

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:

A. B.

Date of Birth:

[redacted]

CLOSED HEARING

ODR File 18366 16 17

Dates of Hearing:

5/2/17, 5/3/17, 7/25/17, 7/31/17

Parent(s):

[redacted]

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Date of Decision:

9/16/17

Hearing Officer:

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

INTRODUCTION

The student (hereafter Student)¹ is a beyond-teenaged young adult who previously resided in and attended the Pleasant Valley School District (District). Prior to graduation, Student was eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² on the bases of Autism, Intellectual Disability, and a Speech/Language Impairment. During Student's final years of high school, beginning in the fall of 2013, Student attended an Adult Training Facility (ATF) for vocational programming several days each week.

Student's Parents filed the instant due process complaint against the District in October 2016, asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973.³ The case proceeded to a due process hearing that was continued for a variety of unavoidable reasons, and ultimately convened over four sessions.⁴ The Parents sought to establish that the District failed to address Student's many and varied needs throughout the time period in question, and that a compensatory remedy was warranted. The District maintained that its special education program, as offered and implemented, was appropriate for Student and that no relief was due.

For the reasons set forth below, the Parents' claims will be granted in part and denied in part.

¹ 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 in 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.

⁴ 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. Citation to the hearing transcript from the May 2015 session will be to S-47 followed by the exhibit page number and then the transcript page number (*e.g.*, S-47 p. 3 at 12). References to Parents in the plural will be made where it appears that one was acting on behalf of both, and to the singular Parent to refer to Student's mother who was more actively involved in the educational program during the time period in question.

PROCEDURAL HISTORY

- A. The Parents previously filed a Due Process Complaint against the District in 2015, proceeding *pro se*, and an initial hearing session convened on May 5, 2015. (S-47)
- B. The Parents subsequently retained counsel, and the parties reached an agreement to conduct independent evaluations and to toll the filing date to late July 2013. (S-19 p. 2, S-25 p. 1, S-26 p. 2)
- C. The Parents filed the instant Complaint in October 2016. (S-25)
- D. The District sought to limit the scope of the Parents' claims, including any remedy, to the period of late July 2013 to the end of the 2015-16 school year. The Parents did not attempt to raise claims that pre-dated July 2013, but did seek relief consistent with *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015). This hearing officer concluded that *G.L.* did apply to this case, noting that the Complaint was filed approximately one year after *G.L.* was decided by the Third Circuit. (N.T. 410-12, 708-10; HO-2)
- E. The Parents offered a number of exhibits to support their suggested remedy under *G.L.*, virtually all of which were education records of Student for the period of time that Student was enrolled in the District prior to the fall of 2012. The District objected to admission of those documents, and this hearing officer reserved ruling on the Parent exhibits. (N.T. 815-20) The admission of those exhibits is discussed *infra*.

ISSUES

- 1. Whether the educational program developed and implemented for Student by the District was appropriate in addressing Student's unique needs between late July 2013 and the end of the 2015-16 school year; and
- 2. If the educational program was not appropriate for Student, whether Student should be awarded compensatory education and, if so, in what form and amount?

FINDINGS OF FACT

- 1. Student is a beyond-teenaged young adult. During the time period in question, Student attended school in the District and was eligible for special education under the IDEA

classifications of Autism, Intellectual Disability, and Speech/Language Impairment. Student was also a protected handicapped Student under Section 504 and Chapter 15 throughout that period of time. (N.T. 31-32; S-1, S-10)

2. Student attended school in the District since entry into public school at the start of the 2000-01 school year. (S-1 p. 1)
3. Student tends to isolate self from noisy environments, sometimes returning on Student's own or with prompting. In the classroom, Student would take a break to calm self at those times. Student would likely not do well with vocational pursuits in a noisy environment. (N.T. 324-25, 426, 720-21; S-4 p. 4)
4. Student exhibited anxiety at school on occasion, usually over something involving the family including the Parent attending an IEP meeting. When anxiety was manifested, Student could sometimes be easily redirected and required more prompting at other times. Student's teachers did not consider the anxiety to be significant or concerning. (N.T. 348-49, 422, 426, 545-46, 747-48)
5. Student is a better auditory learner than a visual learner. (N.T. 589)
6. Student needs to continue to practice and reinforce receptive and expressive language skills, including pragmatic language, due to Student's unique needs. (N.T. 206-07)
7. Student needs continued repetition and practice of academic skills in order to maintain those skills. (N.T. 464, 693; S-1)
8. Student's attendance impacted Student's ability to learn and maintain skills. (N.T. 185-87, 283-84, 344, 368, 379, 436, 680; S-3, S-6, S-12)
9. When a student misses a significant number of school days, the District convenes a meeting to develop a truancy elimination plan and also recommends a psychiatric evaluation. (N.T. 333-34)
10. The District did not develop a truancy elimination plan for Student. (N.T. 380)
11. Student graduated after the 2015-16 school year concluded and the District delivered Student's diploma to the home. Student did not attend any educational program since that time. (N.T. 32-34, 680, 742-43, 731, 739)
12. The Parents want Student to learn a trade in order to be employable and to be self-sufficient. (N.T. 737)
13. Student would need support in order to function in a community work setting. (N.T. 250-51, 258-59, 443, 547-48)

EDUCATIONAL BACKGROUND

14. The District conducted an evaluation of Student and issued a Reevaluation Report (RR) in November 2012. (N.T. 42; S-1)
15. The District school psychologist understood that the purpose of the November 2012 RR was to determine whether Student was making progress within the curriculum as well as toward IEP goals. (N.T. 55)
16. Parent input into the November 2012 RR reflected concerns that Student was regressing despite having the ability to retain information, and that Student isolated self. (S-1 p. 2)
17. Student was cooperative with the administration of cognitive assessment for the 2012 RR, the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV). Student attained a Full Scale IQ score (47) in the extremely low range (< 0.1 percentile) with all Index scores also in the extremely low range. (S-1 p. 2)
18. The District school psychologist obtained teacher rating scales of Student’s adaptive behavior (Adaptive Behavior Assessment System – Second Edition (ABAS-II)) for the 2012 RR. Student reportedly exhibited extremely low adaptive behavior with the exception of School Living (below average range). No Parent ABAS-II rating scales were obtained because the District was looking at performance in the school environment. (N.T. 48, 64; S-1 pp. 2-3)
19. The District school psychologist did not conduct any academic achievement assessment for the 2012 RR but obtained curriculum-based assessments to determine how Student was performing within the curriculum. Student reportedly was at an instructional second grade level in reading comprehension and mathematics skills. (N.T. 48, 55-56; S-1 p. 3)
20. The District school psychologist did not observe Student in the classroom for the 2012 RR. She did not find any concerns regarding Student’s behavior, emotional functioning, or social functioning. (N.T. 50, 57, 60, 62, 68-69; S-1)
21. Teacher input into the 2012 RR reflected that Student was provided small group reading, language arts, and mathematics instruction in the Life Skills classroom. Student required prompting and redirection to maintain focus and attention and follow directions throughout the school day, especially when presented with non-preferred tasks. Student also needed continued repetition and practice in order to maintain skills. The classroom incentive program was reportedly successful for Student. (S-1)
22. Teachers also reported that Student participated in vocational instruction and experiences at school, demonstrating difficulty with multi-step directions especially with unfamiliar tasks. Student learned new vocational skills with direct instruction and prompting until a task became familiar. (S-1)

