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: R. L.

Date of Birth: [redacted]

Dates of Hearing: 1/24/2017, 1/25/2017 and 1/26/2017

ODR File No. 18312-16-17

CLOSED HEARING

Parties to the Hearing:	Representative:
Student [Student]	Student Attorney Heather Hulse Esq. McAndrews Law Office 30 Cassatt Avenue Berwyn, PA 19312
Local Education Agency Pennsylvania Department of Corrections 1920 Technology Parkway Mechanicsburg, PA 17050	LEA Attorney Kelly J. Hoke Esq. Debra S. Rand, Esq Department of Corrections Office of Chief Counsel 1920 Technology Parkway Mechanicsburg, PA 17050
Date of Decision:	March 20, 2017
Hearing Officer:	Brian Jason Ford, JD, CHO

Introduction

[The Student] (Student) is [beyond 21] years old. The Student has been incarcerated in various Pennsylvania State Correctional Institutes (SCIs) since the age of 17. From the start of the Student's incarceration through the end of the school year in which the Student turned 21, the Pennsylvania Department of Corrections (Department) was the Student's Local Educational Agency (LEA).[1]

The Student alleges that the Department failed to provide a free appropriate public education (FAPE), in violation of 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*., as well as their federal and Pennsylvania implementing regulations. The Student alleges that the denial of FAPE was absolute, or nearly so, for the period from November 2013 through August 2016.

The Student demands compensatory education to remedy the denial of FAPE.[2]

For reasons discussed below, I find in the Student's favor.

Procedural History

On October 5, 2016, the Student requested this special education due process hearing by filing a complaint with the Office for Dispute Resolution (ODR) with copy to the Department.[3]

Although there was significant pre-hearing correspondence, the Department did not file a response to the complaint.

The pre-hearing correspondence concerned scheduling, evidence, and procedural matters. Multiple scheduling motions, including motions to extend the IDEA's statutorily-imposed decision due date, were made and granted. Ultimately, the hearing convened over three, full-day sessions on January 24, 25 and 26, 2017.

The IDEA includes special exceptions and defenses applicable when students "are convicted as adults under State law and incarcerated in adult prisons." 20 U.S.C. § 1414(d)(7)(A). These penological exceptions and defenses are discussed below. The Department raised those

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[1] There can be some confusion about whether the Department or individual SCIs are [an] incarcerated student's LEA. *See S.B. v. SCI-Pine Grove*, ODR 13159-1213KE. That distinction makes no difference in this case and, moreover, the Department does not dispute that it is the Student's LEA.

[2] The Student also demands reasonable attorneys' fees and costs, which I read as a reservation of rights, as I have no authority to award attorneys' fees and costs.

[3] In Pennsylvania, special education due process hearings are typically brought by parents on behalf of their minor children. Parents also have their own rights under the IDEA. *Winkelman v. Parma City Sch. Dist*., 550 U.S. 516, 127 S. Ct. 1994 (2007). However, when a student is incarcerated in an adult or juvenile Federal, State, or local correctional institution, "all rights accorded to parents under... [the IDEA's procedural safeguards] transfer" to the student. 20 U.S.C. § 1415(m)(1)(D). This distinction makes no substantive difference in this case, but explains why the case is brought by the Student, not Parents.

exceptions and defenses during the second session of this hearing. The Student objected and moved to preclude those defenses.

During the hearing, I did not preclude evidence concerning the penological defenses. At my request, the parties addressed the question of whether the penological defenses are affirmative defenses as part of their closing briefs. For reasons explained below, I find that the penological defenses are affirmative, were not raised, and have been waived.

Issues[4]

1. What amount of compensatory education, if any, is owed for a denial of FAPE that occurred from November 19, 2013 to November 5, 2014 while the Student was incarcerated at [SCIs]?

2. Did the Department deny the Student a FAPE from November 6, 2014 to the end of the 2015-16 school year while Student was incarcerated at [an] SCI? If so, what amount of compensatory education, if any, is owed for that denial of FAPE?

Stipulation as to a Denial of FAPE

The Student was initially incarcerated in [one]. From [there], the Student was transferred to [another] SCI. From [there], the Student was transferred to [another] SCI. The parties stipulated that the Student was denied a FAPE while incarcerated in [two SCIs]. NT at 11. This includes the period of time starting on November 19, 2013 and ending on November 5, 2014.

There is no stipulation as to what remedy is owed, if any, for that denial of FAPE.

Findings of Fact

I carefully reviewed all of the evidence presented by both parties, but I make findings only as necessary to resolve the issues presented. Both parties presented evidence that is not referenced in this decision. Two categories of evidence are worth noting: First, as noted above, evidence concerning the IDEA's penological defenses was permitted during the hearing but is not discussed here because those defenses have been waived. Second, evidence concerning what periods of time the Student was confined to different parts of different SCIs was also presented. For reasons discussed below, a detailed accounting of the Student's confinement is unnecessary to resolve this case.

Intake, Initial Testing, First IEP

1. The Student was incarcerated briefly at [one] SCI, and then at [another] SCI from November 19, 2013 to November 5, 2014. NT at 11 (Stipulation).

[4] The issues were articulated on the record after the parties presented opening statements. A stipulation concerning a denial of FAPE, discussed herein, prompted the reformulation of the issues presented here.

2. There is no dispute that the Student was identified as a student with disabilities and received an IEP from a public school prior to incarceration. IEPs prior to incarceration were not entered into evidence.

3. On November 22, 2013, three days after the start of the Student's incarceration, as part of its intake procedures, the Department administered academic screeners. These included the short form of the Test of Adult Basic Education (TABE), a "FASTRACK" assessment and some sub-sections of the Brigance Inventory of Essential Skills. P-5.

