

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

DECISION

Child's Name:

M. M.

Date of Birth:

[redacted]

ODR File 18245 16 17

OPEN HEARING

Parent(s):

Pro Se

School District:

Saucon Valley School District, 2097 Polk Valley Road,
Hellertown, PA 18055

Karl A. Romberger, Jr., Esquire, Sweet Stevens, Katz & Williams, LLP,
331 East Butler Avenue,
New Britain, PA 18901

Dates of Hearing:

6/1/17, 8/14/17, 8/22/17, 8/29/17

Date of Decision:

9/10/17

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION

The student (hereafter Student)¹ is a beyond-teenaged young adult who resides in and has graduated from the Saucon Valley School District (District). Student was eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² on the basis of specific learning disabilities prior to graduation in the spring of 2016. Student's Parent became concerned with the educational program that Student was provided and ultimately filed a due process complaint against the District in September 2016. Therein, she asserted that the District denied Student a free, appropriate public education (FAPE) under the IDEA, Section 504 of the Rehabilitation Act of 1973,³ and the Americans with Disabilities Act (ADA),⁴ over the 2014-15 and 2015-16 school years.

After the parties were not able to finalize a resolution of the claims, the case proceeded to a due process hearing convening over four sessions.⁵ The Parent sought to establish that the District failed to provide Student with FAPE throughout the time period in question, most particularly with respect to post-secondary transition services, and that the District further engaged in retaliation; she requested a compensatory remedy. The District maintained that the special education program that was implemented for Student was appropriate, that no retaliation occurred, and that no relief was due.

¹ Although this was an open hearing, in the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified at 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61.

⁴ 42 U.S.C. §§ 12101-12213.

⁵ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. References to duplicative exhibits may be to one or the other. Finally with respect to the evidence, the exhibits that were admitted are correctly stated at N.T. 592 Lines 7-25 through N.T. 593 Lines 1-5, this hearing officer apparently having misspoken at N.T. 593 Line 7.

After review of the record and for the reasons set forth below, the Parent's claims have not been established and, accordingly, must be denied.

PROCEDURAL HISTORY

- A. The Parent, through counsel, filed a Due Process Complaint against the District in September 2016. (S-1)
- B. Following a report of an agreement in principle on all of the issues raised, a sixty day conditional dismissal order was issued in November 2016. That order was extended on joint request in order to provide the parties with the additional time that appeared to be needed to finalize their agreement. (HO-2 pp. 3-6)
- C. The original Complaint was reinstated on May 5, 2017 following a report that the parties had not been successful in reaching a final agreement. (HO-2 p. 2)⁶
- D. Upon reinstatement, this hearing officer sent her standard prehearing information to the Parent and Counsel for the District, while also identifying the decision due date and scheduling a hearing date based on the regulatory timelines. (HO-1)
- E. The matter proceeded to a hearing as scheduled on June 1, 2017. The District's request to extend the decision due date made on the record was granted so that additional hearing sessions could be scheduled for the presentation of witnesses by both parties. (N.T. 187-88)
- F. The record concluded upon the completion of the testimony on August 29, 2017. (N.T. 696)

ISSUES⁷

- 1. Whether the District denied Student a free, appropriate public education during the 2014-15 and 2015-16 school years;
- 2. Whether the District retaliated against Student on the basis of Student's disability; and

⁶ Counsel for the Parent also withdrew her appearance at that time.

⁷ The issues are rephrased from the hearing officer's summation at N.T. 17 for ease of discussion and in order to be consistent with the Parent's actual claims presented in the Due Process Complaint (S-1) and through evidence presented by both parties at the hearing, recognizing that the parties elected to forego traditional opening statements at the start of the hearing.

3. If the District denied Student an appropriate educational program during those school years, whether Student should be awarded a compensatory remedy?

FINDINGS OF FACT

1. Student is a beyond-teenaged young adult who was a resident of and a student in the District during the 2014-15 and 2015-16 school years. Student was eligible for special education under the IDEA on the basis of specific learning disabilities in reading and written expression. (NT. 20-21, 104; S-9 p. 16)
2. Student was provided private tutoring in reading over the 2014-15 and 2015-16 school years. The services during the 2015-16 school year focused on decoding and comprehension, using Orton-Gillingham-based materials adapted by the new tutor for Student, who had to repeat similar tutoring previously provided. The second reading tutor also helped Student with assignments for classes. (N.T. 23, 24, 27-31, 44-45, 110, 130; P-2, P-4)
3. Student has demonstrated difficulty with study skills and organization, as well as written expression and reading skills. (N.T. 32, 49, 419-20)

