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: C.M.

Date of Birth: [redacted]

ODR No. 18243-1617AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Nicole Reimann, Esq. Batchis Nestle & Reimann, LLC Two Bala Plaza, Ste. 300 Bala Cynwyd, PA 19004
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Dates of Hearing: 10/24/2016, 11/15/2016, 12/07/2016

Date of Decision: 01/11/2017

Hearing Officer: Brian Jason Ford, JD, CHO

Introduction and Procedural History

This special education due process hearing concerns whether the educational rights of a student (the Student) were violated by the Montgomery County Intermediate Unit #23 (the IU). The IU provided special education early intervention services to the Student before the Student reached school age.

The IU conducted a special education evaluation of the Student. The Parents claim that the IU's evaluation was inappropriate, resulting in both an inappropriate disability classification, and a denial of a free appropriate public education (FAPE). The Parents allege that these actions violate both the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*. They demand compensatory education to remedy the denial of FAPE.

Before the hearing convened, the IU filed a motion to dismiss the Parents' complaint. While the IU moved to dismiss the complaint in its entirety, the IU primarily sought to limit the scope of this hearing. Ultimately, the IU's motion was resolved when the parties reached a stipulation on the first day of the hearing. Specifically, the parties agreed that January 5, 2015 was the first day that the Student received services from the IU. The Parents clarified that they are not seeking any remedies accruing prior to January 5, 2015, with the understanding that evidence predating January 5, 2015 was admissible if relevant. NT at 32-33. With this agreement in place, the IU's motion became moot, and was withdrawn for that reason.

The hearing convened over three full-day sessions. The parties are in agreement that the IU is no longer the Student's LEA, and that the outcome of this matter has no impact upon the Student's current receipt of FAPE. These factors were considered when considering and granting the parties' various scheduling motions.

For reasons set forth below, I find in the Parents' favor.

Issues

Did the IU deny the Student a FAPE from January 5, 2015, through June 9, 2016, and, if so, what amount of compensatory education is owed as a remedy?[1]

Findings of Fact

Initial Evaluation

1. On October 30, 2014, the Parents gave the IU consent to evaluate the Student's need for special education by signing a permission to evaluate form. IU-40.

2. As part of the evaluation, the Parents completed a Child and Family Profile form for the IU. IU-42. On that form, the Parents indicated concerns with the Student's social skills, eye contact, attention, and fine motor skills. IU-39.

[1] The Parties agree that the IU's potential liability runs from January 5, 2015 though the date that the Student's public school district became the Student's LEA. The IU avers that date is June 9, 2016, avers that was the last day that the Student was enrolled in its programming as LEA, and that the Parents chose to send the Student to camp for the summer of 2016. I accept these averments.

3. The Parents also wrote that they had completed an Autism Spectrum Questionnaire for the Student's pediatrician, but that the results were inconclusive, meaning that the diagnosis "could go either way 50%-50%." IU-42, NT 123.

4. At the time of the evaluation, the Student attended a typical preschool. The Student's teacher provided written information for the evaluation. IU-39. The teacher's report indicated several behaviors stereotypically associated with autism: fixation on certain topics, parroting speech heard in movies or television shows out of context, refusal of non-preferred activities (including elopement), and no verbal interaction with other children. *Id.* At the same time, the teacher reported a perceived average cognitive ability, and that the Student had a "vast" vocabulary. *Id*. However, the Student appeared unable to use that vocabulary or cognitive ability to verbally interact with peers even when prompted. *Id*.

5. As part of the evaluation, the IU's school psychologist observed the Student in the preschool. During the observation, the Student was easily redirected. NT 84. There, despite being "very interested in [] classmates" and "want[ing] to engage with them" the Student "really had no idea how to go about that in appropriate ways. At times, [the Student] seemed to have some difficulty trying to express some frustration or some difficulties that [the Student] might be having. And [the Student] tended to then just elope or walk away as opposed to explaining what was going on." NT 84-85. The psychologist described these in-school behaviors as "red flags for potential autism." NT 104.

6. Despite these in-school behaviors, the psychologist noted a significant difference between the Student's behaviors in school and at home. This, and the fact that the Student had not previously received services, made it "unclear if [the Student] was meeting any clear diagnostic criteria in terms of a mental health disorder". NT 82.