4. The Department uses the TABE "as a thumbnail sketch to get a quick understanding of the grade levels for the students." NT at 38. The TABE is not considered an assessment of academic achievement consistent with the IDEA's requirements. NT at 39.

5. From November 19, 2013 to November 5, 2014, the Student was confined to a "restricted housing unit" (RHU) for the "majority" of the time.[5] When confined to the RHU, the Student was not permitted to attend school in the classroom but was given study packets. NT at 11 (Stipulation).

6. On January 3, 2014, the Department issued its first IEP to the Student. P-5. The IEP does not specify what the Student's qualifying disabilities or categories of disabilities were. *Id.* However, at that time, the IEP team determined that the Student required both Emotional Support and Learning Support. *Id.*

2014 Reevaluation Report

7. On June 23, 2014, the Department completed a Reevaluation Report (2014 RR) of the Student. P-7.

8. At the time of the 2014 RR, the Department had actual knowledge that the Student was diagnosed with Bipolar Disorder and Oppositional Defiant Disorder (ODD), and recognized that the Student qualified as a student with an Emotional Disturbance. NT at 35-37.

9. The Department solicited, received, and incorporated meaningful parental input into the 2014 RR. P-7.

10. The 2014 RR incorporated and relied upon the results of the TABE, administered just after the Student's incarceration began. P-7.

11. The 2014 RR also incorporated the result of a "BETA III," which was administered along with the other assessments in November 2013.[6] P-7. The BETA III is a non-verbal "performance based [assessment used to obtain] a thumbnail sketch to get a quick understanding of their basic intelligence levels." P-7; NT at 42-43. According to the BETA III, the Student had an Intelligence Quotient of 72. P-7.

12. New testing for the 2014 RR included the Wide Range Achievement Test III (WRAT-III) and three subtests of the "Woodcock-Johnson." P-7.

[5] The RHU is an area of the prison in which inmates are confined to their cells, either alone or with a cellmate, for up to 23 hours per day.
[6] The January 2014 IEP does not explicitly reference the BETA III.

13. The WRAT-III was administered to determine the Student's word recognition level. According to the WRAT-III, the Student could recognize words at the 4th grade level. P-7. The 2014 RR incorrectly characterizes this as the Student's approximate reading level.[7] P-7.

14. Like the TABE, the WRAT-III is also a "very brief" assessment that "gives you another thumbnail sketch" and does not assess reading comprehension or other reading domains. *See* NT at 45-46.

15. The 2014 RR does not indicate which version of the Woodcock-Johnson was administered. I take judicial notice that the Woodcock-Johnson is currently in its fourth version, but it is impossible to know what version was used in this case. Based on the subtests reported, the test was a Woodcock-Johnson test of academic achievement, as opposed to cognitive ability.

16. Of the 11 standard battery achievement tests that comprise the fourth version of the Woodcock-Johnson, or the 10 standard battery achievement tests that comprise the third version of the Woodcock-Johnson, three were administered as part of the 2014 RR: Reading Fluency, Math Fluency, and Math Calculation. P-7.

17. Only grade equivalent Woodcock-Johnson scores were reported (Reading Fluency: 4.7, Math Fluency: 4.4, and Math Calculation: 5.7). P-7. Grade level scores, as opposed to standard scores or percentile rank, are the least reliable metric generated by the Woodcock-Johnson, which is a normative, standardized assessment in all versions.

18. The Department's School Psychologist observed the Student in the RHU. The only information produced by that observation was that the Student was confined to the RHU and not attending school for that reason. P-7.

19. The 2014 RR included teacher input. According to the teacher, the Student was cooperative while attending class, and willing to accept additional work. P-7.

20. The 2014 RR states that the Student is capable of communicating needs, and is empathetic towards peers. P-7. The 2014 RR includes no basis for those conclusions, and includes no other information about the Student's Emotional Disturbance or how that disability impacts upon educational needs.

21. The 2014 RR includes recommendations to the IEP team. Those recommendations were for "individual and small group instruction with high interest, grade level adapted learning material. Immediate reinforcement for both positive and negative behaviors is imperative [*sic*]."[8] The recommendations go on to suggest that a consistent routine, visual materials, and detailed directions would all be helpful. The 2014 RR also recommends specially designed instruction (SDI), but does not say what that SDI should include. P-7.

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[7] Reading is much more than word recognition, especially for a student with a specific learning disability in reading. According to the 2014 RR itself, the WRAT-III assessed only word recognition.

[8] To the extent that the 2014 RR suggests that the Student's *negative* behaviors should be reinforced, I read that recommendation as an obvious misstatement as opposed to an actual suggestion for the IEP team to consider.

22. The 2014 RR concludes that the Student continues to be a student with a "[s]pecific learning disability in math, reading, and written expression," and a "[s]erious emotional disturbance." P-7.

July 2014 IEP

23. The Department issued its second IEP on July 24, 2014. P-8.

24. The July 2014 IEP includes a reading comprehension goal, a math calculation goal, and a behavioral goal. None of these goals are baselined, and all call for the Student to do work at a much lower level than was expected in the prior IEP. P-8. *C/f* P-5, P-8.

25. The July 2014 IEP include d generic SDIs (e.g. positive reinforcement) that amount to nothing more than good teaching. The SDIs had no clear link to the Student's needs or goals.[9] P-8.

November 2014 IEP Revision

26. The July 2014 IEP was revised to change the Student's placement from [one] SCI to [another] SCI. This change was implemented because the Department transferred the Student for penological, not educational purposes. The IEP was otherwise unchanged. P-8, P-9.

July 2015 IEP

27. The Department issued third IEP on July 20, 2015. P-18.

28. Just prior to the IEP team meeting, the Department conducted a "Functional Assessment Interview." P-17. Both parties incorrectly refer to this as a Functional Behavioral Assessment (FBA). Through the Functional Behavioral Interview, the Student was asked to self-assess behaviors, consider their function, and help the interviewer develop strategies to avoid negative behaviors.