EDUCATIONAL BACKGROUND

4. Student began attending school in the District in kindergarten and remained there through the end of the first grade year. Student returned to the District after repeating first grade in a parochial school, and remained there until the end of the eighth grade year before attending a cyber charter school for ninth and tenth grade. Student returned to the District again at the start of eleventh grade, the 2014-15 school year, through graduation in the spring of 2016. (N.T. 105-08, 109, 147, 152-53, 154)
5. Student was evaluated by the charter school with a Reevaluation Report (RR) issued in October 2013 when Student was in tenth grade. (S-3 pp. 7-32)
6. Cognitive assessment reported in the RR (Wechsler Adult Intelligence Scale – Fourth Edition) revealed a low average Full Scale IQ (85) with better developed verbal reasoning skills and relative weaknesses in working memory and processing speed. (S-3 pp. 12-13, 22-23)
7. Assessment of academic achievement (Wechsler Individual Achievement Test – Third Edition) yielded average range scores in reading and mathematics but marked deficits in written expression. Student’s reading fluency (Gray Oral Reading Test – Fifth Edition) revealed difficulty with both rate and accuracy, and a Qualitative Reading Inventory (QRI) revealed that Student was instructional at the upper middle school level on

narrative passages but frustrational with expository writing (social studies). (S-3 pp. 14-15, 27-30)

8. Rating scales of behavior and executive functioning in the RR reflected concerns with some executive functioning skills: planning and organizing, and monitoring behavior. (S-3 p. 15)
9. The RR concluded that Student was eligible for special education on the bases of a specific learning disability in reading and written expression. Needs were noted with respect to written expression, reading fluency, planning/organizing and monitoring work, and processing speed and working memory tasks. (S-3 pp. 16-17, 19-21)
10. The charter school's Individualized Education Program (IEP) for Student developed in the fall of 2013 included a post-secondary transition goal for attending college and obtaining employment following high school graduation. Annual goals addressed reading comprehension, reading fluency (at a seventh grade instructional level), and written expression (paragraph writing); goals for functional writing (assignment organization and completion) and organization (planning and chunking assignments for completion) were also included. The IEP contained a number of items of specially designed instruction related to assignment accommodations, assistive technology, a checklist for tracking assignments, and one-on-one direct reading instruction using a multisensory reading program, among other things. Student's program was regular education with itinerant learning support. (S-3 pp. 33- 64)
11. The Parent obtained an Independent Educational Evaluation (IEE) in November 2013 with a recommendation of her then-current attorney. (P-23 p. 6)
 - a. Cognitive assessment (Woodcock-Johnson Tests of Cognitive Abilities – Third Edition Normative Update) revealed a low average range Full Scale IQ (89) which was consistent with the charter school RR. (P-23)
 - b. Academic Achievement assessment (Woodcock-Johnson Tests of Achievement – Third Edition Normative Update) resulted in variable scores across many of the subtests and clusters. (P-23)
 - c. Language assessments (Comprehensive Receptive and Expressive Vocabulary Test – Second Edition and Comprehensive Test of Phonological Processing - Second Edition) yielded scores suggesting relative weaknesses in expressive language as well as phonological awareness, phonological memory, and rapid naming. (P-23)
 - d. Student's vocational interests were also explored with a questionnaire. (P-23)
 - e. The independent psychologist concluded that Student was eligible for special education based on specific learning disabilities in basic reading skills, reading fluency, and written expression, as well as a speech/language impairment. She specifically identified Student as having Dyslexia and Dysgraphia in addition to a Phonological Processing Disorder. (P-23)

- f. The IEE provided a number of recommendations for Student to address weaknesses in working memory, basic reading skills (including a Wilson Reading program), and written expression skills, and also provided suggestions for assistive technology (Read & Write Gold and Dragon Naturally Speaking, among others). (P-23)
12. A separate Auditory Processing Evaluation in January 2014 revealed no deficits. (S-3 pp. 65-68)

ENTRY INTO DISTRICT: START OF 2014-15 SCHOOL YEAR

13. The District was provided with records from the charter school, including the RR and most recent IEP. Student's special education case manager, a learning support teacher, reviewed those documents before the start of the school year and development of an IEP. (N.T. 336-37; S-3)
14. An IEP meeting convened in August 2014. The team discussed necessary assistive technology and how to meet Student's reading needs, and the Parent shared concerns for Student including assignment and test accommodations, assistive technology, need for study skills, and reading aloud in class. The District requested permission to reevaluate Student and met with the Parent in early September to discuss her concerns over a new evaluation. The Parent gave consent for a speech/language evaluation but not for cognitive or achievement testing or behavioral assessment at that time. (N.T. 336-44, 450-51; S-4, S-5, S-6, S-7)
15. The Parent's then-current attorney attended both the August and September 2014 meetings, as did the Parent. Student also attended the September meeting. However, there is no regular education teacher signature for the August meeting. (S-4 p. 5, S-8 p. 1)
16. The August 2014 IEP summarized the RR and relevant information from the charter school IEP, and set forth the Parent's concerns discussed at the meeting. Needs were identified in written expression, reading comprehension, and certain executive functioning skills: work pace, organization, working memory, and problem solving. (S-4)
17. The transition section of the August 2014 IEP reflected a post-secondary goal of attending college and obtaining employment during and after college. Services and activities specified research of college admission requirements, meeting with the guidance counselor to select classes, and discussion with the counselor and other District professionals regarding a career in Student's area of interest [redacted], in addition to improving skills identified as needs. (S-4)
18. Annual goals in the August 2014 IEP addressed written expression (five-paragraph essays), reading comprehension (in a grade-level English class with support, with further baseline data to be collected), reading fluency (at a seventh grade level with further baseline data to be collected), and organizational skills for task completion. A written

expression objective mirrored the functional writing goal in the charter school's IEP (assignment organization and completion). (S-4)