7. The evaluation also included the Connors Early Childhood Rating Scale (Connors), the Autism Spectrum Rating Scale (ASRS), the Battelle Developmental Inventory (Battelle),an informal assessment of Student's gross motor development using Developmental Assessment of Young Children, 2nd Edition 2 (DAYC-2), a portion of the Peabody Developmental Motor Scales, 2nd Edition (Peabody) to assess fine motor development; the Preschool Language Scales-5 (PLS-5), an informal assessment of pragmatic language; and a Functional Behavioral Assessment (FBA) . IU-39.

8. Both the ASRS and Connors typically include parent and teacher ratings, but were given to the Parents only in this case. IU-39. On the Connors, the Parents' ratings indicated concerns about impulsivity and were somewhat elevated across the board. *Id*. The ASRS indicated concerns about peer and adult socialization, but were not otherwise elevated. *Id.*

9. On the Battelle, the Student's standardized score for personal/social abilities was 77, which is more than 1 standard deviation from the mean, described by the assessment as a mild developmental delay. The Student's cognitive score was a 58, which is more than 1.5 standard deviations from the mean, described by the test as a significant developmental delay (and contrasts with the Student's teacher's perception of the Student's cognitive abilities). IU-39.

10. The Battelle also includes a narrative assessment. Significantly, the report includes the following: "[The Student] shows awareness of toys in classroom instead of presence of other children… seems to have difficulty enjoying playing with other children… does not join in or initiate social contact with peers already in play… will respond no differently to familiar and

unfamiliar children… is not communicating a range of negative emotions… has difficulty using words for social contact." IU-39.

11. On the DACY-2, the Student's adaptive behaviors were rated at a 78, which is more than one standard deviation from the mean. However, the Student's gross motor abilities fell in the average range. IU-39.

12. On the Peabody, the Student's fine motor needs were in the 1st percentile of same-aged children. IU-39.

13. On the PLS-5, the Student scored a total language composite score of 82, which is more than one standard deviation below the mean. The PLS-5 is used to evaluate expressive and receptive language in standardized conditions. The IU views a 77 or lower as a qualifying score. IU-39.

14. The IU did not formally assess the Student's pragmatic language but noted "difficulty with reciprocal conversation during today's evaluation although the spontaneous language [the Student] used today appeared appropriate to the situation." IU-39.

15. The FBA was conducted by a Behavior Specialist Consultant (BSC). The BSC noted that of the four preschools the Student attended, the Student had been asked to leave three. The BSC also noted: "[The Student] has difficulty with transitions and attending… has difficulty sitting still… does not stay with the group… [has] difficulty communicating with peers." IU-41.

16. The BSC recommended that the Student receive 10 hours per week of Personal Care Assistant (PCA). IU-45.

17. On December 8, 2014, the IU issued its initial Evaluation Report (ER). IU-39. The psychologist was the ER's primary author, although the ER captures information from multiple sources. IU-39

18. Via the ER, the IU concluded that the Student was eligible for special education under the disability category of Emotional Disturbance (ED), but not Autism. The IU did not find the Student eligible for a developmental preschool, or speech-language therapy. *Id.* The Student was found eligible for occupational therapy (OT) to address fine motor needs as a result of the Peabody, but not OT or physical therapy for gross motor needs as a result of the DACY-2. *Id.*

19. When the ER was written, the psychologist had not seen the Child and Family Profile Form, and was not aware of the BSC's recommendation. NT 64-65, 124, 139-40. More generally, the psychologist testified that ED was chosen over Autism because, in part, the psychologist "wasn't aware [that the Student] was possibly qualified as developmentally delayed in other areas". NT 96-97.

Initial Services

20. On December 17, 2014, the IU issued an Individualized Educational Program (IEP), which the Parents approved via a Notice of Recommended Educational Placement (NOREP). IU-36, 37.

21. The IEP had goals for the Student to improve socialization (4 goals) and fine motor skills (2 goals). IU-37.

22. The NOREP specified that the Student would receive 6 hours of PCA, 2 hours of BSC, and 45 minutes of occupational therapy, all weekly. IU-36.

