

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: J. C.
Date of Birth: [redacted]
CLOSED HEARING
ODR File No. 18419-16-17AS

Parties to the Hearing:

Parents
Parent[s]

Representative:

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Dates of Hearing:

February 10, 2017; February 17, 2017;
March 27, 2017

Date of Decision:

April 15, 2017

Hearing Officer:

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

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a late pre-teenaged student in the Penn Hills School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² as a child with a primary classification of Autism Spectrum Disorder. Student's Parent³ filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA, as well as the applicable federal and state regulations, from the time Student entered middle school and continuing through the present. Notably, the Parent challenged the District's decision in the spring of 2016 to revise its Special Education Plan in a manner that impacted Student's programming.

The case proceeded to a due process hearing convening over three sessions,⁴ with the parties also providing a number of stipulated facts. The Parent sought to establish that the District failed to provide Student with FAPE throughout that time period, and requested compensatory education as a remedy. The District maintained that its special education program, as developed and implemented, was appropriate for Student, and that no relief was due.

For the reasons set forth below, the Parent's claims will be granted 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 set forth in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 711.1 – 711.62.

³ Student's mother was the active participant in the hearing and the reference to Parent is to her.

⁴ The record closed upon receipt of written closing arguments on which a page limitation was imposed, in part due to the rapidly approaching decision due date that had been extended by joint request to accommodate schedules in setting hearing sessions. Citations to the record will be as follows: Notes of Testimony (N.T.); Joint Exhibits (J-) followed by the exhibit number; Parent Exhibits (P-) followed by the exhibit number; School District Exhibits (S-) followed by the exhibit number; and Hearing Officer Exhibits (HO-) followed by the exhibit number. References to duplicative exhibits may not be made to all.

ISSUES

1. Whether the District denied Student FAPE from the start of the 2014-15 school year through the date of this decision;
2. If the District did deny FAPE to Student for any of that time period, should Student be awarded compensatory education?

FINDINGS OF FACT

1. Student is a late pre-teenaged middle school student who is a resident of the District. Student is eligible for special education based on an Autism Spectrum Disorder and a Specific Learning Disability in Oral Expression. (N.T. 21; J-10, J-11)
2. Student has always attended school in the District. Beginning in kindergarten, Student was provided with speech/language services. In Student's second grade year, Student was first evaluated for special education due to concerns with behavior, oral expression, and reading comprehension. Student was determined to be eligible for special education in December 2011. (N.T. 25, 34; J-10 pp. 1-2, 4-6)
3. An Independent Educational Evaluation (IEE) was obtained in the spring of 2013. The resulting report⁵ summarized education records and other relevant history, and provided input from teachers and a classroom observation. Cognitive assessment (Wechsler Intelligence Scale for Children – Fourth Edition) reflected a low average range Full Scale IQ, but Student's relative strengths (Perceptual Reasoning and Processing Speed) and weaknesses (Verbal Comprehension and Working Memory) suggested that the Full Scale IQ did not adequately describe Student's cognitive ability. Academic achievement (Wechsler Individual Achievement Test – Third Edition) results established below average range scores on the Oral Language and Reading Composites and average range scores on the Mathematics and Written Expression Composites, with some variability among Reading subtests. (P-13)
4. Social/emotional/behavioral functioning was examined through rating scales (Behavior Assessment System for Children – Second Edition) completed by the Parent and three teachers. The Parent's ratings indicated an at-risk concern with Withdrawal but no other areas. One or more teacher scales reflected clinically significant concerns with Depression, Atypicality, Withdrawal, Social Skills, Study Skills, Functional Communication, and on the Behavioral Symptoms and Adaptive Skills Indices; and additional at-risk concerns with Aggression, Attention Problems, and Leadership, and on the Internalizing Problems and School Problems Indices. Executive Functioning weaknesses were identified by teachers with respect to shifting, emotional control, and initiation. A rating scale for ADHD did not reveal a likelihood of that diagnosis. (P-13)

⁵ Two pages are missing from the IEE report in P-13, but the omissions are not critical to an understanding of its results and recommendations. The same pages are missing from the copy at S-15 pp. 4-29.

