the name of the Student's placement.

The Parents claim that the Student was denied a FAPE starting in the second semester of 2nd grade (2012-13 school year). At that time, the Student was being educated in accordance with the November 2012 IEP. That IEP called for the Student to show discrete reading skills at the 1st grade level not by the end of 2nd grade, but by the start of 3rd grade. Assuming that these goals were properly calibrated to the Student's actual ability, it is amazing that the record is nearly silent as to what reading program the District implemented, if any. The Student received reading and math instruction in the regular education classroom. While one could safely assume that the Student was exposed to the same regular education reading and math program as every other student, that would still be an assumption.

In sum, the Student's IEP called for the Student to make only very small gains in reading and math, and provided nothing to ensure that the Student would make even that small amount of progress. While I would not give the District credit for implementing SDIs that are not drafted into the IEP, it is deeply troubling that the District acknowledged serious reading and math problems, and then failed to offer anything approaching the direct, intensive programs that the Student very clearly needed. Such programs were neither reflected in the Student's IEP, nor

provided in fact. It is not surprising, therefore, that the Student failed to meet the IEP's goals, as modest as they were.

For those reasons, the November 2012 IEP was inappropriate at the time it was drafted. The District should have known that at the time, based on everything that happened the year prior. Even so, giving the District the benefit of the doubt, the District certainly should have realized that the Student's program was nowhere near the required intensity by the second semester of the 2012-13 school year. I, therefore, find in the Parents' favor that FAPE was denied starting with the second semester of the 2012-13 school year.

Unfortunately, things did not improve in 3rd grade (2013-14 school year). Despite the fact that the Student did not master the goals in the November 2012 IEP (again, modest as they were), the goals were revised to match the Student's grade level. This was inappropriate. No data suggested that the Student's goals should have been increased. The only conclusion is that the District ratcheted up the goals simply because it promoted the Student to the next grade level. I do not find that the District was intentionally trying to hide the fact that the gap between the Student and peers was widening, but that was the result.

Throughout 3rd grade, the Student received no special education at all to address math difficulties. However, SDI in reading increased from nothing to 30 minutes per week of phonics instruction and 15 minutes, twice per week, of fluency and comprehension. While this is certainly an improvement, and the Student did make progress towards recognizing sight words, there is no evidence to suggest that programs that the District offered were of sufficient duration or intensity. The Student's 3rd grade teacher testified that the Student had great difficulties in 3rd grade because, in part, the general third grade reading program (in which the Student received the bulk of instruction) was more challenging than in prior school years, but the program was not adjusted at any point during the school year. See NT 114-116.

In sum, during 3rd grade, the Student's goals were adjusted upward despite all evidence suggesting that change was inappropriate, the Student received nothing to address math difficulties, and the reading interventions were ineffective. Worse, the District knew the reading interventions were ineffective, given the Student's presentation in the regular education classroom, and nothing was changed. The Student's failure to meet IEP goals was, again, unsurprising. All of this, clearly, is a denial of FAPE.

The start of 4th grade (2014-15 school year) was disastrous. This period of time is accurately captured in the District's closing brief at ¶ 29, pages 12-13. As I write for the parties, I will not quote from that brief at length. Rather, I simply find that the District had actual knowledge that the Student was inappropriately placed immediately at the start of the 2014-15 school year. Whether that knowledge, or the IDEA's reevaluation timeline, prompted the 2014 RR is unknown, but it was certainly appropriate to evaluate the Student.

The 2014 RR recommended a change in eligibility category to ID. While subsequent evaluators disagreed with that determination, I find nothing inappropriate about the District's testing itself, which is similar to subsequent testing, including the 2015 IEE. In other words, the 2014 RR revealed accurate information about the student.<sup>13</sup> The 2014 RR made it clear that the Student

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<sup>13</sup> The ID determination was supported by the testing data, and represented the evaluator's professional judgement based on all available information at that time. While other evaluators may interpret similar results differently, the ID classification in and of itself does not constitute a

had very significant needs, and was not making progress in a program that, for the most part, offered regular education.

After the 2014 RR, the District offered a Life Skills placement for two reasons: First, teacher evaluations changed, and the District stopped placing dually-certified teachers in regular education classes to avoid teachers being penalized by assignment to lower performing students. See, e.g. NT 436. The connection between the change in teacher evaluations and the removal of dually-certified teachers from regular education classrooms is not well-explained in the record, but I take the District at its word that changing teacher evaluations reduced placement options for the Student. Second, as explained in the District's closing brief:

The life skills classroom was chosen because there was nothing else in-between to send [Student] to. [Student] needed more one-on-one attention and small group setting, and that could be provided in the life skills classroom. (NT at 201-202, 439). The life skills classroom was merely the place where the instruction needed by Student was delivered, and [Student's] instruction there was exclusively in the academic areas of reading and mathematics. (NT at 439-440).

*District's Closing Brief* at ¶ 35, page 15.

Both of the factors that prompted the District to propose a Life Skills classroom are *per se* violations of the IDEA. As explained above, program and placement must be derived from nothing other than a Student's needs. That did not happen after the 2014 RR. Instead, the District started with a conclusion about where the Student should be educated (the literal placement). That placement was not based on the Student's needs, but entirely on the District's convenience (teacher evaluations and available classrooms). The District then worked the IEP process backwards to get the Student into the predetermined class.

To be clear, I see no malice here. The District understood that, through circumstances of its own making, there was only one placement for students with needs as severe as the Student's in this case. That understanding prompted the District to offer the only placement that might be appropriate. But the District started with the placement and worked backwards – which is forbidden by the IDEA.