23. The Student continued to attend the same typical preschool after the IEP was issued. P-7, IU-33.

24. Various documents refer to a "unit" of service. *See, e.g.* IU-37. One unit of service is 15 minutes. NT *passim.*

25. Services were supposed to start on January 5, 2015. *Stipulation* at NT 32.

26. The Student received no PCA services from January 5, 2015 through January 27, 2015.[2] IU-52.

27. Between January 28, 2015 and March 30, 2015, the Student received a total of 10.5 hours of PCA services. IU-52.

First IEP Revision

28. In February 2015, the typical preschool's director wrote that the Student required a full-time PCA because the Student could not be managed without support. At that time, the director stated that she was effectively functioning as the Student's PCA, relying upon aides and substitutes to free herself for that work. The director informed the family that the Student would be removed from the preschool unless support from the IU was increased, or if the IU would reimburse the preschool for additional classroom staffing. P-7.[3]

29. On February 26, 2015, the IEP team reconvened. IU-26. The Student's program was revised on February 27, 2015 via a NOREP. IU-27. BSC services were increased from 2 hours weekly to 1.5 hours twice per week. *Id.* OT was increased from 45 minutes per week to one hour per week. *Id.* The amount of PCA support did not change. *Id.*

30. Around the same time as the IEP revisions, the Parents asked for additional speech-language and physical therapy assessments. The IU issued a permission to reevaluate on March 3, 2015. IU- 32.

PCA Makeup Hours

31. In April 2015, the IU acknowledged that it owed the Student 66 hours of PCA services (described as "make up hours"). PCA services were then provided at a rate of more than 6 hours per week, with some week-to-week variability. PCA services were also provided while the typical preschool was in session but the IU was on break. Those hours were also counted as make up hours. IU-52, NT 608-611.

32. The PCA frequently heard the Student "script" language, meaning that the Student would repeat things heard on TV shows out of context. The PCA testified that this behavior

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[2] Testimony on this point is somewhat variable and contradictory. I find that the best evidence of what services were provided is the documentary evidence presented in this case. Both parties had more-than-ample opportunity to present evidence.

[3] Portions of P-7 are hearsay. This finding indicates only the information that was provided to the Parents and IU at that time. What the IU did or did not do with this information is relevant to the issue presented in this case.

decreased over time, but there is no good evidence to show the extent of the decrease. NT 588, 614-615.

Alternative Placement – April 20, 2015 through June 30, 2015

33. Around the same time as the February 2015 IEP meeting, the Parents became aware of an alternative placement, specifically a mental health partial hospitalization program for preschool children. *See* NT 229.[4] At that time, the Parents were under the impression that the alternative placement was a social skills classroom. *Id.*[5]

34. On April 20, 2015, the Parents placed the Student in the alternative placement. IU-27.

35. Through its Answer to the Parents' Complaint, the IU conceded that by May 2015, the Student's IEP team (meaning Parents and IU) "determined that Student should be placed in a specialized classroom setting…" *Answer* at 3.[6]

36. The IU did not issue a NOREP (or any other document) offering to place the Student in the alternative placement. *See* NT 406.

Reevaluation

37. On May 1, 2015, the District issued a reevaluation report (RR), which was the culmination of the evaluations that the Parents provided consent for in March 2015. IU-31. The reevaluation was conducted before the Student entered the alternative placement although the report was issued after.

38. The RR included input from the Student's typical preschool teacher. In general, the teacher reported that the Student did not interact with other children. Rather, the Student would wander around the class holding an object. IU-31.

39. For the RR, a speech pathologist administered the CELF-P-2, an age-based, criterion referenced test (meaning that it measures the Student's ability to perform certain skills, and then compares the Student's abilities to what is expected for the Student's age). IU-31. The Student obtained a score of 55. A score of 68 is expected for the Student's age. *Id.* Consequently, speech/language (S/L) services were recommended. *Id.*

40. For the RR, the Peabody was re-administered. The Student's gross motor abilities were rated in the 3rd percentile compared to same-aged peers. IU-31.

41. The RR concluded that the Student remained eligible for special education, still under the classification of ED, not autism. IU-31.

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[4] Although there is not clear testimony about this, I take notice that the alternative placement is operated by a non-profit community mental health provider.

[5] There is conflicting testimony about whether the IU told the Parents about the alternative placement or whether they found out about it through other means. There is also conflicting testimony about whether the IU described the alternative placement to the Parents as a social skills classroom. *See,* NT 472. I find only that the Parents came to know of the placement in February of 2015 and had a particular understanding of what the placement was.