5. Assessments of sensorimotor and speech/language functioning in the IEE reflected concerns with fine motor and speech/language skills, social functioning, and maladaptive behaviors. (P-13)
6. The IEE made recommendations that included behavioral intervention, social skills training, social stories, a multi-sensory reading program for phonological processing, decoding, and word recognition as well as strategies to promote reading comprehension. (P-13)
7. A privately obtained evaluation in September 2013 provided diagnoses of Asperger's Disorder, Disruptive Behavior Disorder, and Reading Disorder. Wraparound services were recommended. (J-10 p. 4)
8. Student was evaluated for assistive technology (AT) in November-December of 2013. Student did not qualify for AT, but recommendations were made for a written agenda, social stories and visual supports for requesting help and communicating emotions, and a text to speech program. There was no meeting held with the Parent to discuss the AT evaluation at that time. (N.T. 45-47, 82, 421; P-2, P-5C p. 4)
9. A reevaluation report (RR) was completed in November 2013. The RR summarized in detail previous evaluations and relevant records. Teachers reported concerns with Student's refusal to complete work and respond to questions and directives, inattention and distractibility, difficulty with transitions, failure to ask for help, tendency to become frustrated, lack of organization, and peer relationships. A number of recommendations for Student's educational program were provided to address social skill development, reading comprehension and oral expression weaknesses, providing wait time, alternatives to written assignments, social stories for positive behavior, schedules provided in advance to assist with transitions, chunked assignments, preferential seating, assignment and test accommodations, individual and small group instruction as needed, and direct instruction in reading comprehension skills. (J-10)
10. A Functional Behavioral Assessment was completed in November 2013, identifying withdrawal/disengagement when Student did not understand a task or activity and/or perceived it as being too difficult. (S-5)
11. An IEP developed in December 2013 indicated that Student exhibited behaviors that interfered with learning. Identified needs were overall communication skills, social skills, reading fluency, and reading comprehension. Annual goals addressed reading comprehension (at a fourth grade reading level), asking for help when feeling frustrated, following multi-step directions, and expressive, receptive, and pragmatic language skills. Program modifications/items of specially designed instruction included test accommodations and adaptations, processing and wait time, social skills cuing, and a behavior chart. Speech/language therapy and a shared aide were identified as related services. Student's program was for itinerant speech/language and autistic support. (J-5)
12. A Positive Behavior Support Plan (PBSP) that addressed work refusal, negative comments toward others, and "shutting down" or becoming unresponsive was also

developed in December 2013. The PBSP included annual goals, antecedent strategies, replacement behaviors (communicating a need for help or removing self from situations with peers), and a behavior chart. (S-4)

DISTRICT POLICIES AND PROCEDURES

13. The District has an anti-bullying policy that strictly prohibits bullying, which is also defined by the policy. (N.T. 201-02, 468-69; S-1)
14. A District student's IEP goals are aligned to the Common Core standards. At least some teachers understood that a student may not have an IEP goal for a specific need if the subject area is not included in the Common Core standards for that particular grade level. IEP goals were also dependent upon disability category. (N.T. 150-52, 168-70, 230-33, 430-31)

2014-15 SCHOOL YEAR

15. Student entered fifth grade in the middle school for the 2014-15 school year with itinerant autistic support in a "co-teaching and inclusive setting." (J-6 p. 6) Students in grades five through eight attend middle school where class periods are almost one hour. (N.T. 267, 472; J-6)
16. Student was in several co-taught classes during the fifth grade school year: Reading, Mathematics, and Social Studies. The special education teacher was in those classes each day for the class period. (N.T. 400-01)
17. Student exhibited some problematic behavior at the start of the 2014-15 school year, including work refusal. Those behaviors decreased as the year progressed. (N.T. 414-17, 435-36)
18. Student was involved in a few instances of peer conflict that Student perceived as bullying in fifth grade. Those incidents were addressed by the teachers. (N.T. 425-26)
19. Most reading in fifth grade was done together as a class. However, shortly after the start of the school year, the District suggested that Student attend a reading intervention period focused on decoding, comprehension, spelling, vocabulary and writing skills. Because doing so would have required that Student no longer participate in an elective that Student enjoyed and which provided socialization opportunities, Student did not attend the reading intervention. (N.T. 84, 115-16, 409-10, 419-20; S-15 pp. 1-3)
20. In the fall of 2014, the Parent asked for an assistive technology evaluation. A meeting convened to discuss the evaluation from the fall of 2013 which concluded that Student did not qualify for assistive technology. (N.T. 402-09, 420-21; P-5C pp. 10-12, 14)
21. Student's annual IEP was developed in December 2014. That document indicated that Student did not exhibit behaviors that impeded Student's learning or that of others, and a previous behavior plan was discontinued. Needs were identified with respect to social