19. Program modifications and items of specially designed instruction were: frequent checks for understanding, preferential seating, assignment and test accommodations, an assignment book, assistive technology including a word processor for writing assignments, study guides and notes, study skills daily during a remediation period, use of clear directions, excusal from reading aloud during class, audiobooks for texts and novels, recording of lectures, the ability to visit the counselor or office as needed, and direct instruction in a multisensory reading program for 45 minutes daily. (S-4)
20. The August 2014 IEP proposed regular education with learning support for reading and written language in co-taught English classes. (S-4)

DISTRICT REEVALUATION

21. The District school psychologist conducted an observation of Student in two classes for the District's RR that was issued in November 2014. The psychologist noted that Student was off-task at times during those observations. (N.T. 451-52, 462-63; S-9 pp. 12-14)
22. The November 2014 RR summarized results from previous evaluations and provided several curriculum-based assessments. Teacher input reflected that Student required prompting and assistance with assignments and study skills in some classes. (S-9)
23. The speech/language portion of the reevaluation assessed a possible central auditory processing disorder as well as general language development (receptive, expressive, and pragmatic language). No speech/language impairment was identified. (N.T. 528-32; S-9 pp. 9-12)
24. The November 2014 RR reflected that Student demonstrated a relative strength in reading comprehension and relative weaknesses with written expression including mechanics, conventions, and spelling. (N.T. 454-55)

2014-15 SCHOOL YEAR

25. Student met with a learning support teacher for thirty minutes each day during the remediation period to work on organizational skills and provide learning support; progress monitoring on IEP goals was also conducted during those periods. As the 2014-15 school year progressed, Student had a need to meet with other teachers during remediation period, so the meetings with the learning support teacher decreased to twice and then once each week. (N.T. 348-51, 354, 408)
26. The learning support teacher developed a rubric for Student to complete for all assessments to guide Student's studying. (N.T. 352-54)

27. A meeting of Student's IEP team convened in December 2014 and the document was revised. The Parent and her then-current attorney attended the meeting. (N.T. 161; S-10)
28. The IEP team agreed in December 2014 to provide Student with access to a keyboarding program for use at home. (N.T. 355, 442-43)
29. The team discussed options for addressing Student's reading needs at the December meeting, including provision of Orton-Gillingham tutoring in place of a reading class. That suggestion was not pursued because Student would not receive credit toward graduation. The Parent and Student opted to take a critical reading class that provided support for an English literature class. (N.T. 345-57, 356-58, 400-01, 548-59, 571-72, 580)
30. The team agreed to initiate the SETT process⁸ in December to explore additional technology. At that time, Student was using Dragon Dictate and a voice recorder to record lectures. The District completed an application to the local Intermediate Unit (IU) to initiate that process. (S-10 p. 8, S-12)
31. The December 2014 IEP incorporated recent assessment results, information provided for the new RR, and progress monitoring on the goals. New transition information noted completion of a survey and Student's interest in a four year college for [redacted] rather than [redacted], or alternatively employment involving [redacted]. The Parent indicated an interest in Student attending a four year college. (S-10)
32. The December 2014 IEP removed reading comprehension as a need, but retained written expression (including mechanics/conventions) and encoding/decoding, as well as executive functioning skills, as areas to be addressed. The transition section was revised slightly to note the new interest in [redacted] and to omit reading comprehension as a service. The reading fluency goal was revised to reflect mastery of the goal for seventh grade level text and insertion of eight grade level text, and a study skills goal was added. All goals had baseline data collected after the school year started. (S-10)
33. The majority of the program modifications and items of specially designed instruction remained the same. Consistent with the team's discussion, the keyboarding program was changed to be done as homework, and the provision for remediation sessions with the learning support teacher was decreased to twice each week. New provisions for adapted assessments, prompts and cues, multimodal instruction, and a speech-to-text program were added and direct reading instruction was removed. Student's program remained regular education with learning support for reading and written language in co-taught English classes. (S-10, S-11)
34. A Notice of Recommended Educational Placement (NOREP) issued after the December 2014 meeting was returned with a request by the Parent for another meeting in January 2015. (S-13)

⁸ This process is a framework where the Student, Environment, Tasks, and Tools are considered in evaluating potential assistive technology.