[6] That sentence goes on to claim that the IU offered placement in the alternative program. That is contrary to the evidence in this case.

Second IEP Revision

42. On May 29, 2015, the Parents and IU met by phone. IU-28. The physical therapist, occupational therapist, speech/language therapist, and BSC did not attend the meeting. IU-29.

43. On May 20, 2015, the IEP was revised again, and a NOREP was issued. IU-28, 30.

44. As a result of the IU's IEP software, each goal is given a new number when added. Consequently, the numbering of goals is a function of the software and has no relation to the number of goals in an IEP. Similarly, if anything changes in a goal (including a simple update) the software marks the goal as "discontinued" even if an IEP goal is a continuation of a previous goal with a new baseline. *See, e.g.* NT 235-241.

45. As a result of the IU's software, all six goals of the prior IEP were "discontinued." Nine "new" goals were added: two gross motor goals, a S/L goal, four behavioral goals, and two OT goals. IU-28.

46. The revised IEP included the same amount of PCA support (6 hours per week), 8 hours of BSC per 30 days (the same as in the prior IEP, but phrased differently), 45 minutes of direct OT and 15 minutes of OT consult per week (the same as before), 30 minutes of PT per week (new), and 30 minutes of individual S/L therapy every 14 days and 30 minutes S/L consult every 30 days (also new). IU-28, 30.

Autism Diagnosis and IU's Knowledge

47. On May 7, 2015, while attending the alternative placement, professionals associated with the alternative placement diagnosed the Student with Autism Spectrum Disorder (ASD), with a rule-out of ADHD (meaning that ADHD was suspected, but more information was required for a conclusive diagnosis). IU-27.

48. Factors yielding the ASD diagnosis included: "difficulty with eye-to-eye gaze and use of gestures to regulate social interaction (hugs too tight, pushes on nose to gain attention); facial expression not appropriate to affect; delay in developing age-appropriate peer relationships (shows little interest in reciprocal interaction with others); lack of social emotional reciprocity; impairment in sustaining conversation with others; the use of repetitive and scripted language." IU-27.

49. The ASD diagnosis and reasoning behind it were reported in a Discharge Summary when the Student left the alternative placement. IU-27.

50. The Discharge Summary also states that the Student, "still requires verbal prompting, modeling, and 1:1 assistance from an adult to stay with a particular activity to task completion, to engage with peers, to clean up and to transition". IU-27.

51. The Parents gave the Discharge Summary to the IU very shortly after receiving it themselves. The Parents offered to provide a copy of the Discharge Summary in June 2015. The IU requested a copy of the Discharge summary in October 2015, and the Parents provided a copy the next day. This was an additional copy to the IU. Further, IU personnel and alternative placement personnel were in frequent communication with each other. NT 229-234, 259-260, 477-480; P-7.

52. In early July 2015, the Parents discussed the ASD diagnosis and placement options with IU personnel. NT 477-480.

Developmental Preschool

53. In September 2015, the IU advised the Parents to consider a developmental preschool.

54. On September 16, 2015, the IEP team met. The IU issued a NOREP placing the Student in a developmental preschool, but did not specify any particular developmental preschool. IU-23. Rather, the IU encouraged the Parents to consider two different developmental preschools. The Parents rejected both.[7] One was rejected because the Parents believed that the classroom size (18-20 students) was too big for the Student. The other was rejected because, during a tour, the Parents learned that not all students were toilet-trained. NT 260, 482-484, 533-534.

55. On September 23, 2015, the Parents rejected the NOREP. IU-23.

56. After the Parents rejected the NOREP, the IU suggested a different (3rd) developmental preschool. The IU arranged a tour of that school, and communicated with that school about the potential placement. Ultimately, that school did not accept the Student.

57. There is conflicting testimony about why the 3rd developmental preschool rejected the Student. Either there was no space for the Student (the District's version of events), or the school was not licensed to accept students with emotional disturbances, which was still the Student's eligibility classification (the Parents' version of events). The Parents' version of events is the more likely story. See IU-46 at 77. Regardless, the reason for the rejection is ultimately irrelevant. Both parties agree that the school rejected the Student, whatever its reasons were. See P-7, IU-46, NT 409-410, 486-488.