23. Teacher input also reflected that Student engaged socially with peers and adults, but that there were times that Student would choose to draw quietly alone during free time. (S-1 p. 4)
24. Speech/language input into the 2012 RR included results of the Expressive One-Word Picture Vocabulary Test – Fourth Edition (EOWPVT) and the Receptive One-Word Picture Vocabulary Test – Fourth Edition (ROWPVT). Student was cooperative with those tests, attaining scores at the 1st percentile on the EOWPVT and below the 1st percentile on the ROWVT. Continuation of speech/language therapy twice per six-day cycle was recommended. (S-1 p. 5)
25. The November 2012 RR identified Student as eligible for special education on the bases of Autism, Intellectual Disability, and a Speech or Language Impairment. Recommendations included continuation of small group instruction and a functional curriculum, community-based instruction, and prompts for focus. (S-1)
26. The District school psychologist who issued the November 2012 RR did not meet with the Parents to review its results. (N.T. 52)
27. An Individualized Education Program (IEP) was developed in early December 2012 after the RR. The Parents and Student did not attend this meeting. (S-2)
28. At the time of the December 2012 IEP, Student was demonstrating reading comprehension and reading accuracy skills on a Qualitative Reading Inventory (QRI) at the same level as the previous school year, reflecting a second grade instructional reading level. (S-2 pp. 9-10)
29. At the time of the December 2012 IEP, Student demonstrated the ability to provide written demographic information when requested, but needed prompts and further practice in completing forms requiring such information. Student at that time indicated an interest in employment in retail or personal service. (S-2 p. 11)
30. The December 2012 IEP noted needs with respect to semantic and pragmatic language; reading comprehension; functional mathematics skills; attention and focus; following directions containing more than one step; continued development of safety awareness; and vocational skills (completing forms/applications, self-advocacy, and exploring vocational opportunities). (S-2 p. 14)
31. Transition services in the December 2012 IEP noted goals for supported employment opportunities but not post-secondary education, and supported living. Activities toward the employment goal included job site instruction for school- and community-based tasks and completion of a career interest survey. Student had already completed an application with the Office of Vocational Rehabilitation (OVR). Activities toward the supported living goal included instruction in activities of daily living. (S-2)
32. The December 2012 IEP provided annual goals and short term objectives in functional mathematics skills (telling time, counting money and determining amounts of purchase and change, solving word problems using addition, subtraction or money, using fractions

for measuring recipe ingredients, and comparing quantities and amounts); reading comprehension at a third grade level (identifying story elements, answering “wh” and other comprehension questions, using comprehension strategies) and reading fluency and accuracy; expressive, receptive, and pragmatic language (identifying items within categories, labeling items/events, conversational turns with prompting); vocational skills (identifying jobs of interest, completing applications with demographic information, and following multi-step directions and focusing attention); and activities of daily living (following multi-step directions and focusing attention, danger awareness). (S-2)

33. Program modifications/items of specially designed instruction in the December 2012 IEP were for small group reading instruction, a modified curriculum focused on key concepts, a functional academic curriculum, materials read to and reviewed with Student, test accommodations and modifications, repeated and simplified directions, additional processing time, presentation of new vocabulary both visually and auditorally, prompts and assistance for written tasks, prompts for focus and task completion, use of a calculator, positive reinforcement, community-based instruction, opportunities for practice and repetition of skills, and communication with the Parents. Small group speech/language support and daily transportation were related services. (S-2)
34. Student was determined to be not eligible for Extended School Year (ESY) services because Student’s ability to recoup skills and make progress on IEP goals was deemed to be adequate. Student’s program was for life skills for all academic, daily living, and vocational instruction in addition to speech/language support. The Parents approved the accompanying Notice of Recommended Educational Placement (NOREP). (S-2)
35. Over the course of the 2012-13 school year, Student was deemed to have made moderate progress on all of the IEP goals and objectives. By the fourth quarter, the progress report reflected Student’s absences as impacting Student’s progress with reading. (S-3)
36. The District uses a subjective rating scale for reporting progress on IEP goals and objectives. Teachers can give two numbers if a student is between the choices. (N.T. 199, 205-06, 664-65)
37. At the end of the 2012-13 school year, the Parent and District discussed Student graduating, and the parties communicated with OVR. The District provided contact information for OVR and made an initial contact for Student, but the Parent needed to handle the registration. The Parent then arranged for Student to be provided some vocational services outside of the District through OVR. In addition, OVR conducted a community-based work assessment in July 2013, and at that time Student reportedly exhibited difficulty with multi-step directions and tasks and maintaining focus and attention, and resisted redirection. (N.T. 365-66, 433, 724-25, 760, 775-76; S-4, S-47 p. 37 at 145-47)
38. Student believed Student would graduate at the end of the 2012-13 school year and did not want to return to school in the fall of 2013. (N.T. 713-14)