skills and interactions, managing frustration, reading comprehension, written expression, and expressive/receptive language skills. Annual goals addressed reading comprehension (at Student's level), receptive/expressive/pragmatic language skills, vocabulary for grade level text, reading accuracy and fluency, reading comprehension, written expression (conventions), and managing frustration. Program modifications/items of specially designed instruction provided for test accommodations, test adaptations for core classes, and language activities; speech/language therapy was identified as a related service. Student's program was for itinerant speech/language and autistic support. (J-6)

22. Student's PBSP was removed from the IEP by agreement of the team in December 2014. (N.T. 87, 423-24)
23. The Parent approved the December 2014 Notice of Recommended Educational Placement (NOREP). (J-12 pp. 5-8)
24. Student had no disciplinary referrals during the 2014-15 school year. (J-3 p. 15)
25. The Parent and special education teacher communicated over the course of the school year about a few occasions when Student did not complete assignments and experienced difficulties with peers. (P-5C pp. 1-2, 32, P-5E pp. 8-11; S-15)
26. Progress monitoring for the 2014-15 school year reflected that, by the end of the school year, Student made growth in identifying details in a passage and making inferences attaining at least 80% accuracy (reading comprehension); had variable performance on the vocabulary goal; made some gains toward the expressive language goal; remained consistently below 80% on the reading accuracy and fluency goal; and met or exceeded the writing conventions goal. With respect to managing frustration, Student's use of communication skills to express those feelings was at the targeted 80% level in structured settings. Progress on the prior IEP was provided for only one quarter and several of the goals were not monitored for that nine week period. (J-17 pp. 1-17)

2015-16 SCHOOL YEAR

27. Student began sixth grade at the start of the 2015-16 school year with itinerant autistic support "in a co-teaching and inclusive setting." (J-7 p. 5)
28. During sixth grade, Student's special education teacher/case manager was present in most of Student's core classes: Reading, Language Arts, Mathematics, and Science; an instructional aide was in the Social Studies class. Usually the general education teacher would instruct the class and the special education teacher would circulate among the students and assist anyone who needed help, whether or not the child was provided special education services. The special education teacher sometimes provided small group instruction to any student who needed it. (N.T. 128-29, 131-33)
29. Students in sixth grade transition to different classrooms for different subjects. The students were grouped so that the groups of students attended the same classes together, and had three different teachers. (N.T. 134-35, 309)

30. Students in the sixth grade discussed bullying several times each month. (N.T. 208)
31. At the beginning of sixth grade, Student believed that a peer was bullying Student through verbal comments. Student at times misinterpreted actions or statements of peers as bullying. (N.T. 176-77, 186-87, 214-15)
32. Student did not have regular counseling during sixth grade, but the special education teacher met with Student every other week to “check in” (N.T. 180 L 20) and address any concerns. The teacher discussed the peer bullying with Student and the situation between the two students improved. (N.T. 179-80, 186-87, 206-07)
33. Student was able to go to the special education teacher’s classroom when Student needed a break during sixth grade. The special education teacher and Student communicated when Student was frustrated, and they discussed strategies and techniques for managing anxiety and frustration. Usually Student went to the teacher at those times, with prompting from an adult, and they worked through the frustration so that Student could return to class. (N.T. 160-63, 226-27, 244-45, 249-50)
34. Although not part of the IEP, Student had options for where to have lunch, such as in a small, quiet room with an invited peer or with an administrator, or in the special education teacher’s classroom. At times, that privilege was removed as a consequence of behavior. (N.T. 197-98, 203-04)
35. Student attended a lunchtime group that met every other week in sixth grade. The group was comprised mostly of regular education students, and all shared an interest in the theme of the group, and provided an opportunity to practice social skills. (N.T. 177-79, 250)
36. The Parent and special education teacher exchanged concerns with Student’s difficulties with peers over the course of the 2015-16 school year, as well as Student’s anxiety about going to school and failure to comply with teacher directives at times. Those exchanges increased significantly by the beginning of December 2015 and into the spring semester. The Parent continued to voice concerns about bullying by other students. (P-5B; S-7)
37. Student did not have assistive technology in sixth grade. (N.T. 181-83)
38. Student’s annual IEP was developed in December 2015. Student reportedly did not engage in behaviors that impeded Student’s learning or that of others. The IEP indicated that Student was acquiring and using grade-level vocabulary with 54% accuracy and reading grade-level texts with fluency with 60% accuracy. Student was using appropriate writing conventions with only 37% accuracy, and writing tasks were reportedly not preferred. Student was managing frustration and asking for help with 50% accuracy. Speech/language therapy information reflected continued needs. (J-7 pp. 1-5)
39. Parent concerns in December 2015 were focused on peer bullying and Student’s safety especially during transitions, as well as writing needs. Identified needs in the December 2015 IEP were for social skills and peer interactions, managing frustration, and written expression. (J-7 p. 6, J-20 pp. 5-12, 17, 19, 24)