58. Around the same time of the tour and ultimate rejection by the 3rd developmental preschool, the IU suggested another (4th) developmental preschool as well. The IU believed that 4th school would be a good match for the Student, given the Student's needs for language enrichment. NT 426.

59. On November 16, 2015, the IEP team reconvened. At this point in time, there was general agreement that the Student would attend the 4th developmental preschool. The IEP was revised to reflect this. All goals and services stayed the same except the 30 minutes of S/L consult per month was removed. IU-19, 20.

60. On November 16, 2015, the IU offered a NOREP placing the Student in a "Language Classroom," which both parties understood meant the 4th developmental preschool. IU-19. The Parents approved the NOREP on November 20, 2015.

61. On November 20, 2015, the Student started attending the developmental preschool. IU-19, NT 675. The Student continued to attend the developmental preschool for the remainder of the period of time that the IU was the Student's LEA.

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[7] A revised IEP issued around the same time as the NOREP references one of the two placements. The NOREP – the document through which placement is actually offered – does not reference any particular developmental preschool.

Independent Educational Evaluation

62. The Parents requested, and the IU provided, an Independent Educational Evaluation (IEE) for the Student. The evaluation took place after the Student had started attending the developmental preschool.

63. On February 2, 2016, a report of the IEE was issued. IU-16

64. A doctoral-level neuropsychologist observed and tested the Student over five sessions for about 6.5 hours total. During this time, the neuropsychologist observed the Student continued to use scripted, out-of-context speech. IU-16; NT 314, 316-318.

65. The neuropsychologist administered the Autism Diagnostic Interview, Revised (ADI-R), consisting of a structured interview with parents and an observation of the Student. The ADI-R confirmed the prior ASD diagnosis across the three domains assessed by that instrument: social interaction, communication, and behavior. IU-16.

66. The neuropsychologist administered the WPPSI-V. This test confirmed prior observations that the Student has a very large vocabulary. However, the Student's inability to use language, in part, contributed to a full scale IQ score of 69. IU-16.

67. The neuropsychologist found that the Student's ability to use language pragmatically was significantly impaired across multiple settings. NT 359-360. While the Student's expressive and receptive language skills were tested in the average range, the neuropsychologist generally was of the opinion that those ratings were a function of the Student's strong vocabulary. In essence, the Student understood language, but was unable to use language to communicate social intent. *See, e.g.* NT 287-289.

68. Nothing in the IEE suggests that the developmental preschool was inappropriate for the Student. To the contrary, the report recommends the type of environment found at the developmental preschool. In general, the neuropsychologist opined that the Student's placement was appropriate, assuming all IEP services were properly delivered, but should have started sooner. *See* IU-16; NT 331-339.

Second Reevaluation

69. After the IEE, the IU conducted another revaluation of its own (2nd Reevaluation).

70. On May 13, 2016, the IU issued a report of the 2nd Reevaluation. IU-14.

71. The 2nd Reevaluation included narrative reports from the Student's developmental preschool teachers. These reports are similar in substance to the reports from prior teachers (no interest in socialization with peers, scripted language recited out of context, lack of eye contact, solitary play). IU-14. The IU's speech therapist who worked with the Student at that time provided substantively similar feedback. IU-14.

72. As part of the 2nd Revaluation, the IU administered the ASRS, but this time to both Parents and teachers. Both rated the Student highly in multiple domains, consistent with an ASD diagnosis. IU-14.

73. The 2nd Reevaluation concluded that the Student's proper eligibility category is Autism. The 2nd Reevaluation also concluded that the Student did not have a S/L impairment. IU-14.

Final IEP Meeting and NOREP

74. The IEP team reconvened on May 26, 2016. IU-10.

75. The team discussed services over the summer, and the Parents informed the IU that the Student would attend a camp in the summer of 2016, which was contrary to the IU's guidance. IU-10; NT 634-635.

76. The IU issued a NOREP on June 10, 2016, one day after the end of the liability period stipulated to in this case. IU-10.

Missed Services

77. For purposes of this hearing, the IU drafted a document attempting to capture the number of hours of services owed to the Student. IU-44. That document contained errors, and a revised version of the document, which also contained errors, was entered into the record. IU-44b.

78. The proper method for calculating of the total amount of missed services, and the impact of that calculation upon this case, is contained in the discussion below.