2013-14 SCHOOL YEAR

39. Student's IEP team met in October 2013 to develop a new IEP. The Parent and Student attended the meeting. (S-5)
40. In September 2013, Student obtained scores on the EOWPVT and ROWPVT that were identical to the scores from September 2012 (at and below the 1st percentile, respectively). (S-5 p. 11)
41. In September 2013, Student remained at a second grade instructional reading level, making a slight increase in word accuracy and comprehension and a slight decrease in fluency from September 2012. (S-5 p. 11)
42. The October 2013 IEP noted needs with respect to semantic and pragmatic language; reading comprehension; functional mathematics skills; attention and focus; following directions containing more than one step; continued development of safety awareness; and vocational skills (completing forms/applications, self-advocacy, and exploring vocational opportunities). (S-5)
43. Transition services in the October 2013 IEP noted goals for supported employment opportunities (with improvement of job skills) and supported living. Activities toward the employment goal included attendance at the ATF two days per week, completion of an interest inventory and career survey, and prompting for interpersonal skills with peers. Activities toward the supported living goal included instruction in activities of daily living. (S-5)
44. The October 2013 IEP provided annual goals and short term objectives in functional mathematics skills (telling time, counting money and determining amounts of purchase and change, solving word problems using addition, subtraction, or money, and linear measurement); reading comprehension at a third grade level (identifying story elements, answering comprehension questions, using comprehension strategies) and reading fluency and accuracy; expressive, receptive, and pragmatic language (identifying items within categories, labeling items/events, conversational turns with prompting); vocational skills (identifying jobs of interest, completing applications with demographic information, and following multi-step directions and focusing attention); and activities of daily living (following multi-step directions and focusing attention, danger awareness). (S-5)
45. Program modifications/items of specially designed instruction in the October 2013 IEP remained essentially the same, with the addition of breaks to reinforce on-task behavior and parental contact regarding transportation when Student would not attend the ATF. The provision for vocabulary presentation was removed. Transportation was removed as a related service, but the speech/language therapy remained. (S-5)
46. Student was determined to be not eligible for ESY services again because Student's ability to recoup skills and make progress on IEP goals was deemed to be adequate. Student's program was for life skills for all academic, daily living, and vocational

instruction in addition to speech/language support. The Parent approved the accompanying NOREP. (S-5)

47. Over the course of the 2013-14 school year, Student was deemed to have made moderate progress on most of the IEP goals and objectives, with the exception of the objective for using a clock to take a break that was not introduced and more limited progress on the objectives for following multi-step directions and focusing attention. Student was absent from school more than twenty school days that school year and missed a portion of school days on several other occasions; however, ten of the missed full days were at the very start of the school year. (N.T. 330-31; S-6, S-7)
48. The Parents advised the District that Student would not return to school in the fall of 2014. (N.T. 185; S-8 p. 15)

2014-15 SCHOOL YEAR

49. Student's IEP team met again in September 2014 after the Parents advised that Student would return for the 2014-15 school year, and Student did return on September 15, 2014. No revisions were made to the IEP at that time. (N.T. 432-33, 760-61, 768; S-8)
50. Student was disappointed that Student returned to school in the fall of 2014 and expressed the belief to teachers that Student should not be back in school. (N.T. 433-35, 545-46)
51. In September 2014, Student obtained a score on the EOWPVT below the 1st percentile. Student also scored below the 1st percentile on the Peabody Picture Vocabulary Test, Fourth Edition (PPVT-4) (which measures receptive vocabulary, see S-18 pp. 6-7). (S-8 p. 15; HO-1)
52. In September 2014, Student remained at a second grade instructional reading level, with a slight decrease in word accuracy and fluency, and a significant decrease in comprehension, from September 2013. Student showed some improvement in reading accuracy at a third grade level over the previous September. (S-8 p. 16)
53. A transition assessment was conducted in late September 2014, including an interview with Student and completion of a Picture Interest Career Survey. (N.T. 442; S-23)
54. The District convened another meeting of the IEP team in October 2014 for development of a new IEP, but the Parents did not attend. The District members of the IEP team met and discussed options for Student's programming, including increasing the number of days at the ATF. They also discussed other vocational programs in the area. The District planned to but did not propose an increase in the number of days per week at the ATF because the Parents were not in attendance. (N.T. 298-300, 429-30, 432; S-8 pp. 9-10)
55. The October 2014 IEP noted that the Parents had not provided input into that document, asking the District to rely on prior information. As in the prior IEP, needs were identified with respect to semantic and pragmatic language; reading comprehension; functional

mathematics skills; attention and focus; following directions containing more than one step; continued development of safety awareness; and vocational skills (completing forms/applications, self-advocacy, and exploring vocational opportunities). (S-8)

56. Transition services in the October 2014 IEP noted goals for supported employment opportunities (with improvement of job skills) and supported living. Activities toward the employment goal included attendance at the ATF three days per week, completion of an interest inventory and career survey, and prompting for interpersonal skills with peers in addition to participating in self-advocacy scenarios. Contact information for OVR and two other vocationally-oriented agencies was also provided. Activities toward the supported living goal included instruction in activities of daily living. (S-8)
57. The October 2014 IEP provided annual goals and short term objectives in functional mathematics skills (using fractions for measuring recipe ingredients, telling time, counting money, solving functional word problems using money); reading comprehension at a third grade level (identifying story elements, answering comprehension questions, using comprehension strategies), reading fluency and accuracy; expressive, receptive, and pragmatic language (vocabulary including synonyms and antonyms, conversational turns with prompting); and daily living (following multi-step directions and focusing attention, danger awareness, completing applications, and requesting help). (S-8)
58. Program modifications/items of specially designed instruction in the October 2014 IEP were for small group instruction for reading and mathematics, social skills instruction, preferential seating with teacher proximity, prompting for remaining on task, opportunities for reinforcement and practice of skills, test accommodations and modifications, curriculum focused on key concepts, community-based instruction, and an agenda. Small group or individual speech/language support was a related service. (S-8)
59. Student was determined to be not eligible for ESY services again because Student's ability to recoup skills and make progress on IEP goals was deemed to be adequate. Student's program was for life skills for all academic, daily living, and vocational instruction in addition to speech/language support. The Parents did not return a signed NOREP. (S-8)
60. The District issued a new RR in November 2014 that was a record review only because the Parents did not consent to a reevaluation. The Parents did not provide input into the RR. (N.T. 96; S-9 p. 1, S-10, S-47 pp. 49-50 at 194-99)
61. The District school psychologist did not conduct any academic achievement assessment for the 2014 RR but obtained curriculum-based assessments for educational programming. Included in the RR were the results of a September 2014 QRI, a District curriculum-based assessment in mathematics, and a writing sample. The District school psychologist also did not observe Student for the 2014 RR. (N.T. 97, 103-04, 108; S-10)
62. Teacher input into the 2014 RR reflected that Student required prompting and redirection to maintain focus and attention and follow directions throughout the school day, and

difficulty retaining information and skills. Repetition, consistency, and practice were considered to be necessary to maintain skills and make progress on IEP goals and objectives. (S-10)