35. Following the Parent's request for another meeting of the IEP team, one was scheduled for April 2015 due to difficulty accommodating schedules including those of counsel for both parties. That meeting was to address the Parent's concerns with Student's literature course and assistive technology. The Parent and Student also attended. (N.T. 368-73; S-16, S-18, S-19, S-20, S-21)
36. Because Student was then less available to the learning support teacher during remediation periods, the IEP team agreed to change the writing goal from a five-paragraph essay to a single-paragraph essay, but assessing all of the same skills and particularly the content. Student had already taken and passed an English composition course before returning to the District high school. (N.T. 350, 360-61, 371-72, 427, 541-42)
37. The IEP was revised following the April 2015 meeting. Progress monitoring was reported on the IEP goals. The written expression goal was revised to reflect one-paragraph pieces consistent with the team's agreement, although Student reportedly continued to exhibit difficulty with introductory and conclusory paragraphs and transitions; multiple-paragraph writing was also part of Student's English class instruction. A new goal was added to address writing conventions and mechanics. The sessions with the learning support teacher during the remediation period were reduced to once per week. Student's program remained regular education with learning support for reading and written language in co-taught English classes. (S-22)
38. Student's English class during the eleventh grade year addressed study skills, particularly those that were essential to the Keystone exams. Student ended the school year with a proficient score in that class. (N.T. 56-67, 60-62, 78-79, 96, 101)
39. Student's tests were adapted for the English class in eleventh grade with extended time provided for completion. (N.T. 82-83)
40. Over the course of the 2014-15 school year, Student made some progress on the IEP goals but demonstrated continued needs with respect to written expression (spelling, sentence formation, and transitions) and conventions/mechanics; inconsistent performance with reading comprehension questions at Lexile level 1120; and inconsistency with organizational and study skills performance. Student nearly mastered the reading fluency goal at the eighth grade level. (S-53)
41. Student successfully passed all classes during the 2014-15 school year with mostly B- and C-range final grades. (N.T. 373-74, 435-36; S-46)

ASSISTIVE TECHNOLOGY

42. Student had access to a voice recorder at the start of the 2014-15 school year, and a speech/language pathologist provided training to Student on its use. (N.T. 164, 529)
43. Student had access to audiobooks at the start of the 2014-15 school year. (N.T. 301-03, 341)

44. Student had access to Learning Ally after a short delay. (N.T. 163-64)
45. By early December 2014, the District provided Student with Dragon Dictate, a speech-to-text software program, but Student had difficulty with the required voice training to use that program successfully. Other similar programs were also trialed and Student ultimately was provided with Read & Write Gold in the spring of 2015 that was more successful for Student. The District provided assistance to Student including instruction on how to use those various software programs. (N.T. 255-65, 272-73, 275, 329-30, 366, 400, 427, 431, 432, 435, 441-42; S-57)
46. The District also provided Student with access to the Read & Write Gold program through Student's Google account so that it could be used on non-District devices including at home. The version available through the Google account was not exactly the same as the program on the District MacBook but included the features Student would need. (N.T. 263-64, 274, 277-78, 297-99)
47. In January 2015, Student's IEP team members including the Parent considered providing Student with an iPad or a MacBook and the District suggested a meeting. The District ultimately provided Student with a MacBook during the 2014-15 school year followed by an iPad during the 2015-16 school year. (N.T. 255, 307-08, 366, 399, 426; S-14, S-56)
48. Student, like all students, was permitted to take the District devices home, but Student rarely did so. (N.T. 298, 557-58)
49. In mid-February 2015, the District submitted a second SETT request to the IU. At that time, Student was rarely using the voice recorder (but was provided adapted notes), was using the speech-to-text software that did not always work well, and was not accessing audiobooks. (S-15)
50. Student, like all students, had access to various applications for the iPad to aid with tasks such as note-taking and keeping track of assignments. (N.T. 299-304, 315)

2015-16 SCHOOL YEAR: FALL 2015

51. The Parent retained new counsel in the fall of 2015. (S-25, S-26)
52. Student met with a learning support teacher once a week during the remediation period to work on organizational skills and provide learning support. Student was able to and did meet with other teachers during remediation period on the remaining days of the week. (N.T. 375)
53. Student had access to audiobooks from the start of the 2015-16 school year. (N.T. 375)
54. Student met with an information technology specialist for assistance with computer programs and applications for a period of time. (N.T. 260-62, 266)

55. Student had an application on Student's iPad which provided a mobile device version of Read & Write Gold. (N.T. 289-90)
56. The District invited the Parent to an IEP meeting in November 2015. The Parent attended accompanied by an advocate. (N.T. 379-80; S-27, S-29 p. 3)
57. The November 2015 IEP provided new teacher input and progress monitoring information on the goals. The transition section was updated to reflect Student's interest in a community college before a transfer to a four-year college with a major in [redacted] and a plan to take the SAT; Student would also contact the office of disability services at the post-secondary institution Student would attend with the assistance of the guidance counselor, and identify dates for college fairs. New baseline data was reported for the annual goals, and Student's program remained regular education with learning support for reading and written language in co-taught English classes. (S-29)
58. Another IEP meeting was held in December 2015. The team agreed to another SETT process. There is no regular education teacher signature for this meeting. (N.T. 381-82, 386-87; S-31, S-33, S-35)