Progress Towards Goals

79. Just as the IU's IEP software re-numbers goals, inflating the total number of goals that the Student worked towards, the software also generates a written descriptor in progress reports when goals are changed. NT *passim*.

80. "We are satisfied that we have finished this outcome/goal" means that the goal has been mastered. "Our situation has changed; we no longer need to work on this goal" indicates that the goal has not been met but is either being discontinued, or is being continued in a substantively similar goal. "We need to work toward this outcome/goal. Let's continue with what we have been doing" means that the goal was not mastered and is being continued. NT 238-241, 255-259; 283-287.

81. The software's confounding verbiage, combined with a near total lack of reliable, objective evidence concerning the Student's progress, makes it impossible to find facts about any particular quantum of progress that the Student made.[8]

82. Given the lack of quantitative evidence, and the IU's confounding software, the best evidence of the Student's progress or lack thereof is found in the Student's evaluations. Taken as a whole, the Student's evaluations (ER of 10/30/2014, RR of 05/01/2015, IEE of 02/26/2016, 2nd RR of 05/13/2016) illustrate only trivial progress over time (discussed below).[9]

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[8] Virtually no quantitative evidence of the Student's progress was made part of the record in this case. What was presented must be completely discounted, as continuous graphs were generated using measurements of different things (i.e. the first data point measured one thing, but the second measured something else completely).

[9] To the extent that non-objective, narrative reports of the Student's progress were presented, they support the same conclusion. For example, the Student worked on proper use of scissors for nearly 17 months. *See, e.g.* IU-39.

Legal Principles

The Burden of Proof

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

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.

Evaluation Criteria

The IDEA establishes requirements for evaluations. Substantively, those are the same for initial evaluations and revaluations. 20 U.S.C. § 1414.

In substance, evaluations must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the child is a child with a disability and, if so, what must be provided through the child’s IEP in order for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation must “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child” and must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”. 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the District is obligated to ensure that:

> assessments and other evaluation materials... (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments.

20 U.S.C. § 1414(b)(3)(A).

Finally, evaluations must assess “all areas of suspected disability”. 20 U.S.C. § 1414(b)(3)(B).

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

Inappropriate Initial Evaluation

The IU's initial evaluation was inappropriate. Testimony explaining the psychologist's choice to have the Parents complete the ASRS and Conners, but not the Student's teachers, was not compelling. *See, e.g.* NT 81. These assessments are designed to obtain information from multiple raters across multiple settings. Given the emphasis that the psychologist placed on the differences in the Student's behaviors at home and in school, the intentional decision to forego information that could be used to compare the Student's behaviors across settings in a standardized way is inexplicable.

Similarly, an evaluation can only be as good as the information that the evaluator knows about. In this case, the IU had valuable information (the Child and Family Profile Form and BSC's recommendation), but – for reasons never satisfactorily explained on the record – that information never reached the IU's psychologist.

All of the symptoms that promoted others to reach an ASD diagnosis were present during the IU's initial evaluation. The IU's psychologist reached a different conclusion based on an erroneous assumption about the differences in the Student's behavior at home and in school. The unused-but-available information suggests the opposite.

Inappropriate Classification

As a result of the inappropriate initial evaluation, the Student was found eligible under the IDEA as a Student with an Emotional Disturbance, not Autism. That incorrect classification remained in place from the initial evaluation in October 2014, through the reevaluation in May 2015, until the second revaluation in May 2016. This inappropriate classification remained in place despite overwhelming evidence that the Student was diagnosed with ASD.

In the face of conflicting testimony, I find that the Parents provided the IU with a copy of the alternative school's Discharge Summary shortly after they received it themselves in June 2015. Had I found otherwise, however, the outcome would be the same. The IU and alternative placement personnel were in touch with each other. Documentary evidence clearly shows that

the Parents offered to provide a copy of the Discharge Summary in June 2015. It would have been grossly inappropriate for the IU to not actively seek out the Discharge Summary at that point in time. By finding that the IU actually had a copy in June 2015, I am giving the IU the benefit of the doubt.

Despite actual knowledge of the Student's ASD diagnosis, the IU kept the Student classified as a student with an Emotional Disturbance, not Autism, for roughly another 11 months.