63. Student maintained expressive language skills from the fall of 2012 to the fall of 2014. (N.T. 407-08)
64. The 2014 RR identified Student as eligible for special education on the bases of Autism, Intellectual Disability, and a Speech or Language Impairment. Recommendations included continuation of life skills support and speech/language support in addition to the recommended evaluations. (S-10)
65. The District school psychologist who issued the November 2014 RR did not meet with the Parents to review its results. (N.T. 104)
66. The District school psychologist who issued the November 2014 RR recommended a psychiatric evaluation to assess the reasons for Student's school avoidance. A speech/language evaluation was also recommended. The Parents did not consent [to] those evaluations. (N.T. 118-19, 334-35, 367; S-9 p. 1, S-47 pp. 49-50 at 194-99)
67. A QRI in March 2015 reflected a decline in scores at the second grade reading level in accuracy and comprehension. Student similarly demonstrated a decrease in mathematics skill proficiency on curriculum-based assessments. No speech/language assessments had been conducted in the spring of 2015. (S-15 pp. 9-10)
68. Over the course of the 2014-15 school year, Student was deemed to have made minimal to moderate progress on most of the IEP goals and objectives, with some not introduced or monitored during some quarters. Student's attendance was noted to impact Student's progress in all areas, with regression on some skills (such as counting coins and bills). (S-12)
69. Student's attendance was not consistent during the 2014-15 school year, with Student absent nearly forty school days for all or a portion of the school day (more than one or two periods). (N.T. 180-81, 331-32; S-13)

2015-16 SCHOOL YEAR

70. The IEP team met to develop a new IEP in September 2015. The Parent was not able to attend. (N.T. 787; S-15)
71. Limited information on Student's then-present levels of present educational and functional performance were provided in the September 2015 IEP because Student's inconsistent attendance had limited the District' ability to conduct assessments. (N.T. 176; S-15)
72. Needs identified in the September 2015 IEP remained the same as the most recent IEP: semantic and pragmatic language; reading comprehension; functional mathematics skills;

attention and focus; following directions containing more than one step; continued development of safety awareness; and vocational skills (completing forms/applications, self-advocacy, and exploring vocational opportunities). (S-15)

73. The transition section of the IEP remained very similar, with indications that Student was not attending school so those activities were limited. The District proposed that Student attend the ATF three days per week, and did not recommend that Student attend the ATF five days per week because Student had academic and speech/language needs that could not be met by the ATF. (N.T. 759, 784; S-15)
74. The September 2015 IEP provided annual goals and short term objectives in functional mathematics skills (telling time, counting money, solving functional word problems using money); reading comprehension at a third grade level (identifying story elements, answering comprehension questions, using comprehension strategies), reading fluency and accuracy; expressive, receptive, and pragmatic language (vocabulary including synonyms in context, reciprocal conversational skills with prompting); and daily living (following multi-step directions and focusing attention, danger awareness, completing applications, and requesting help). An attendance goal at the high school with related objectives, aiming for 100% attendance except for legitimate excuse, were added. (S-15)
75. Program modifications/items of specially designed instruction in the September 2015 IEP were for small group instruction for reading and mathematics, social skills instruction, prompting for remaining on task, opportunities for reinforcement and practice of skills, test and assignment accommodations and modifications, curriculum focused on key concepts, community-based instruction. Small group speech/language support was a related service. (S-15)
76. The IEP team developed a positive behavior support plan for failure to attend school. The hypothesis of the function of that behavior was determined to be gaining control or escaping/avoiding tasks at school. No Functional Behavioral Assessment (FBA) was conducted regarding that behavior since Student was not attending school, and there was no specially designed instruction or related services specific to attendance. (N.T. 310-11, 455, 537, 539-41; S-15)
77. Student was determined to be not eligible for ESY services because Student would age out of special education at the end of the 2015-16 school year. Student's program was for life skills for all academic, daily living, and vocational instruction in addition to speech/language support. The Parent did not return a signed NOREP. (S-15)
78. The District also issued a NOREP on September 30, 2015 proposing that Student would graduate in June 2016. That NOREP was not returned signed and approved. (S-16)
79. The District requested consent to another reevaluation in the fall of 2015. (S-17)
80. Student did not attend school during the 2015-16 school year because Student refused to do so, believing Student had graduated. (N.T. 180, 333, 454, 457, 460, 462, 554, 682, 716-17; S-21, S-22)

81. Student attended the ATF during the 2015-16 school year, and attendance was fairly consistent. However, Student sometimes missed one or more days per week. (S-20)
82. The District issued a NOREP ending special education services in June 2016 due to Student's age and graduation. The Parents did not return the NOREP. (N.T. 460-61)

DISTRICT'S HIGH SCHOOL LIFE SKILLS CLASSROOM

83. In the high school life skills classroom, two special education teachers and at least two paraprofessionals were present. The teachers split the class into groups for reading and mathematics instruction typically based on ability level. The students were also divided into groups for other activities such as social skills, vocational skills, and activities of daily living. Most groups consisted of approximately six students with one teacher and one paraprofessional. (N.T. 417-19, 446, 643-44, 647-48)
84. The students in the life skills classroom generally had breakfast upon arrival, then a morning meeting followed by reading and mathematics instruction. The students would leave the classroom for special or elective classes then have lunch in the cafeteria. Afternoons consisted of social skills, vocational skills, and activities of daily living until the end of the school day. (N.T. 420-21, 423, 425, 448-49, 522, 643-44)
85. Reading instruction was focused on comprehension including strategies to aid in understanding the text. (N.T. 648, 686)
86. Mathematics instruction was focused on functional skills. (N.T. 688)
87. Students in the life skills classroom moved to different parts of the school building for specials and electives and occasionally academic classes. (N.T. 326-27)
88. Students in the life skills classroom worked on organizational skills such as filing papers. (N.T. 428, 644-45)
89. The life skills classroom used a class-wide behavior plan where the students could earn rewards for exhibiting positive behavior. Students who exhibited frequent problematic behavior were not permitted to participate in rewards. Student did not exhibit behaviors at school that required additional behavioral intervention. (N.T. 424-25)
90. Student was social with peers at school both in and outside of the life skills classroom. Student was able to communicate with others at school, but did have difficulty maintaining conversations. (N.T. 419-20, 426, 447, 449, 556, 720)
91. The life skills class participated in pre-vocational activities in the community, including at a public library, a supermarket, and a local resort. Those activities occurred once or twice per week. (N.T. 301-07, 351-57, 726-27)
92. Vocational skills include pre-vocational and "soft" skills, such as following directions, organizing and completing tasks, and cooperating with a group. Vocational skills also

include social skills, functional academic skills, and activities of daily living. (N.T. 213, 218-19, 749-56, 762-63)

93. When students develop pre-vocational and vocational skills in multiple environments, they are better able to transfer and generalize those skills to new situations such as a new work setting. (N.T. 756-57)