2015-16 SCHOOL YEAR: SPRING 2016

59. Another IEP meeting was held in January 2016 with the Parent attending and the IEP was revised. There is no regular education teacher signature. New services and activities in Student's transition plan included applying to colleges and meeting with the guidance counselor monthly regarding those applications. Progress monitoring on the goals was also included. The reading comprehension goal was revised to reflect high school level text, and the reading fluency goal reflected ninth grade level materials. The program modifications and items of specially designed instruction added provisions for adult support in core classes, and remediation when assignments were incomplete. Student's program was for regular education with adult support in core classes. A NOREP issued after that meeting resulted in another request by the Parent for a meeting. (N.T. 387-88; S-36, S-37, S-38, S-40)
60. By March 2016, Student was failing three classes and was required to attend remediation periods for those classes. (S-39)
61. The IEP team met again in March 2016 with the Parent and Student attending. At that time, the Parent's concerns were reading including decoding, written expression, organizational skills, and inadequate preparation for post-secondary transition. The District arranged for a special education teacher to work with Student on study skills and organization for one period per day after that meeting to address those needs and to help Student raise Student's grades, and Student dropped a class that Student was failing but did not need to graduate. A new program modification/item of specially designed instruction for the period of study skills and organization instruction was added. Student's program remained regular education with additional adult support in core classes. (N.T. 213, 225, 392-93, 410, 544, 581, 590-91; P-26; S-40)

62. On March 14, 2016, the Parent approved only the IEP revision that added the study skills. (P-24, P-26)
63. In March 2016, the Parent contacted the learning support teacher because of concerns with Student taking tests in the hallway. A paraprofessional had done so because no other room was available, but the learning support teacher directed the paraprofessional not to let it happen again. (N.T. 124, 389-90, 415-16, 556-57)
64. Student's grades declined over the course of the 2015-16 school year due to a failure to complete assignments. The learning support teacher did not believe that Student was incapable of performing the work assigned, but rather failed to complete assignments and turn them in. Student also missed remediation periods in order to attend the Orton-Gillingham tutoring. (N.T. 384-86, 394, 403-04, 411-12)
65. Student was successful in Student's classes, including on written assignments, during the senior year. (N.T. 285-87, 290-91, 320)
66. Student quit a District sports team during the senior year because of the need to focus on school work. (N.T. 114, 404, 411; P-10)
67. An independent reading evaluation obtained by agreement of the parties in May 2016 reflected continued weaknesses with decoding and fluency, as well as in reading comprehension skills. (N.T. 111-13; P-1; S-43)
68. Student passed all classes during the 2015-16 school year, attaining mostly B- and C-range grades. Student graduated in June 2016 having completed all credit requirements. (N.T. 21, 170, 395, 560; S-41, S-45, S-46)
69. Over the course of the 2015-16 school year, Student made some progress on the IEP goals but demonstrated continued needs with respect to written expression (spelling, transitions, and conclusions) and conventions/mechanics; variability in performance with reading comprehension questions at Lexile level 1210-1260 (high school level) probes; inconsistency but some improvement with organizational skills; and decreased study skills performance. Student's performance was somewhat inconsistent toward the reading fluency goal at the ninth grade level. (S-53, S-54)
70. The District Director of Special Education and other administrators investigated every allegation of retaliation or other actions against Student, including a call to the office for [redacted] for which no disciplinary consequences were imposed. There was no substantiation found of any of those assertions of retaliation. (N.T. 126-28, 539-40, 559-60, 564-68; P-21; S-48 pp. 1-2, S-55, S-59)
71. The District issued a NOREP in June 2016 for graduation from the District. The Parent did not approve the NOREP, but Student did graduate. (N.T. 21; S-41, S-42)

POST-SECONDARY TRANSITION

72. Student had a goal of attending a four year college. That goal changed during the final two years of high school to a community college or trade school. At the time of the due process hearing, Student was attending a local technical school. (N.T. 117-18, 123, 132, 204, 205, 418, 496, 509-10)
73. The guidance counselor provides all juniors in the District with information on and considerations for selecting a post-secondary educational institution, dates for college admissions testing and registration information, and procedures for obtaining necessary documentation for college applications. There are evening meetings held to which parents are also invited. (N.T. 481, 487)
74. Student took the Preliminary SAT that the District offers to its students. Student attained a critical reading score at the 12th percentile, a mathematics score at the 13th percentile, and a writing skill score at the 19th percentile. (N.T. 490-91; S-44 p. 4)
75. The guidance counselor assisted Student in applying for and obtaining approval for accommodations for the Scholastic Aptitude Test (SAT) after the Parent provided her consent in October 2015. Student then took the SAT in the guidance counselor's office at the high school. (N.T. 481-83; S-44 p. 7-8, S-48 p. 9)
76. The guidance counselor provides all seniors in the District with information on and considerations for selecting a post-secondary educational institution, dates for college admissions testing and registration information, and procedures for obtaining necessary documentation for college applications and accommodations. There are evening meetings held to which parents are also invited. (N.T. 485-87, 492-94; S-44)
77. The guidance counselor reviewed with Student the steps necessary to obtain accommodations at the college level. She also provided a number of colleges for Student to contact that were recommended because of the availability of support for students with disabilities. (N.T. 169, 418, 483-86, 488-89, 489-92, 508-09; S-58)
78. Student applied to and was accepted for admission at a local community college, but was required to take an entrance examination to determine placement. Student's stated major for the fall of 2016 was to be [redacted]. (N.T. 117, 176-77, 494, 558; S-44 pp. 9-11)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the

burden of persuasion in this type of case 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).