29. The Functional Assessment Interview is not referenced in the July 2015 IEP, but comments in the present education levels section of the IEP are consistent with the Interview. P-17, P-18.

30. A re-administration of the TABE from December 16, 2014, is referenced in the July 2015 IEP. P-18. Generally, the Student's grade equivalent scores on the 2014 TABE were higher than the grade equivalent scores on the 2014 Woodcock-Johnson administered about 6 months prior.

31. Nothing in the record suggests that it is a valid measure of progress to compare the TABE and Woodcock-Johnson grade equivalent scores, and I find as a matter of fact that they are not comparable.[10]

[9] I decline to re-write sections of the IEP here. A complete list of the 6 SDIs included in the 2014 IEP is found at P-8, page 16.

[10] The Woodcock-Johnson is a standardized, normative assessment. The subtests administered in 2014 should have been administered under standard conditions and used with seven or eight

32. The 2015 IEP includes a brief summary of a psychological evaluation completed prior to the Student's Department incarceration. P-18.

33. In the 2015 IEP's present education levels, the Department states that the Student should continue to "self-monitor and regulate [] behaviors. A task analysis may assist [] with meeting [] goals, beginning with identifying the antecedents and feelings prior to acting." P-8. The same section says that the Student "continues to need" anger management. *Id*.

34. The 2015 IEP includes eight goals. Four of those goals are behavioral. Three of those goals are for reading. One of those goals is for math. None of the goals are baselined. P-18.

35. The three reading goals purport to address fluency, vocabulary, and comprehension. At that time, the Woodcock-Johnson was the only assessment of the Student's fluency. The TABE screened for vocabulary and comprehension. It is unclear, however, how any of those scores align with the goals, or how the TABE or a single subtest of the Woodcock-Johnson were (or could be) used to develop goals. P-18

36. The math goal speaks to "problem solving, measurement, percents, probability and statistics…" However, the only expectation set by the goal was for the Student to maintain an 80% in class. P-18

37. As with the prior IEP, the July 2015 IEP included generic SDIs (e.g. clear expectations, preferential seating).[11] P-18. However, the July 2015 IEP's SDIs were a small step in the right direction by including some SDIs that appear to be relative to the Student's needs (e.g. chunking assignments). Unfortunately, implementing some of those SDIs was, explicitly, at the Department's discretion (e.g. announce changes in routines *as early as possible*, scaffold modifications *as appropriate*).[12] P-18.

38. The 2015 IEP included weekly group therapy. P-18.

June 2016 IEP

39. The Department issued its fourth and final IEP on June 27, 2016. P-24

40. The 2016 IEP purports to include the results of a TABE administered on May 31, 2016. Those scores are not reliable because they are absolutely identical to the scores reported in the prior IEP. *C/f* P-18 at 6, P-24 at 6. I believe that the Department mistakenly forgot to update the scores from the new administration. I do not believe that the Student's responses were identical on a question-by-question basis.

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other subtests to yield statistically valid information about the Student's academic achievement. The TABE, in contrast, is a quick screener. The TABE may be standardized, but it is not normative. It is a criterion based assessment, used to get a sense of whether a student has particular skills, as opposed to broadly applicable academic abilities.

[11] Again, I decline to re-write sections of the IEP here. A complete list of the 11 SDIs included in the 2014 IEP is found at P-18, page 20.

[12] It is not clear what it means to "scaffold modifications" – but whatever that was, it was only necessary when the Department deemed it "appropriate."

41. The 2016 IEP indicates that behavioral self-regulation is still a need, and that strategies used to assist the Student in this regard at time of the IEP were not effective. *See* P-24 at 8.

42. The 2016 IEP includes six goals. None were baselined. P-24.

43. Two goals were academic transition goals, requiring only that the Student maintain a "passing score" or earn sufficient credits in an automotive class and a "daily living" class.[13] None of those goals address reading, math, or written comprehension (i.e. the domains of the Student's SLD). P-24.

44. Three goals in the 2016 IEP were behavioral. One goal called for the Student to "separate []self from the situation" when "unable to control impulses" and then use breathing exercises.[14] Another called for the Student to "take a deep breath and count to 5" when facing an "unwanted situation." The third simply called for the Student to "adhere to expectations." P-24.

45. One goal in the 2016 IEP addressed attendance. This goal called for the Student to attend class 90 percent of the time. P-24.

46. The SDIs in the 2016 IEP represent a step backward. Not only are all of the SDIs generic, but there is no link between the SDIs and the goals. For example, it is not clear how preferential seating is linked to the Student's needs, will help the Student attend classes, will help the Student regulate behaviors, or enable the Student to earn passing scores. As with the July 2014 IEP, these SDIs are little more than good teaching.[15]

Legal Principles

The Burden of Proof

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

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a FAPE to students who qualify for special education services. 20 U.S.C. §1412. LEAs, including DOC in this case, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized

[13] The "daily living" class required the student to learn "workplace skills" by using "Microsoft products."
[14] It is not clear how the Student would have enough control to separate from a negative situation *after* becoming unable to control impulses.
[15] Again, I decline to re-write sections of the IEP here. A complete list of the 6 SDIs included in the June 2017 IEP is found at P-24, page 17.

Education Program (IEP), which functions as the blueprint for each student's special education. *See School Comm. of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 368 (1985).

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." The term "calculated" means that an IEP's appropriateness is judged based on reasonable expectations at the time it is issued, not on any student's actual progress. *See, e.g. Fuhrmann v. E. Hanover Bd. of Educ.,* 993 F.2d 1031 (3d Cir. 1993). However, this does not alter an LEA's responsibility to modify an IEP when evidence shows that expectations are not aligned with reality.