ADULT TRAINING FACILITY

94. Student attended the ATF, operated by a behavioral health organization, beginning in the fall of 2013. There, participants work on pre-vocational skills and participate in community activities. Community integration is a major focus of the ATF program Student attended. (N.T. 212-13, 235; S-29)
95. The District provides transportation to and from the facility for students who attend. After a morning meeting, the adults engage in pre-vocational activities in small groups until a break for lunch, which the adults assist in serving and cleanup. Activities that might be vocational or recreational, in the facility or out in the community, then follow for the afternoon again in small groups. (N.T. 225-27, 245-46, 340, 384)
96. The ATF begins planning for an adult's discharge from the time of admission, aiming for the most independence possible and identifying necessary steps toward that goal. (N.T. 238)
97. Student's goal at admission to the ATF was for placement at the ATF following graduation to continue to develop pre-vocational skills. (N.T. 239)
98. The ATF conducted an integrated assessment of Student in the fall of 2013 to identify strengths and needs and to prioritize concerns. The priorities for Student were determined to be a willingness to engage and learn pre-vocational skills, and appropriate social interactions. Both of those priorities were vocational skills. (N.T. 216-19; S-29)
99. An initial annual assessment of Student was also conducted by the ATF when Student first began attending there. At that time, Student demonstrated needs in most areas because Student did not perform skills or did so inconsistently: functional skills such as telling time; pre-vocational skills such as initiating tasks; community life such as community volunteering; and social skills. Student was independent with self-care skills and fairly consistent in the area of safety. The ATF identified employment barriers including social skills and independent living skills, but few needs for work readiness. (N.T. 220-22; S-30)
100. The ATF developed treatment plans that were reviewed regularly. Student's skill deficits in the fall of 2013 were identified with goals and planned interventions. (S-31)
101. During the 2013-14 school year, the ATF identified needs with respect to staying focused and remaining on task (with a goal for accepting vocational opportunities offered) and reducing anxiety that interfered with social relationships (with a goal to decrease nervous

- behaviors). Student demonstrated improvement in those areas based on anecdotal reports and objective data where available. These results are provided to parents and the local educational agency. (N.T. 228-29, 270; S-31, S-32, S-33, S-34)
102. A new annual assessment in the fall of 2014 revealed that Student had the same needs as in the initial annual assessment, with additional safety concerns noted in a kitchen environment and outdoors. Continued concerns with respect to a willingness to engage and learn pre-vocational skills and appropriate social interactions were noted. (S-36, S-37⁵)
 103. During the 2014-15 school year, the ATF identified needs with respect to staying focused and remaining on task (with a goal and objective to attend the ATF and improve job skills). Another objective was engaging in social activities with peers. Student demonstrated inconsistent improvement toward meeting the goal and objectives based on anecdotal reports and objective data where available. (S-39, S-40)
 104. A new annual assessment in the fall of 2015 revealed that Student had the same needs as in the fall 2014 annual assessment. Continued concerns with respect to a willingness to engage and learn pre-vocational skills and appropriate social interactions were noted. (S-41, S-42⁶)
 105. During the 2015-16 school year, the ATF identified needs again with respect to maintaining attention to task without assistance and redirection (with a goal and objective to attend the ATF and improve job skills). The additional objective for engaging in social activities with peers remained. Student demonstrated inconsistent improvement toward meeting the goal and objectives based on anecdotal reports and objective data where available; however, Student did demonstrate decreased self-stimulatory behaviors by the end of the school year. (S-41, S-43, S-45, S-46)
 106. Throughout Student's attendance at the ATF, Student demonstrated pre-vocational and vocational needs, as well as social, emotional, and behavioral needs. Student's progress on ATF goals was variable. (N.T. 239, 252-53, 262)
 107. Except for absences, Student attended the ATF two days per week during the fall of the 2013-14 school year and the District high school on the other three days. By the spring semester, Student was at times attending the ATF three or four days per week. There was a period of time when Student attended the ATF four days per week in order to make up some missed time there. (N.T. 298, 341-43; S-48)
 108. Except for absences, Student attended the ATF three days per week during the 2014-15 school year and the District high school the other two days. Student did not start at the

⁵ The ratings for each of the four parts of the 15-page annual assessment were identical to those in October 2013; however, the determination of needs was subjective (N.T. 264, 266-70, 271-72).

⁶ The ratings for each of the four parts of the 15-page annual assessment were identical to those in October 2013 and October 2014.

ATF until the very end of September, and was absent approximately twenty four days during the first semester and sixteen days the second semester. (N.T. 298, 341-44; S-48)

109. Student attended the ATF three days per week during the 2015-16 school year. (S-20, S-43 p. 1)
110. The District did not suggest that Student attend the ATF for more than three days a week because Student's attendance was not, but needed to be, consistent. (N.T. 757-59)

INDEPENDENT EVALUATIONS

111. By agreement of the parties, an independent educational evaluation (IEE) was conducted in the fall of 2015, with a report of that evaluation issued in September 2016. The independent psychologist was not able to arrange for an observation of Student at the ATF. (N.T. 570-71; S-19)⁷
112. Cognitive assessment for the IEE were the Comprehensive Test of Nonverbal Intelligence – Second Edition (CTONI-2) and Woodcock-Johnson Tests of Cognitive Abilities - Fourth Edition (WJ-IV-COG). The CTONI-2 yielded a Full Scale Composite Index score (52) below the 1st percentile and in the very poor range; both of the scale scores were consistent. On the WJ-IV-COG, Student attained a General Intellectual Ability score in the very low range (standard score below 40, < 0.1 percentile rank), and similar scores on those subtests. The detailed analysis of the cognitive assessment in the IEE reflected a relative strength with Oral Vocabulary and a number of relative weaknesses. (S-19 pp. 5-13)
113. Student's academic achievement was assessed for the IEE (Woodcock-Johnson Tests of Achievement – Fourth Edition (WJ-IV-ACH) reflecting scores in the very low range across clusters and subtests compared to same-age and same-grade peers. Student demonstrated relative strengths in achievement in the areas of Written Expression and Spelling and other areas of relative weakness. (S-19 pp. 19-27)
114. Assessment of Student's memory and learning profile (Wide Range Assessment of Memory and Learning – Second Edition) for the IEE yielded overall impaired skills (< 0.1 percentile) with all subtest scores in the borderline/low average to impaired range. (S-19 pp. 13-14)
115. The IEE also reported results of the Behavior Rating Inventory of Executive Function (BRIEF) for adults from the Parent and an ATF employee. Concerns of the Parent were reflected in the Shift, Working Memory, and Task Monitor Scales; no concerns were indicated by the ATF employee. (S-19 pp. 15-18)

⁷ The markings on S-19, all of which are underlines or circles done in pen or pencil, were not made by the hearing officer.