Accordingly, the burden of persuasion in this case rests with the Parent who filed the complaint and requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be credible, testifying to the best of his or her recollection from his or her own perspective. The Parent’s testimony was heartfelt, but it should be noted that her understanding of events that occurred in the school, particularly those that she believed to be retaliatory, were frequently based on what Student or others reported and were not corroborated by independent evidence. There were few inconsistencies in the record with respect to the FAPE issues this hearing officer was asked to decide. Although there were some gaps in the testimony resulting from a lack of clear memories and the absence of witnesses who were no longer available, the documentary exhibits were quite helpful in that regard. In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as were the parties’ closing statements.

IDEA PRINCIPLES

The IDEA and state and federal regulations obligate local educational agencies (LEAs) to

provide a “free appropriate public education” (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services that are reasonably calculated to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). LEAs meet the obligation of providing FAPE to eligible students through development and implementation of an IEP that 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).

Recently, the U.S. Supreme Court considered anew the application of the *Rowley* standard, observing that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA[.] * * * A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child's circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. * * * As we observed in *Rowley*, the IDEA "requires participating States to educate a wide spectrum of handicapped children," and "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between."

Endrew F., ___ U.S. ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017) (citing *Rowley* at 206-09). The Court explained that, "an educational program must be appropriately ambitious in light of [the child's] circumstances... [and] every child should have the chance to meet challenging objectives." 137 S. Ct. at 1000, 197 L.Ed.2d at 351. This is especially critical where the child is not "fully integrated into the regular classroom." *Id.* The Court thus concluded that "the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. at 1001, 197 L.Ed.2d 352. This standard is not inconsistent with the above interpretations of *Rowley* by the Third Circuit.

As *Rowley*, *Endrew*, and the IDEA make clear, the IEP must be responsive to the child's identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, the IEP need not "provide 'the optimal level of services,' or incorporate every program requested by the child's parents." *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Furthermore, "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

GENERAL SECTION 504 AND ADA PRINCIPLES

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she "has a physical or mental impairment which substantially limits one or more major life activities," or has a record

of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, 172 F.3d at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Further, the substantive standards for evaluating claims under Section 504 and the ADA are essentially identical. *See, e.g., Ridley School District, supra*, 680 F.3d at 282-283. Courts have long recognized the similarity between claims made under those two statutes, particularly when considered together with claims under the IDEA. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will all be addressed together.

STUDENT’S EDUCATIONAL PROGRAM: FAPE

Parents who believe that an LEA has failed to comply with its obligations under the IDEA may file a Due Process Complaint wherein they may “present a complaint [] with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to [a] child.” 20 U.S.C. § 1415(b)(6)(A). An administrative hearing will be held on the issues presented. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.511, 300.512, 300.515; 22 Pa. Code § 14.162. In this matter, the Parent filed such a complaint challenging the District’s program over the 2014-15 and 2015-16 school years. Her FAPE claims focus on programming relating to post-secondary transition, reading and written expression, assistive technology, and organizational and study skills. (N.T. Vol. I – IV *passim*;

Parent's Closing at unnumbered 1-5.) She also raised a procedural concern in that a regular education teacher was not present at every IEP meeting.

Before turning to the Parent's specific contentions, it is helpful to review broadly the District's response to Student's constellation of educational needs. Upon notice of Student's re-enrollment in the fall of 2014, the District convened an IEP team and reviewed available records from the previous charter school, proposing a new evaluation. The Parent, who was represented by counsel, was given the opportunity to provide input and share her concerns with Student's program and any reevaluation. The District then developed an IEP based on the information known to it, addressing the identified needs (including post-secondary transition geared towards Student's goal of attending a four year college, written expression, reading fluency and comprehension, organizational skills, and assistive technology) through goals and objectives that utilized the then-current present education levels until more definitive baselines could be determined. Each of Student's identified needs were addressed in the IEP through goals and program modifications/items of specially designed instruction while certain assessments were conducted.

The team re-convened in December 2014 following completion of the new RR, and revised Student's IEP based on all available new information, including baseline data, Student's changing post-secondary interests, and the Parent's election to continue Orton-Gillingham tutoring. The SETT process was initiated to explore additional options for assistive technology. Then, the team met again in April 2015, making adjustments as the team agreed were necessary to provide Student with necessary support in regular education classes. It is somewhat concerning that the written expression goal was revised, not in response to Student's needs but because the learning support teacher was not able to successfully monitor Student's progress on

that goal in the limited time available; nevertheless, Student's written expression weaknesses continued to be addressed through other classes in addition to the revised goal that remained focused on content of those writing pieces.