In the Third Circuit, the amount of benefit required by the IDEA and *Rowley* must be 'meaningful'. The meaningfulness of the educational benefit relates to each 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) (school district must show that its proposed IEP will provide a child with a meaningful educational benefit).

LEAs, however, are not required to maximize each student's opportunity; they 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). 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 IDEA 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 Third Circuit has recognized this principle while, at the same time, requiring a meaningful benefit. Therefore, the Third Circuit has held that the benefit must be more than "trivial" or "*de minimis*." *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School District 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 confer additional benefits, since the IEP required by IDEA represents only a "basic floor of opportunity").

It must be noted that, at the time of this decision, the question of what quantum of benefit the IDEA requires is currently pending before the Supreme Court. *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 29 (2016)(granting petition for writ of certiorari).[16] In that case, the United States has argued for a position substantively identical to the Third Circuit's standard. *See Brief*

[16] The specific question presented in *Endrew F.* is "What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq.?" *Pet. for Writ of Cert.* at 2, available at http://www.scotusblog.com/wp-content/uploads/2016/05/15-827-Petition-for-Certiorari.pdf.

for the United States as Amicus Curiae, available at http://www.scotusblog.com/wp-content/uploads/2016/08/15-827-US-Amicus.pdf.

Evaluation Criteria

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

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 (or continues to be) 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 [LEA] 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 are 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.

IDEA Provisions Applicable to Incarcerated Students – The Penological Exceptions and Defenses

The IDEA's federal implementing regulations specify that the IDEA is binding upon "State and local juvenile and adult correctional facilities" in states that receive IDEA funds. 34 C.F.R. § 300.2(b)(1)(iv). Specific portions of the IDEA, however, do not apply to "children with disabilities who are convicted as adults under State law and incarcerated in adult prisons." 20 U.S.C. § 1414(d)(7)(A).

Specifically, the IDEA's requirement for children with disabilities to participate in statewide assessments such as the PSSA does not apply to incarcerated students. 20 U.S.C. § 1414(d)(7)(A)(i). The IDEA's requirements concerning transition services also do not apply if the student will age out of IDEA eligibility before the student is released from prison. 20 U.S.C. § 1414(d)(7)(A)(ii).

The same section also includes defenses for correctional facilities that function as a student's LEA:

> If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of [sections] 1412(a)(5)(A) of this title and paragraph (1)(A) *if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.*

20 U.S.C. § 1414(d)(7)(B) (emphasis added).

The first section referenced in the defense is 20 U.S.C. § 1412(a)(5)(A), which includes the requirement to educate children with disabilities in the LRE. The second section referenced in the defense, "paragraph (1)(A)," is 20 U.S.C. § 1414(d)(1)(A), which defines IEPs and sets forth their mandatory content.

In sum, when an IDEA-eligible student is convicted of a crime as an adult and is incarcerated in an adult prison, the student retains all IDEA entitlements except for provisions concerning statewide assessments and, in this case, transition services. Also, a special defense is available to the Department. That defense permits the Department to modify the Student's IEP without

regard to placement in the LRE, and without regard to mandatory IEP content if there is a bona fide security or compelling penological interest.

Discussion

I. Availability of Penological Defenses

A. The Penological Defenses are Affirmative

On the second day of this due process hearing, the Department asserted the penological defenses found at 20 U.S.C. § 1414(d)(7)(B). The Student objected and, on the spot, filed a written motion to preclude the penological defenses. The Student's motion did not explicitly address the question of whether the penological defenses are affirmative defenses. Both parties addressed that question in their closing briefs.

The Department argues that the penological defenses are not affirmative, but rather are a statutory exception applicable when there is a condition precedent; namely a compelling security or penological interest. I disagree.

Comparing 20 U.S.C. § 1414(d)(7)(A) and 20 U.S.C. § 1414(d)(7)(B) reveals a striking difference. The exceptions at 20 U.S.C. § 1414(d)(7)(A) are just that: *exceptions.* The IDEA's provisions for statewide assessments do not apply simply because the Student is incarcerated. The condition precedent is the Student's incarceration. The IDEA's provision for transition planning does not apply simply because the Student aged out of eligibility while in prison. The condition precedent is the Student's aging out during incarceration. In both instances, the Department needn't prove anything for the exceptions to apply.

The same is not true for the defenses at 20 U.S.C. § 1414(d)(7)(B). Unlike the two exceptions, these are *defenses* to alleged LRE and IEP violations. The Department must prove something for the defenses to apply. Specifically, the Department must prove that 1) adherence to the LRE or IEP mandates would create a bona fide security interest, violate compelling penological interest, or both, and 2) those interests cannot otherwise be accommodated.

While the Department must prove something to avail itself of the penological defenses, that alone is not conclusive as to whether the penological defenses are affirmative. It is important to note that neither the federal nor Pennsylvania rules of civil procedure apply to this due process hearing. An examination of those rules, however, is instructive. In the Pennsylvania rules, Pa. R.C.P. 1030(a) lists various affirmative defenses, but that list is "including but not limited to." *Id*. In the federal rules, Fed. R.C.P. (8)(c)(1) is less equivocal. Its list is simply "including." *Id*. Nevertheless, the federal list has been interpreted as non-exclusive. *Daiichi Pharm. Co. v. Apotex, Inc.*, No. 03-937 (WGB), 2005 U.S. Dist. LEXIS 26059, *3-4 (D.N.J. Nov. 1, 2005) *citing Williams v. Ashland Engineering Co., Inc.,* 45 F.3d 588, 593 (1st Cir. 1995) (discussing preemption as an affirmative defense); *Cornwall v. U.S. Constr. Mfg., Inc.,* 800 F.2d 250, 252 (Fed. Cir. 1986) (discussing invalidity as an affirmative defense); *Freedman Seating Co. v. American Seating Co.,* 420 F.3d 1350, 1363 n.6 (Fed. Cir. 2005) (discussing enforceability as an affirmative defense); *Ray v. Kertes,* 285 F.3d 287, 291-92 (3d Cir. 2002) (discussing exhaustion as an affirmative defense); *Shechter v. Comptroller of City of New York,* 79 F.3d 265, 270 (2d Cir. 1996) (discussing immunity as an affirmative defense); *Kennan v. Dow*