116. The Beery-Buktenica Developmental Test of Visual Motor Integration administered as part of the IEE together with optional companion instruments revealed weak overall visual-motor integration skills. (S-19 pp. 18-19)
117. Rating scales from the Behavior Assessment System for Children – Third Edition (BASC-3) were completed by the Parent and an ATF employee for the IEE. The Parent’s form yielded at-risk concerns with respect to Adaptive Skills including Adaptability, Leadership, Activities of Daily Living, and Functional Communication. The ATF employee endorsed a clinically significant concern with respect to Withdrawal, and at-risk concerns with respect to Atypicality and Social Skills. Overall, the BASC-3 did not reveal significant difficulty with behavior. (S-19 pp. 29-32)
118. The Parent and ATF employee also completed rating scales to assess Student’s social skills, revealing some areas of deficit. Those same individuals completed the Gilliam Autism Rating Scale – Third Edition, yielding results supporting Autism. (S-19 pp. 32-36)
119. The Parent completed the protocol for the Third Edition of the ABAS for the IEE, reflecting under-developed adaptive skills overall with some variability among areas assessed by that instrument. (S-19 pp. 36-39)
120. With respect to transition planning, the IEE sought and included input from the Parents and the ATF employee. Both reflected that Student continued to need to develop skills in identifying and learning about careers of interest, applying to post-secondary institutions, understanding Student’s strengths and weaknesses and advocating for needs based on weaknesses, and learning independent and daily living skills, as well as improving functional academic skills. (S-19 pp. 38-40)
121. The IEE concluded that Student was a child with a disability and in need of specially designed instruction based on Intellectual Disability and Autism. The private psychologist who conducted the IEE offered recommendations for a blended functional academic and vocational training program. Particular intervention was noted to be necessary in the areas of social skills instruction as well as behavioral and social manifestations of Student’s Autism. A focus on vocational training and adaptive/functional skills was also noted. (S-19 pp. 44-46)
122. An Independent Speech and Language Evaluation was also conducted in November 2015. The independent speech/language pathologist observed Student at the ATF. (S-18 pp. 5-6)
123. The independent speech/language pathologist administered the PPVT-4 and the EOWPVT-4. Student attained scores below those from previous administrations, well below the 1st percentile on the former and below the 1st percentile in the latter; Student thus showed regression in receptive language skills in the fall of 2015. On select subtests of the Clinical Evaluation of Language Fundamentals – Fifth Edition (CELF-5). Student’s scores on all subtests administered similarly fell within the severely delayed range. (N.T. 403-06; S-18)

124. Pragmatic language ability was also assessed for the independent speech/language evaluation. Student demonstrated pragmatic language skills that were also significantly delayed. All of Student's language deficits are commensurate with Student's cognitive profile. (N.T. 188-90; S-18)
125. At this age and considering Student's cognitive ability, Student would not likely make significant gains in language skills, although Student could be expected to make progress on specific targeted skills such as perspective-taking that are of interest to and useful for Student. (179-80; S-18)

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 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 Parents who filed the complaint and requested this hearing. Nevertheless, application of this principle determines which party prevails only in the rare case where the evidence is evenly balanced or in " equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position, 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 their recollection from his or her perspective. The relatively few inconsistencies in the testimony, such as for what period of time

Student attended the ATF four days per week, were attributed to inaccurate memories rather than any intent to deceive or exaggerate, and were relatively inconsequential to the issues presented. The testimony of the independent psychologist was forthright, knowledgeable, and quite persuasive, and was accorded significant weight, particularly with respect to Student's current needs.⁸ On the other hand, the testimony of the Parent was undermined by the assertion that Student made "no progress at all, none" from the start of the 2013-14 school year to the end of the 2015-16 school year (N.T. 731); in addition, much of her testimony regarding Student's program at the District was second-hand and was thus accorded reduced weight.⁹ The testimony of all other witnesses was gauged to be straightforward and given essentially equal weight.

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 arguments.

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.

⁸ Further to his credit, this psychologist answered many questions with "yes and no" (e.g., N.T. 599, 610-11, 613), recognizing that the process of conducting evaluations of and programming for special education needs is dependent upon many factors.

⁹ The Parents' concerns, however, were sincere and clearly genuine, and certainly not discounted.

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). Nevertheless, 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). Thus, the FAPE claims under both statutes will be addressed together.

THE PARENTS' CLAIMS

The Parents challenge various aspects of Student's program. The first to be addressed, logically, is whether the District failed to conduct adequate evaluations of Student to guide programming decisions. The first relevant evaluation was in the fall of 2012, a reevaluation of Student that would serve to inform programming decisions for the beginning of the relevant time period, specifically the 2013-14 school year.

The IDEA sets forth two purposes of the required evaluation or reevaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1)(C)(i). In conducting the evaluation, the law imposes certain requirements on local education agencies to ensure that sufficient and accurate information about the child is obtained:

(b) Conduct of evaluation. In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

(i) Whether the child is a child with a disability under § 300.8; and

(ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. §§ 300.304(b); *see also* 20 U.S.C. § 1414(b)(2). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing,

social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3). All evaluations, including reevaluations, require review of existing data. 20 U.S.C. § 1414(C)(1); 34 C.F.R. § 300.305(a).

The Parents point out a number of potential flaws with the 2012 RR: the failure of the school psychologist to observe Student in any setting, the absence of any standardized assessments other than the WAIS-IV, and the failure to comprehensively assess Student’s executive functioning skills, memory, pragmatic language skills, and social/emotional/behavioral functioning. Certainly the addition of some if not all of the assessments conducted for the IEE, as well as observations by the school psychologist, would have yielded significant useful information about Student’s functioning at school and in vocational settings to assist the IEP team in making programming decisions. This hearing officer does have concern with the use of strictly curriculum-based measures in the fall of 2012 to understand Student’s academic achievement,¹⁰ as well as the school psychologist’s description of the purpose of the November 2012 reevaluation and the failure to meet with the Parents to discuss the results and determine whether additional assessments were warranted. The independent psychologist also provided a cogent explanation of the utility of obtaining rating scales from individuals in different environments as part of a special education evaluation (N.T. 582-83), contrary to the use of the

¹⁰ The testimony regarding the District norming of its curriculum-based assessments, while credible, applied only to students through eighth grade. (N.T. 745-46)

ABAS-II in 2012.¹¹ Nevertheless, it must be remembered that Student had attended school in the District since 2000, and the District was clearly very well informed of Student's various strengths and needs over time. Student's teachers provided significant input into the 2012 RR that included their own observations both inside and outside the classroom. In addition, there was no indication in the record that any of the District professionals had concerns with Student's executive functioning, memory, or social/emotional/behavioral functioning that would suggest additional assessments were necessary in order to develop IEPs for Student. Both the Parent and Student participated in the IEP team meeting in the fall of 2013, the first during the relevant time period, and were able to provide input into the program including Student's strengths and needs. Moreover, even the independent psychologist who conducted the IEE stopped short of characterizing the 2012 RR as inadequate under the law (N.T. 581).