Student was provided with assistive technology through, among other things, a MacBook with speech-to-text software from one of the publishers recommended by the psychologist who conducted the IEE. When difficulties with the software arose, the District looked into alternate options, including a new software program also recommended by the private psychologist that additionally accommodated Student's use of non-District devices. An iPad was also provided. Throughout the relevant time period, the IEP team explored various forms of assistive technology that would meet Student's unique needs.

The IEP team continued to work collaboratively with the Parent and Student over the 2015-16 school year, convening multiple meetings and addressing concerns as they arose, including new assistive technology and Student's changing goals for post-secondary education and employment. The IEP was revised as needed based on Student's progress and emerging concerns regarding failing classes and study skills. In sum, the District did not fail to recognize or refuse to program for Student's individual special education strengths and weaknesses, including making appropriate revisions to that program as concerns of the Parent and Student were made known, throughout the 2014-15 and 2015-16 school years.

THE PARENT'S FAPE CLAIMS

The post-secondary programming, which appears to be the major contention of the Parent, shall be addressed first.

The IDEA requires that every IEP created for a child that is age sixteen or older must include appropriate measurable post-secondary goals based on age appropriate transition assessments related to training, education, employment, and

independent living skills, as well as corresponding transition services. 20 U.S.C. § 1414(d)(1)(A)(VIII). A transition plan is a “set of activities” based on the student’s needs and is created to help the disabled student move from school to post-school activities. 20 U.S.C. § 1401(34)(B); 34 C.F.R. § 300.43.

K.C. ex rel. Her Parents v. Nazareth Area School District, 806 F. Supp. 2d 806, 822 (E.D. Pa. 2011). In Pennsylvania, LEAs are required to begin transition planning during a student’s fourteen year. 22 Pa. Code § 14.131(a)(5).

The Third Circuit has not defined what amount of transition planning is required in an IEP to ensure a FAPE. Several courts, including those in the Eastern District of Pennsylvania, have suggested that inadequate transition planning is a procedural defect and thus should be evaluated based on whether substantial harm has resulted. The floor set by the IDEA for adequate transition services appears to be low, focusing on whether opportunities are created for a disabled student to pursue independent living and a career, not just a promise of a particular result.

Coleman v. Pottstown Sch. Dist., 983 F. Supp. 2d 543, 566 (E.D. Pa. 2013) (internal citations omitted), *aff’d*, 581 Fed. App’x 141 (3d Cir. 2014).

The post-secondary transition programming in this case reflected Student’s education, employment, and independent living goals with a series of activities, some once a year and some ongoing, designed to assist Student in reaching those goals. That section of the IEP was revised as Student’s goals and interests changed. The guidance counselor met with all students during the junior and senior years to present general information that related to Student preparing for and applying to college, and followed up with Student individually to register for the SAT, apply to colleges of Student’s interest, and to take necessary steps to contact the appropriate office of those institutions to obtain support for Student’s disabilities. Taken as a whole, all of these services more than met the requirement of creating opportunities for Student to pursue post-secondary education, employment, and independent living.

The Parent contends that the District refused to assist Student with preparing any college essays. It is unclear whether such a service was intended to be part of Student's post-secondary transition planning, but in any event there is no evidence in the record that Student or the Parent ever asked for that accommodation and that the District refused. There also appears to be a claim that Student's change in plans for post-secondary education, and resulting current placement in a technical school, are the fault of the District. As noted above, however, the law does not require an LEA to guarantee any particular post-secondary result, nor is there any evidence in the record to suggest that the District is in any way responsible for the schools that Student applied to or enrolled in. Moreover, while it may have been necessary for Student to take certain remediation classes if enrolled in the local community college, that circumstance does not mean that Student could not have been successful in that environment. While one can certainly appreciate that the Parent is disappointed that her goal for Student to attend a four-year college has not been achieved, at least not as of today, the evidence does not support a conclusion that the District failed in any of its obligations to Student with respect to transition planning.

Turning next to the programming to address Student's needs in reading and written expression, the Parent emphasizes the District's failure to "close the gap" between Student's performance in those areas of disability and that of grade-level peers. However, as *Andrew* recently made clear, the IDEA demands a program that is "appropriately ambitious in light of [the child's] circumstances..." 137 S. Ct. at 1000, 197 L.Ed.2d at 351, not one that is optimal. While the Parent's desire for such an outcome is certainly understandable, an LEA "is not required to maximize a handicapped child's potential 'commensurate with the opportunity provided to other children.'" *El Paso Independent School District v. Robert W.*, 898 F. Supp.

442, 449 (W.D. Tex. 1995) (quoting *Rowley, supra*, 458 U.S. at 186). Goals must aim to be challenging, but need not be (and indeed should not appear to be) insurmountable. The District could not be expected to eliminate Student's disability or to guarantee that Student would attain any particular level of proficiency in Student's areas of weakness, including basic reading skills and written expression. *Leighty v. Laurel School District*, 457 F.Supp.2d 546, 557 (W.D. Pa. 2006). Thus, the fact that a gap remains between Student's abilities and those of peers in reading and written expression skills does not amount to a denial of FAPE.