The District argues that the Life Skills class was “Life Skills” in name only. The District's position is that regardless of what the class was called, it functioned as a location in which the Student could receive intensive remediation. This argument falls flat, given the evidence. I accept that the Student should not have been in a regular education classroom for reading and math. Exposure to grade-level, regular education coursework was understandably upsetting to the Student and educationally counterproductive. It is also true that the Student could be exposed to curriculum at the Student's own level in the Life Skills classroom. Such exposure was an appropriate accommodation, regardless of the name of the classroom. However, no evidence suggests that the Student received the sort of direct, intensive, research-based programs that the Student obviously required.

The very fact that the Student could no longer handle regular education instruction was a very clear signal that intensive remediation was necessary. Instead, the Student received reading, math, language arts, and writing instruction in the Life Skills classroom for two hours per day, 30 minutes per day of phonics, and all other instruction in regular education with accommodations.

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denial of FAPE. If anything, that classification enhanced the Student's substantive and procedural protections – but in areas that are not relevant to this hearing.

SDIs for reading and math were actually reduced in the November 2014 IEP. Neither the November 2014 IEP, nor any of the evidence, suggest how exposure to work at the Student's level would remediate the Student. While that accommodation was necessary, the program as a whole was entirely insufficient. The District knew or should have known that simply accommodating the Student was less than half the battle. Intensive remediation was clearly needed, but was not offered.

Given the lack of intensity in the Student's program, it is unfortunately not surprising that the Student ended 4th grade still reading at a 1st grade level according to the District's own data. While sight words continued to improve, all evidence suggests that those sight words did not carry over into any appreciable improvement in the Student's overall ability to read. Happily, the Student showed some progress in math, and the teacher is commended for breaking out data in the most understandable way. Even so, this shows that at the end of 4th grade, the Student effectively mastered a math goal that was put into place years prior.

At the start of 5th grade (2015-16 school year), the District came to the conclusion that middle school students with disabilities may need something other than full inclusion or Life Skills. This resulted in a new Learning Support program opening in January 2016. Before then, however, the Student remained in a Life Skills placement under the November 2014 IEP. Even more so than in the year prior, the 5th grade life skills placement was made entirely for the District's convenience and with no consideration for the Student's actual needs. See FF 121, see also, *District's Closing Brief* at ¶ 51, page 22. As with the prior year, I see no malice here. Instead, the District simply started with what was available and worked backwards. It is telling that the District's consideration of the Student's actual needs (and the needs of similar students) is what prompted the District to create a new placement instead of leaving things as they were.

Importantly, while the SDIs in the IEP did not change in October 2015, the Student's reading program changed significantly. The District started a research-based reading program that, based on the data available at the time of this hearing, looks promising. That program happens to be one of the programs endorsed by the independent evaluator. Moreover, this represents the District's first coordinated effort to close the gap in terms of the Student's reading. It is also significant that the Student started attending the District's new Learning Support program in January 2016 and by April 2016 the parties reached an agreement on programming going forward. I do not understand, however, why the District would not take credit for its work by crafting the Student's IEP to reflect the services that the Student started receiving in 5th grade. This omission is a procedural error.

In sum, the Student's IEPs were not reasonably calculated to provide a meaningful educational benefit from the time that they were offered, and the Student did not in fact receive a FAPE, starting with the second semester of the 2012-13 school year through the start of the 2015-16 school year. From that time forward, the Student received appropriate instruction in reading, but not in writing or math. That instruction represents a change in the Student's SDIs, and that change is not reflected in the Student's IEP. That omission is a procedural error.

### ***Compensatory Education***

The record as a whole supports a conclusion that the Student should have received direct, intensive, research-based intervention in reading, writing and math. Such intervention would have gone beyond accommodations (bringing the work to the Student's level), but at a minimum would have helped the Student close the gap between the Student's cognitive and academic abilities, and likely would have helped the Student not fall even further behind peers. Given the

Student's cognitive profile, it is possible that the Student may not have been completely remediated had the Student received a FAPE all along, but the gap would be smaller.

No evidence was presented regarding what the Student's abilities would be today had the Student received a FAPE. No evidence was presented regarding what quantum of compensatory education is needed to place the Student in the position that the Student would be in but for the denial of FAPE. Therefore, I must resort to an hour-for-hour calculation.

The Parents argue that the Student is owed full days of compensatory education for each day that the Student was placed in Life Skills. I reject this. The Student spent two hours per day, at most, in Life Skills. While the Student did not make meaningful progress, I do not find that the denial of FAPE was so broad-based as to impact upon every aspect of the Student's education. Rather, the evidence clearly points to a denial of FAPE in discrete academic areas, namely reading, writing, and math.

I will award the student one (1) hour of compensatory education in each of those domains, three (3) hours total, for each day that school was in session from the start of the second semester of the 2012-13 school year through the start of the 2015-16 school year. At that point, the District implemented a reading program that is reasonably calculated to yield a meaningful educational benefit. Consequently, the Student is awarded two (2) hours of compensatory education for each day that school was in session from the start of the 2015-16 school year through April 1, 2016.

An order consistent with the foregoing follows.



## **ORDER**

Now, May 2, 2016, it is hereby **ORDERED** as follows:

1. The District violated the Student's right to a FAPE, as described in the foregoing Decision.
2. The Student is awarded three (3) hours of compensatory education for each day that school was in session from the start of the second semester of the 2012-13 school year through the start of the 2015-16 school year.
3. The Student is awarded two (2) hours of compensatory education for each day that School was in session from the start of the 2015-16 school year through April 1, 2016.
4. The Parents may decide how the hours of compensatory education are used. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product, or device. The compensatory education shall be in addition to, and shall not be used to supplant, any educational and related services to which the Student is currently entitled.

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

/s/ Brian Jason Ford  
HEARING OFFICER