Chemical Co., 717 F.Supp. 799, 808-09 (M.D.Fla. 1989) (discussing preemption as an affirmative defense).[17]

Under both Pennsylvania and Federal law, courts look to the nature of the defense, and not simply a list, to determine if the defense is affirmative. A defense is affirmative if it requires a defendant (or respondent in this case) to introduce evidence, which, if credible, will negate liability. *See Donohoe v. Am. Isuzu Motors*, 155 F.R.D. 515, 519 (M.D. Pa. 1994). Affirmative defenses "excuse a defendant's conduct or otherwise avoids the plaintiff's cause of action but which is *proven by facts extrinsic to the plaintiff's cause of action*…" *Id* (emphasis added).

To the extent that the Department claims a bona fide security interest, it is certainly required to prove facts extrinsic to the Student's complaint. *See Buckley v. State Corr. Institution-Pine Grove,* 98 F. Supp. 3d 704, 717 (M.D. Pa., 2014) (illustrating how a court may assess the Department's evidence of a bona fide security interest). The application of the bona fide security interest defense also hinges on the credibility of that evidence. *Id*. This compels me to conclude that the "bona fide security interest" defense is affirmative.

The same is true for compelling penological interests. The term "compelling penological interest" is undefined and intentionally vague. *Buckley, supra* at 716-717, citing the United States Department of Education's policy guidance in *Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12406-01, 12577 (March 12, 1999) (FAPE Requirements for Students with Disabilities in Adult Prisons (§ 300.311))*. While there is some latitude to say what is and is not a compelling penological interest, it is clear that the compelling penological interest must be proven by evidence.

In this case, the Department argues that it has a compelling penological interest in enforcing its own non-educational policies, such as increasing the restrictiveness of an inmate's confinement in response to infractions. Said differently, the Department says it has a compelling penological interest in keeping the Student in the RHU when assigned to the RHU, because to do otherwise would create chaos. *See* NT at 182. The Department argues, therefore, that it must be excused from withholding the educational services that can only be delivered in the regular education classroom, which is outside of the RHU, while the student is confined to the RHU. The Department makes the same argument for periods of time during which the Student was confined to the Special Needs Unit (SNU), or cell restriction.[18]

The Department's evidence that breaching its own policies would create chaos is testimony from a Department employee that breaching its own policies would create chaos. *See* NT at 182. This obviously begs the question. Setting that logical fallacy aside, the Department still presented evidence extrinsic to the Complaint (i.e. the testimony) which, if credible, negates

[17] The error correction provided for at Fed. R.C.P. (8)(c)(2) does not apply in this case because neither a response to the complaint nor a counterclaim were filed. The same is true for Fed. R.C.P. (8)(e), for the same reason.

[18] The SNU is a section of the prison designated for inmates with some mental "limitation" (e.g. dementia or an intellectual disability) who could otherwise be in the general population. NT 193-194. Cell restriction is when inmates in the general population are confined to their cells. NT *passim*.

liability – highlighting the conclusion that the "compelling penological interest" defense is affirmative.

B. Consequence of Failing to Plead Affirmative Defenses in a Special Education Due Process Hearing

As noted above, neither the Pennsylvania nor the Federal rules of civil procedure apply in this matter. The general rule that un-pled affirmative defenses are waived comes from rules and jurisprudence that are not binding here. Even so, the IDEA has pleading requirements, although they are "minimal." *Schaffer v. Weast*, 546 U.S. 49, 54, 126 S. Ct. 528, 532 (2005). Analysis starts with what the IDEA actually requires.

In all cases, "the non-complaining party shall, within 10 days of receiving the complaint, send to the complainant a response that specifically addresses the issues raised in the complaint." 20 U.S.C. § 1415(c)(2)(B)(ii). In addition to addressing the issues raised in the complaint, the response must also include particular explanations and descriptions whenever the "local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice." 20 U.S.C. § 1415(c)(2)(B)(i).

The foregoing rules are awkwardly drafted. The additional requirements for special circumstances are stated before the general rule, creating a common misconception that responses are required only when the subject matter of the complaint was not addressed in a prior written notice. In reality, the IDEA requires responses in all cases.

While a response is always required, nothing in the IDEA addresses affirmative defenses. The decision to omit requirements for pleading affirmative defenses appears to be intentional. When respondents receive a complaint, the IDEA sets a timeline for a response. The IDEA also sets a timeline for respondents to challenge a complaint's sufficiency if the IDEA's pleading requirements have not been met. 20 U.S.C. § 1415(c)(2)(A), (C). In sum, the IDEA requires responses in all cases, requires enhanced responses in a certain situation, and permits sufficiency challenges. The IDEA sets timelines for all three options, but leaves out any reference to affirmative defenses within that structure.