The Parents point out similar flaws in the fall 2014 RR. However, the record is clear that the Parents would not provide their consent to new assessments, so the District was limited to a review of records. 20 U.S.C. § 1414(c)(3); 300 C.F.R. §§ 300.300(c) and (d). In sum, despite the fact that the District did not have as complete a picture of Student in the fall of 2012 and 2014 as did the independent psychologist who conducted the IEE, the circumstances in this case do not equate to a denial of FAPE where there was information available from which the team could determine the content of Student's IEPs, the substance of which must also be examined.

The next issue is whether Student's IEPs were appropriate for Student under the IDEA and the implementing regulations. As noted above, an IEP must be reasonably calculated to enable the student to receive meaningful educational benefit in light of the student's unique circumstances and potential. However, "it would again be inconsistent with the longstanding

¹¹ The District's reasons for not doing so were less persuasive (N.T. 110, 114).

interpretation of the IDEA to find that providing a FAPE requires designing specific monitoring goals for every single recognized need of a disabled student. As noted above, a FAPE is a threshold guarantee of services that provide a meaningful educational benefit, not a perfect education.” *Coleman v. Pottstown School District*, 983 F. Supp. 2d 543, 572-573 (E.D. Pa. 2013), *aff’d*, 581 Fed. App’x 141 (2014). An absence of goals or monitoring of progress with respect to a particular area of educational need can amount to a procedural violation. *Benjamin A. v. Unionville-Chadds Ford School District*, 2017 U.S. Dist. LEXIS 128552, *37-38, 2017 WL 3482089 (E.D. Pa. 2017). 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).

The Parents challenge the District’s IEPs for the 2013-14, 2014-15, and 2015-16 school years with respect to academic, social/emotional/behavioral, speech/language, and executive functioning skills, activities of daily living, post-secondary transition vocational programming, and eligibility for ESY services. (N.T. 20; Parents’ Closing at unnumbered pp. 29-30)

With regard to academics, review of the IEPs reflects that Student had similar annual goals throughout the time period in question, focused on functional reading, functional mathematics, expressive/ receptive/pragmatic language, vocational skills, and activities of daily living, all of which were needs identified for Student. Student’s short term objectives did change from year to year, reflecting that the IEP team considered Student’s then-current strengths and weaknesses at the time of development of each IEP. It must also be remembered that Student required ongoing repetition and practice to maintain skills across domains. Thus, it is not

inappropriate that Student's IEPs continued to emphasize skills that Student had acquired in order not to regress.

The Parents point to Student's relatively stagnant instructional grade levels in reading and mathematics skills, for example. Nevertheless, the IEPs and Student's progress must be evaluated in light of Student's unique circumstances and potential. The independent evaluator recommended that Student's program be focused on functional academics, which is what the District did throughout the time period in question, as did the ATF. There was also evidence that Student could not be expected to make significant gains in language skills. Rather than concentrating on any specific grade levels, the more pertinent consideration is whether the academic programming was appropriately functional for Student. The preponderant evidence is that the IEPs implemented over the three school years did provide for Student to continue to acquire and maintain functional academic skills geared toward Student's unique abilities and weaknesses, at Student's age, and were sufficiently challenging for Student who struggled with consistent demonstration of previously acquired skills.

With respect to the post-secondary programming, the following is instructive.

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 fourteenth 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, supra, 983 F. Supp. 2d at 566.

The Parents, quite understandably, are concerned that Student is not sufficiently prepared to function independently in an adult society, including holding employment without support and attaining a level of self-sufficiency. The services available to young adults who are beyond the age of IDEA eligibility are undeniably limited. However, the District did not, and indeed was not obligated to, guarantee any particular outcome for Student upon graduation, including helping Student to learn a trade. Student participated in a variety of vocational and independent living activities, including the development of pre-vocational soft skills, that were geared toward post-secondary vocational and living opportunities based on identified transition goals. Those activities occurred both in the school environment (including a variety of community-based activities) and at the ATF where Student's individual needs, specifically undeveloped pre-vocational skills, dictated Student's goals for that program. Student's post-secondary interests also changed over time. While it is true that the District did not actively monitor Student's progress at the ATF, and Student's growth in that program was incremental and at times inconsistent, the mere fact that Student continued to demonstrate pre-vocational needs at the end of the 2015-16 school year does not mean that Student failed to make progress in developing and maintaining many of those varied skills. Taken as a whole, and giving due consideration to Student's unique strengths and needs, the evidence supports a conclusion that the District provided opportunities for pursuit of post-secondary employment and daily living to Student that were aligned with Student's interests, goals, and potential.

Next, the Parents challenge the District's programming for Student's social, emotional, behavioral, and executive functioning. However, with the exception of attendance discussed below, Student did not exhibit emotional or behavioral needs at school, including manifesting anxiety, that required intervention beyond the classroom incentive plan. Student was provided instruction in and practice with social skills and organization throughout the school day, and engaged appropriately with peers in that environment. Even the independent psychologist noted that Student's executive functioning would not necessarily be specifically addressed in an IEP since Student did not exhibit the same deficits at the ATF as Student did at home (S-19 p. 45). In sum, the District identified Student's social, emotional, and behavioral needs that were manifested in the educational and vocational environment and appropriately responded, which is what the law requires.

With respect to ESY eligibility, it is surprising that Student's IEPs continually reflected that Student did not lack the ability to recoup skills and make progress on IEP goals¹² in light of the extensive citation throughout the record to Student's need for repetition and practice to maintain skills. Nevertheless, the evidence is clear that the District was informed that Student would graduate at the end of the 2013-14 school year, only learning in September 2014 that Student would return, so there was no reason for it to consider ESY in 2014. By the summer of 2015, Student's attendance at school had become steadily poorer, and it is far from likely that Student would have been amenable to attending an ESY program in 2015. Student graduated at the end of the 2015-16 school year, so ESY was not available. For these reasons, the evidence does not establish a denial of FAPE for ESY programming.

¹² The relevant time period begins at the end of July 2013; ESY that summer would have been concluded or nearly concluded by then.