Moreover, the District did address those specific academic needs. The initial IEP included goals for reading comprehension, reading fluency, and written expression. The goals were revised over time as Student's needs changed and Student made progress with respect to those skills, with high school level reading materials used during the senior year. The Parent's election to continue Orton-Gillingham tutoring was her choice, but did not reflect on the District's failure to provide appropriate instruction and services.⁹ It is true that that "a child's entitlement to special education should not depend upon the vigilance of the parents[.]" *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996)). However, here, the Parent and Student were actively involved in programming decisions and, it must be remembered, one of their main goals was that Student would earn the credits needed to graduate so that Student could go on to post-secondary education. Viewed in the context of the entire record, the evidence falls short of establishing a denial of FAPE with regard to reading and written expression needs.

The Parent also asserted that the District did not deliver appropriate programming with

⁹ The effectiveness of that tutoring for Student cannot be ascertained, but the second tutor who worked with Student during the 2015-16 school year testified that she essentially had to start over with Student. (N.T. 27-28.) One can, however, surmise that her assistance with assignments benefitted Student.

regard to assistive technology. Student was provided with word processing and a keyboarding program, in addition to audiobooks and a voice recorder, as part of the IEP from the start of the 2014-15 school year based on needs known to the team. As noted above, a MacBook with speech-to-text software by a publisher recommended by the psychologist who conducted the IEE was supplied mid-way through the year, with an iPad added in the spring. As difficulties arose with Student's access to and use of the technology, the District worked to address them, ultimately providing Read & Write Gold that was available at home¹⁰ and on the iPad. Student was given training on all of the assistive technology that was trialed and provided through an ongoing SETT process. Lastly on this topic, there is no evidence that Student was unable to complete any assignments due to difficulties with assistive technology that might suggest a substantive denial of FAPE. The record simply does not support a conclusion that the District denied Student FAPE in any respect based on assistive technology.

The final major substantive claim relates to organizational and study skills with a passing reference to a need for support in mathematics.¹¹ Student's needs with respect to organizational and study skills were addressed over the course of the two school years in several ways: through remediation periods with the special education teacher; as an IEP goal that was added in December 2014; by provision of a rubric for studying for assessments; with an increase in study skills support in the spring of 2016 (after parental consent was obtained) when Student was failing several classes; and through assistive technology. This hearing officer concludes that the needs in organizational and study skills were appropriately addressed throughout the 2014-15 and 2015-16 school years. With respect to any mathematics need, there is nothing in the record

¹⁰ It was never made clear to this hearing officer why Student did not use the District-provided devices at home, which would have eliminated the functional disparity, as limited as that discrepancy was, in what was available through the Google account.

¹¹ The asserted mathematics need appears in the Parent's Closing at unnumbered p. 3.

to suggest that Student was ever identified as requiring specially designed instruction or having needs in this area, and this claim therefore also fails.

Lastly on the FAPE issue, the Parent challenges the District's failure to include a regular education teacher at every IEP meeting.¹² However, a procedural violation is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefit. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 565 (3d Cir. 2010); 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2). Although there were several IEP meetings for which there is no regular education teacher's signature, there is no evidence to support a conclusion that this procedural flaw resulted in any loss of educational opportunity for Student or a denial to the Parent of the opportunity to participate meaningfully in educational decision-making.

Having found no substantive denial of an appropriate education to Student under the IDEA, there is no need to further discuss the coextensive Section 504 and ADA FAPE claims, or to reach the issue of any potential compensatory remedy.

RETALIATION AGAINST STUDENT

The remaining issue is whether the District engaged in retaliation against Student related to Student's disability and the Parent's advocacy for Student.

The elements of a retaliation claim require a showing by the filing party (1) that they engaged in a protected activity, (2) that defendants' retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or her rights, and (3) that there was a causal connection between the protected activity and the retaliatory action.

¹² Parent's Closing at unnumbered p. 2.)

Lauren W. v. DeFlaminis, 480 F.3d 259, 267 (3d Cir. 2007) (citations omitted). To establish the requisite causal connection a plaintiff usually must prove either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link. *Id.* (citations omitted).

The few isolated incidents that were presented by the evidence, including [redacted] do not, in this hearing officer's estimation, establish a claim of retaliation. At best, the record establishes that Student and/or others at times engaged in behaviors that were brought to the attention of administration, which investigated those and found none to be substantiated or to merit consequences. Even assuming that Student and/or the Parent genuinely believed there to have been conduct by District professionals that was retaliatory against Student, and there is no reason to doubt her sincerity, the record is simply not preponderant to establish the requisite elements of such a claim. Accordingly, the retaliation issue lacks merit.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the evidence does not establish a substantive denial of FAPE or discriminatory retaliation. Consequently, no remedy is due.

ORDER

AND NOW, this 10th day of September, 2017, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not deny Student a FAPE during the 2014-15 or 2015-16 school years.
2. The District did not engage in discriminatory retaliation against Student.
3. The District is not ordered to take any action.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are **DENIED** and **DISMISSED**.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
18245-1617AS