Other than the penological defenses, the only other affirmative defense explicitly addressed in the IDEA is the statute of limitations. 20 U.S.C. § 1415(f)(3)(C). There have been several recent, important cases about the IDEA's statute of limitations. The most notable of these is *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015). None of those cases address when the statute of limitations must be pled. However, with the *G.L.* case in the zeitgeist, there has been a notable uptick in schools raising the statute of limitations as a defense in IDEA cases. In almost all cases, the defense is raised either with the school's answer, or very shortly thereafter. When LEAs have failed to raise the statute of limitations in advance of a hearing, I have held that the affirmative defense was waived. *K.D. v. Downingtown Area Sch. Dist.,* ODR No. 16186-1415KE at 14 (Jan 4, 2016).[19]

At the outset of every due process hearing, I contact the parties by email to inform them of my preferences and the procedures that I will use during the hearing. ODR publishes a dispute resolution manual and, while that manual does not have the force of law, I adhere to it. Like

[19] Available at http://odr-pa.org/uploads/hearingofficerdecisions/16186-14-15.pdf

every hearing officer, I also have my own preferences that fill in the manual's gaps. These preferences are akin to a judge's standing orders. In this case, I sent my preferences and procedures to the parties by email on October 17, [2016]. The Department acknowledged receipt the same day. My email included the following:

> **Affirmative Defenses**
>
> In the absence of clear regulatory or jurisprudential guidance, and pursuant to my broad authority to efficiently manage this due process hearing, affirmative defenses shall be filed within 15 days of the transmission of this email (November 1, 2016).

As noted above, the Department neither responded to the Complaint nor raised affirmative defenses until the hearing was underway.

Courts have acknowledged hearing officers' broad authority to put rules in place to ensure fair and efficient hearings, provided that those rules do not directly conflict with any law or regulation, and that they are consistent with fundamental due process. *See D.Z. v. Bethlehem Area Sch. Dist.,* 2 A.3d 712 (Pa. Commw. Ct. 2010), *A.S. v. William Penn Sch. Dist.*, No. 13-2312, 2014 U.S. Dist. LEXIS 50261 (E.D. Pa. Apr. 10, 2014).

In sum, the Department failed to comply with the IDEA's requirement to respond to the Student's complaint, and then compounded that error by failing to comply with my own instructions. Those instructions explicitly and unequivocally set a deadline for the Department to raise affirmative defenses. Under current jurisprudence, I may enforce my own instructions provided that they are consistent with fundamental due process.

In light of the foregoing, I find that the penological defenses are affirmative, were not properly raised, and have been waived.[20]

C. Absurd Results

Above, I conclude that the Department has waived the penological defenses available at 20 U.S.C. § 1414(d)(7)(B) because 1) they are affirmative defenses, 2) the Department had an obligation to raise them and 3) the Department failed to raise them. I acknowledge that making this determination opens the door to absurd results. Fortunately, in this case, the Student does not demand anything that would create an absurd result. For example, the Student does not argue that the Department was obligated to replicate the complete experience of a typical high school within the prison system, or somehow enable attendance in a traditional high school. Theoretically, to the extent that the Department is bound by the IDEA's LRE mandate, such

[20] I reject the Student's argument that any defense not raised in a response to a due process complaint is waived. I also reject the Student's argument that permitting the Department to raise the penological defenses would constitute an unfair surprise. The Student was very clearly ready for the Department to raise these defenses, having a written motion at hand to submit when that happened. By prohibiting the penological defenses, I am doing nothing more than adhering to the rules set for both parties at the outset of this hearing: that affirmative defenses must be raised by the deadline that I established.

claims could be made. They are not, but even if they were, the admonition to construe pleadings "so as to do justice" must not be ignored. *Fed. R. Civ. P.* 8(e).[21]

It is easy to see how rejecting the penological defenses in any case involving an incarcerated student could yield absurd results. The claims and demands in this case, however, make that undesirable outcome a non-issue.

II. November 19, 2013 to November 5, 2014

From November 19, 2013 to November 5, 2014, the Department concedes that it denied FAPE to the Student. This is analogous to a stipulation of liability but not damages. When the stipulation was placed on the record, I instructed both parties that, despite the stipulation, evidence is required to determine whether compensatory education is owed, and if so, how much, for that period of time. *See, e.g.* NT at 22-23.

No evidence was presented to establish how much or what type of special education is needed to make the Student whole. Therefore, despite judicial preferences to the contrary, I must revert to the hour-for-hour model.

The "hour-for-hour" method described above requires analysis of how much service the Student should have had relative to what the Student actually received. The Stipulation itself resolves the second part of that analysis. Per the stipulation, from November 19, 2013 to November 5, 2014:

> The majority of this time was spent in a restricted housing unit, during which time [the Student] was not permitted to attend school in the classroom and was provided with study packets.

NT at 11.

In this case, it is possible that the Student derived some benefit from study packets in the RHU but, after conceding the denial of FAPE, the Department put on no mitigating evidence.

Regardless of the Department's evidence, it is the Student's burden to establish how much appropriate special education was denied. To that end, the record establishes that from November 19, 2013 through January 3, 2014, the Student had no IEP at all. Then, from January 3, 2014 through November 5, 2014, the Student had an inappropriate IEP derived from an inappropriate RR. An discussion of why the RR and IEP are inappropriate is included herein, below in sections III(A) and III(B). For purposes of the stipulated denial of FAPE, I conclude that the Department's denial of FAPE was complete, affecting every aspect of every moment of the Student's education.

I note that from November 19, 2013 to November 5, 2014 the Student received precisely what Plaintiff Buckley received in *Buckley v. State Corr. Institution-Pine Grove*, 98 F. Supp. 3d 704,

[21] As noted above, Rule 8(e) is not on point in this case because 1) the federal rules are not binding in this hearing and 2) there is no pleading to construe. However, the general principle to justice is instructive when considering the consequences of precluding defenses in this hearing.

717 (M.D. Pa., 2014). Further, there is remarkable overlap between the Student's disabilities and presentation and Buckley's. In *Buckley*, the court concluded that the Department's provision of study packets in the RHU was not special education at all, and awarded full days of compensatory education for each day that Buckley was in the RHU. *Id.* at 720. This decision was based, in part, on a finding that the Department's actions were tantamount to "effectively nullifying" Buckley's IEP while he was in the RHU. *Id* at 718. The same thing happened in this case. While in the RHU, the Student's IEP was not implemented. While outside of the RHU, the Student's IEPs were completely inappropriate.