The final FAPE matter to be discussed is whether the District responded appropriately to Student's failure to attend school. The evidence reflects that Student's irregular attendance at the end of the 2012-13 school year was impacting Student's progress on reading goals and objectives. Student missed the first ten days of the 2013-14 school year, but attendance moderated after that period and was not a cause for alarm. The start of the 2014-15 school year was rather different, with Student disappointed that Student had not graduated and expressing that Student should not be in school. The District's response was, quite appropriately, to seek a psychiatric evaluation as it does when any student misses a significant number of school days, so that a truancy elimination plan could be conducted. It is quite unfortunate that the Parents would not consent to that evaluation.

Nevertheless, certainly by the start of the second semester of the 2014-15 school year, some action should have been taken by the District to address Student's lack of attendance at school,¹³ particularly given Student's need for continued repetition and practice to maintain skills in all areas and the recognition that Student could not increase the number of days per week at the ATF unless Student demonstrated a more consistent presence. With no agreement for the psychiatric evaluation, it is perplexing that the IEP team did not convene to discuss how to address Student's irregular attendance that was affecting Student in all areas. The problem worsened in the following 2015-16 school year when Student did not attend school at all. While adding an attendance goal to the September 2015 IEP and proposing an FBA was surely a step in the right direction, the time to conduct an FBA and determine interventions to encourage

¹³ The District's Closing Argument emphasizes Student's poor attendance, and this hearing officer agrees with its suggestion that it is not necessary to calculate the exact number of days that Student was absent (District's Closing at 9 n. 1), particularly since there are a few apparent, but certainly not unusual, human errors in the documentation. There is no dispute between the parties that Student's attendance was a concern during the 2014-15 and 2015-16 school years.

Student's attendance was in the spring of 2015, when Student was still at school on many days. There was also no apparent consideration given to identifying changes to the school-based program that may have helped Student be available for academic instruction and speech/language services somewhere other than the classroom to which Student was reluctant to return. This hearing officer concludes that the failure to address Student's attendance constituted a denial of FAPE for the second half of the 2014-15 school year and the entire 2015-16 school year, for which relief shall be awarded.

REMEDY: COMPENSATORY EDUCATION

As a remedy, the Parents seek compensatory education, which is an appropriate form of relief where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C., supra*. Such an award may compensate the child for the period of time of deprivation of educational services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has recently endorsed a different approach, sometimes described as a "make whole" remedy, where the award of compensatory education is designed "to restore the child to the educational path he or she would have traveled" absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

The Parents suggest that Student should be awarded full days of compensatory education, and further assert that a make whole remedy requires much more (Parents' Closing at

unnumbered 27-30). They also sought introduction of a number of District education records, mainly evaluations of and programming for Student prior to those admitted for the relevant time period, for consideration of that qualitative remedy. Both parties provided argument on the utility of these documents in their closings as was requested.

After review, this hearing officer is not persuaded that consideration of those proffered documents would assist in calculation of a compensatory education award in 2017 for several reasons. First, to the extent the documents might suggest previous FAPE denials as the Parents contend, evidence on whether the District provided or did not provide an appropriate educational program to Student outside the scope of the claims is not relevant and must be excluded. To hold otherwise would, in this hearing officer's estimation, render meaningless the statutory requirement inserted into the IDEA in 2004 for filing within the limitations period. Stated another way, if a party could file a complaint beyond the two-year limitations period, but then be permitted to seek the very same remedy that could have been pursued if the complaint had been filed on a timely basis, the IDEA statute of limitations, and the precedential authority such as *G.L.* construing its language, would be wholly inconsequential. Second, *G.L.* stated very clearly that a compensatory education demand that seeks to restore a child to the position he or she would have held "*but for the deprivation,*" 802 F.3d at 625 (emphasis added), was an available remedy and, accordingly, any such award must still be tied to the FAPE denial that is at issue. Moreover, permitting the Parents to proceed with the evidence regarding the provision of FAPE prior to July 2013 would directly contravene the caution of the *G.L.* Court that a party may not attempt to sweep together untimely claims with those that were filed within the two-year statutory period. 802 F.3d at 625. For all of these reasons, the District's objection to the exhibits offered by the Parent at the close of the hearing is hereby sustained.

This hearing officer concludes that the record does not include any relevant evidence on an appropriate equitable remedy that would place Student in the position where Student would be absent the FAPE denial described above. Thus, the hour-for-hour method will be used as the basis for the appropriate approach. Student must be provided with the number of hours of compensatory education lost due to the failure to address attendance at school (not the ATF) during the spring semester of the 2014-15 school year and the entire 2015-16 school year. That amount shall be calculated at 5.5 hours per day¹⁴ for each day of unexcused absence from school during the second half of the 2014-15 school year,¹⁵ in addition to eleven hours per week (two days each week that Student would have attended school) for the entire 2015-16 school year (thirty six weeks) for a 2015-16 school year total of 396 hours of compensatory education.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parents may decide how and by whom the hours of compensatory education are provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product, or device that furthers Student's post-secondary transition, academic, speech/language, or social/emotional/behavioral needs and skills. The compensatory education services may occur when convenient for Student and the Parents, and may be used at any time from the present until Student turns age twenty-six (26). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents.

¹⁴ Secondary school students are required to be provided with 990 hours of instruction for the school term of a minimum of 180 school days. 22 Pa. Code §§ 11.1, 11.3.

¹⁵ Due to apparent errors in some of the attendance records, this exact number is not set forth as it cannot be calculated with confidence.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District did deny Student FAPE for part of the 2014-15 and 2015-16 school years and Student must be awarded compensatory education to remedy the deprivation.

ORDER

AND NOW, this 16th 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 fail in part of its FAPE obligations to Student under the IDEA during the second half of the 2014-15 school year through the end of 2015-16 school year, not including ESY programming.
2. The District shall provide Student with compensatory education as follows:
 - a. For the entire second semester of the 2014-15 school year, 5.5 hours for each day of Student's unexcused absence from school according to final school records; and
 - b. For the entire 2015-16 school year, 396 total hours.
3. The compensatory education award is subject to all of the following conditions and limitations:
 - a. Student's Parents may decide how and by whom the hours of compensatory education are provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product, or device that furthers Student's post-secondary transition, academic, speech/language, or social/emotional/behavioral needs and skills. The compensatory education services may occur when convenient for Student and the Parents, and may be used at any time from the present until Student turns age twenty-six (26).
 - b. The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost to the District of providing the

awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

4. Nothing in this decision and order should be read to prevent the parties from mutually agreeing to alter any of its terms.

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
18366-1617AS