Despite this clear and persistent error, there is no preponderance of evidence linking the incorrect classification to any substantive harm to the Student. With the exception of Intellectual Disability, any student's eligibility category has no substantive impact upon the student's rights.[10] In this case, the Student's right to FAPE was no different before and after the Student's eligibility category was corrected. The only evidence concerning any substantive harm caused by the incorrect classification is that the 3rd developmental preschool refused to accept the Student because it was not licensed to accept students with emotional disturbances. As noted above, evidence on this point is contradictory, and not preponderant in the Parents' favor.

Compensatory Education

In their closing brief, the Parents provide their own calculation of owed hours. I am persuaded by the Parents' calculation for the most part. The Parents simply multiplied the total hours that the Student should have received as outlined in IEPs and NOREPS, and multiplied those hours by the number of weeks that the IEPs and NOREPS were in place. However, the Parents included weeks that the IU was on break.

The Parents argue that the Student was entitled to services even while the IU was on break because the IU never performed a regression or recoupment analysis. I disagree with this argument. Given the Parents' burden of proof, discussed below, it is the Parents' obligation to prove that the Student was entitled to services during the IU's breaks. There is no preponderant evidence of this entitlement. Consequently, the proper calculation is: the total hours that the Student should have received according to IEPs and NOREPS, multiplied those hours by the number of weeks that the IEPs and NOREPS were in place while the IU was in session, minus the hours of service that the Student received.

The difficulty with the Parents' method in this case is that the evidence concerning the services that the Student actually received is also flawed. Undisputed testimony indicates that the services logs made part of the record in this case are also flawed. They are incomplete and were not intended to substantiate all of the time that service providers spent with the Student (e.g., they are not billing records). Consequently, as the Parents tacitly acknowledge in their closing brief, the District's calculation of owed services is the best evidence for some services, and the logs are the best evidence for others.

Fortunately, under the standard articulated above, it is not necessary for me to determine exactly how many hours of what kind of services were owed on the last day that the IU was the Student's LEA. Rather, my task is to determine the period of time during which FAPE was denied. Above, I have found that the Student made only trivial progress across all domains during the period of time in question.

The Student's disabilities permeated every moment of the Student's school day. Before placement in the alternative school, the Student was completely unmanageable in the typical

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[10] In Pennsylvania, students with Intellectual Disability are entitled to enhanced protections.

preschool. The IU had knowledge of this fact, and yet the provision of a PCA was delayed, and then sporadic. A preponderance of the evidence illustrates that the Student's basic social and behavioral needs did not change over time. The number of compensatory education hours that the Student is owed, therefore, is not limited to the number of hours that were not provided, but rather is equal to the number of hours that FAPE was denied. The same is true for PT, OT, and S/LT.

As discussed above, courts have expressed a preference for a "make-whole" compensatory education calculation. With no evidence to make such a calculation, however, I revert to an "hour-for-hour" method. Evidence in this case is more than preponderant that the Student required special education services for the entirety of the school day. The IU's own BSC recommended 10 hours per week of PCA support before services started. The Student also clearly required the intensive, full-day support found only in specialized classrooms. In addition to these behavioral needs, the Student needed physical and occupational therapy, and those needs did not improve with the IU's interventions. I find that this comes to five (5) hours per day for each day that the IU was in session during the period of time in question.

The IU is not entitled to a reduction of this award for the amount of time that it would have taken to find and fix the problem. The denial of FAPE was the result of the IU's flawed initial evaluation, which occurred prior to the period of time in question, and resulted from the IU's failure to use the information that it had. Consequently, the IU had actual knowledge of its own errors at the outset of the liability period. These errors were then compounded by the IU's inability to put services in place, and confounding data collection and reporting.

An order consistent with the foregoing follows.

ORDER

Now, January 11, 2017, it is hereby **ORDERED** as follows:

1. Between January 5, 2015 and May 13, 2016, the IU violated the Student's procedural rights under the IDEA by improperly classifying the Student as a student with an Emotional Disturbance.

2. Between January 5, 2015 and June 9, 2016, the IU substantively denied the Student a FAPE. Compensatory education is owed as a remedy for this substantive violation. Specifically, the Student is awarded five (5) hours of compensatory education for each day that the IU was in session between January 5, 2015 and June 9, 2016.

3. 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 entitled under the Student's current IEP, or any future IEP operative at the time that compensatory education is used.

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

/s/ Brian Jason Ford
HEARING OFFICER