Given the foregoing, I award full days of compensatory education from November 19, 2013 to November 5, 2014. A "full day" of compensatory education is defined in section IV, below.

III. November 6, 2014 Through the End of the 2015-16 School Year

The Student argues that FAPE was denied from November 6, 2014 through the end of the 2015-16 school year, because the 2014 RR was inappropriate and, consequently, any IEP derived from it is inappropriate. The Student argues that all subsequent IEPs were derived from the 2014 RR. The Student also argues that the IEPs were inappropriate regardless of the appropriateness of the 2014 RR. I agree that the 2014 RR and all of the subsequent IEPs were all inappropriate.

A. The 2014 RR was Inappropriate[22]

The 2014 RR falls short of IDEA's substantive requirements in almost every possible way:

First, the 2014 RR fails to evaluate "all areas of suspected disability". 20 U.S.C. § 1414(b)(3)(B). Emotional Disturbance was not only suspected, but found. Yet there was no substantive analysis of the Student's emotional state or behavioral needs. The 2014 RR fails to consider the impact of the Student's Bipolar Disorder and ODD upon the Student's education.

Second, the 2014 RR fails to "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). This is not to say that the instruments used were not sound for their intended purpose. Rather, their intended purpose was not to assess the relative contribution of cognitive and behavioral factors relative to the Student's education and disabilities. The assessments that were used are intended to function as quick screeners. They do not include the deep and rich analysis common to the wide range of standardized, normative assessments of cognitive functioning, academic ability, and behavior that are routinely used in IDEA evaluations.[23] At best, the assessments administered as part of the 2014 RR drew a very rough sketch of how the Student was functioning while confined to the RHU in 2014. They

[22] The penological defenses, excluded above, shield prisons from LRE and IEP violations. Even if those exceptions applied in this case, they would not excuse the Department from failing to appropriately evaluate the Student.

[23] Many assessments satisfy the criteria outlined here. Of those, it would be inappropriate for me to endorse one assessment over another. Yet even a cursory glance at Pennsylvania due process decisions highlights a bevy of such assessments, all of which yield the type of data that is consistent with what the IDEA requires. The type of data produced by the assessments in this case fall well short of the mark.

reveal no data about how the Student's disabilities impact upon learning, or what special education was required to ensure the provision of FAPE.

Third, and for the same reason, the assessments in the 2014 RR were "not used for purposes for which the assessments or measures are valid and reliable." 20 U.S.C. § 1414(b)(3)(A)(iii). Again, the Department relied upon quick screeners to make sweeping conclusions about the Student's needs and abilities. This was not the intended purpose of the screeners.

Fourth, and similarly, the 2014 RR fails to "gather relevant functional, developmental, and academic information … that may assist in determining" what must be provided through the Student's IEP in order for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A). In most cases, a robust assessment of cognitive functioning and academic abilities are the hallmarks of a strong evaluation. In this case, those assessments were cursory, and insufficient to yield meaningful data that would enable the IEP team to draft an appropriate IEP. As just one example, the only assessment of the Student's cognitive ability was the BETA III, a non-verbal screener given to a verbal student who had just been incarcerated.

The academic assessments were cursory, and *nothing* was done to assess the Student's needs as a student with an Emotional Disturbance. It is axiomatic that education goes well beyond academics. This is seen in nearly all IDEA cases involving students with an Emotional Disturbance, and is evident in the IDEA itself. Of the 13 recognized categories of disabilities, only one (SLD) is purely academic in nature. 34 C.F.R. § 300.8(a)(1). In this case, at the time of the RR, the Department had actual knowledge of the Student's Bipolar Disorder and ODD, and recognized that the Student qualified as a student with an Emotional Disturbance. NT at 35-37. The 2014 RR simply did not assess those needs.

B. The July 2014 IEP was Inappropriate

It is possible in theory to draft an appropriate IEP following an inappropriate evaluation. That did not happen in this case.

It makes sense that the July 2014 IEP included goals for reading comprehension, math calculation, and a behavior. Generally, these align with the Student's needs as a student with both SLD and an Emotional Disturbance. Yet none of those goals are baselined. The 2014 RR was insufficient for the Department to draw baselines, or to craft a reasonable expectation of how much progress the Student could make over the term of the IEP.

Even if the goals were appropriate, the SDIs are not. SDIs are the core of special education. They explain what services beyond regular education and best practices a LEA will provide to a student in order to enable the student to obtain the IEP's goals. The SDIs in the July 2014 do not approach that mandate. The IEP says nothing substantive about what special education the Student should have received, instead providing only generic or vague SDI that, at best, reflect good teaching. An IEP that fails to provide special education cannot be reasonably calculated to provide any level of educational benefit.

C. The November 2014 IEP Revision was Inappropriate

The November 2014 IEP revision was inappropriate for all the same reasons that the July 2014 IEP was inappropriate. They are the same document but for the change to accurately reflect the SCI in which the Student was housed.

D. The June 2015 IEP was Inappropriate

Some aspects of the June 2015 IEP were a small step in the right direction. However, after nearly a year in the Department's educational programming, no further evaluation was conducted that would remedy the flaws in the 2014 RR. Neither the "Functional Assessment Interview" nor a re-administration of the TABE constitute a new RR. This is not to say that a new RR was due. Rather, to whatever extent the 2014 IEPs were inappropriate because they flow from an inappropriate evaluation, the same is true for the June 2015 IEP.

Again, the June 2015 IEP's goals addressed reading, math, and behaviors. Again, this makes sense relative to the Student's disabilities. What does not make sense is that after a year to collect baseline data, none of the goals are baselined (meaning that no baseline is written into the goal itself or can be pulled out of the present education levels). I reject any argument that the TABE itself can function as a baseline. That is not the intended purpose of the TABE.

Without baselines, the goals cannot be appropriate. For example, a goal to increase the Student's reading fluency that is not relative to a baseline is meaningless because it is not possible to know how much progress that goal represents. To use simple numbers, a goal calling for a student to read at a 10 might mean one thing if the student can read at a 1 when the IEP is drafted. The same goal means something else entirely if the student can read at a 9 when the IEP is drafted.

Moreover, as with the prior IEP, even assuming that the goals are appropriate, the SDIs are not. The SDIs in the June 2015 IEP were marginally better than in the prior IEP, but still fell far from the mark. There were certainly more SDIs, but including more generic accommodations that essentially capture good teaching practices does not make the June 2015 IEP more appropriate. Further, so much latitude was drafted into the SDIs that they did not guarantee the provision of special education to the Student.

E. The June 2016 IEP was Inappropriate

If the June 2015 IEP was a half-step forward, the June 2016 IEP was two steps back. Regardless of baselines, the IEP included no goals relative to the Student's SLD. None of the goals were baselined, yielding the same problems as discussed above, and the SDIs are completely generic (even more than the 2014 IEPs). As with the 2014 IEP, the June 2016 IEP simply does not offer special education and, consequently, is inappropriate by any measure.

IV. Compensatory Education

Above, I find that the Student is entitled to full days of compensatory education from November 19, 2013 to November 5, 2014. The same is true for the period from November 6, 2014, through the end of the 2015-16 school year.

There is more than preponderant evidence in the record that the IEPs were not implemented, let alone implemented with fidelity, for long stretches of the Student's incarceration. Ample, undisputed evidence was presented proving that the Student spent significant time in the RHU, in the SNU, or on cell restriction. Ample, undisputed evidence was presented that the Student's IEPs were not followed during these periods of time and that, for the most part, the Student

received no education at all. I did not make findings of fact regarding these placements and their duration above because, given the analysis of the Student's IEPs, such findings are irrelevant.

No evidence was presented to establish how much or what type of special education is needed to make the Student whole. Therefore, despite judicial preferences to the contrary, I must revert to the hour-for-hour model.

In some cases, IEP implementation failures are examined using the hour-for-hour model. In those cases, a student receives something less than what that student's IEP calls for. For example, if an IEP called for three hours per week of a particular service, and the student receives only two hours per week of that service, one hour per week of compensatory education is appropriate. In other cases, inappropriate IEPs are examined under the hour-for-hour model. In those cases, the IEP calls for something less than what a student needs. For example, if a student needs three hours per week of a particular service, and the IEP fails to include that service, three hours per week of compensatory education is appropriate.

This case follows neither of those models because none of the Student's IEPs offer or guarantee the provision of special education. The hour-for-hour calculation in this case, therefore, is whatever the student needs minus zero. That math is impossible, however, because the Student has yet to receive an appropriate evaluation.

Since it was the Department's obligation to provide an appropriate evaluation, however, I will not penalize the Student for the Department's failure. The Department concedes that the Student required special education to address an Emotional Disturbance and SLD in reading, written expression, and math. These disabilities permeate every moment of the school day. There is no moment when the Student is not suffering from an Emotional Disturbance – especially without appropriate intervention. The Student's SLD impacts upon performance in a vocational class as much as in a reading or math class. For example, there is no reason to think that the Student can read vocational education materials any better than anything else. For these reasons, I award full days of compensatory education from November 6, 2014 through the end of the 2015-16 school year, as defined below.

I make this determination, in part, because the Department's evidence of mitigation is not preponderant. The Department argues that all IEPs were drafted with parental involvement and implemented with parental consent. In a typical IDEA case, that does not matter because if a LEA violates a student's right to FAPE after obtaining parental consent (typically via a NOREP), the ***student's*** right has been violated. The argument is even less relevant in this case because all rights transferred to the Student upon incarceration. The Department also argues that the Student earned academic credits, and that is evidence of progress. I disagree. Grade to grade advancement — earning credit — is not, by itself, evidence that FAPE has been provided. *See, e.g. Bd. of Educ. v. Rowley*, 458 U.S. 176, 203 n.25 (1982); *accord Leighty v. Laurel Sch. Dist.,* 457 F. Supp. 2d 546, 557 (W.D. Pa. 2006). The Department's argument that it provided FAPE because the Student performed well when attending classes fails for the same reason, and also because evidence supporting that argument is not preponderant.

For purposes of this decision, a "full day" of compensatory education is calculated as follows: Pennsylvania law requires 990 instructional hours per school year. There is no dispute that the Department runs a 12 month educational program. Consequently, the Student is owed 990 hours per 12 month period, or 82.5 hours of compensatory education per month for both the stipulated and un-stipulated period. This ranges from November 19, 2013 through August 30,

2016. That period is equal to 33 months. Consequently, the Student is awarded 2,722.5 hours of compensatory education.

An order consistent with the foregoing follows.

ORDER

Now, March 17, 2017, it is hereby **ORDERED** as follows:

1. The Department denied FAPE to the Student from November 19, 2013 through August 30, 2016.

2. Full days of compensatory education, as defined above, are awarded to remedy said denial of FAPE, amounting to 2,722.5 hours of compensatory education.

3. The Student may decide how the hours of compensatory education are used. The compensatory education must take the form of any appropriate developmental remedial or enriching educational service, product, or device, except as provided in this order.

4. Compensatory education may be used while the Student is incarcerated, but may not be used to procure any service, product, or device that is not permitted within whatever SCI the Student is housed.

5. Any compensatory education not used while the Student is incarcerated may be used up to four (4) years after the Student is released, without restrictions concerning what is permissible within a SCI, but still must take the form of any appropriate developmental remedial or enriching educational service, product, or device.

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

/s/ Brian Jason Ford
HEARING OFFICER