40. Annual goals in the December 2015 IEP addressed written expression based on a rubric, reading comprehension at Student's unidentified grade level, vocabulary, and expressive/receptive/pragmatic language skills. Another goal for managing frustration was targeted for ESY. Program modifications/items of specially designed instruction provided for test accommodations/adaptations and language activities; speech/language therapy was identified as a related service. Student's program was for itinerant speech/language and autistic support. (J-7)
41. The Parent approved the December 2015 NOREP. (J-12 pp 9-13)
42. Student was provided with preferential seating after an incident with a peer in December 2015. The teacher met with Student more frequently for a period of time after that incident. (N.T. 208-12; S-7 p. 1)
43. The special education teacher worked with small groups of students on reading accuracy and fluency as well as written expression activities. (N.T. 153-54, 157-58)
44. Student expressed anxiety about returning to school in January 2016 after the holiday break. (S-7 pp. 3-4)
45. Student had a foreign language class during the fourth quarter in the spring semester. That class was not co-taught and Student did not have an aide. Student had difficulties with peers during that foreign language class, and ultimately Student was physically assaulted by classmates. Student was then removed from that class by agreement of the Parent and District (without an IEP meeting), and Student went to the library for that class period after removal from that class approximately three weeks into the quarter. (J-20 pp. 1-4, J-22; HO-1)
46. An IEP meeting convened in May 2016 to address bullying. The team added to the IEP a provision that Student would have the option to go to the autistic support classroom for a portion of the school day, and that Student would have an escort when going to that classroom. (N.T. 107-09, 190, 222, 248-49; J-8 p. 21; S-6)
47. Student incurred seven disciplinary referrals during sixth grade, all in 2016. Student was non-compliant with teacher directions, left the classroom without permission, and was aggressive toward a peer on two occasions and verbally aggressive to a peer on another occasion. Student was placed on In-School Suspension for the aggressive incidents. (J-3 pp. 2, 8-9)
48. Student told the Parent that Student acted out at school in order to be disciplined so that Student could feel safe in the room where detentions are held. (P-5B p. 68)
49. There was no PBSP during sixth grade and the team did not discuss making any revisions to include a PBSP. (N.T. 234-35, 240)
50. Progress monitoring for the 2015-16 school year, first quarter, reflected performance consistent with the prior year in identifying details in a passage and making inferences attaining near or over 80% accuracy (reading comprehension) and on the writing goals,

with slight growth on the vocabulary goal with some variability. Progress monitoring on the December 2015 IEP goals reflected fairly stable performance on all goals, with apparent growth on the written expression goal but only with supports. (J-17 pp. 13-21)

51. For progress monitoring on the writing goal, Student was not provided with any support, and instead was given a writing prompt. The progress monitoring prompts were provided in a small environment with only Student and the teacher present. (N.T. 243, 250-52)
52. The Parent decided that Student would not attend ESY during the summer of 2016, and Student did not. (N.T. 91, 225; S-7 pp. 77-78)

DISTRICT CHANGES IN POLICY SPRING 2016

53. In the spring of 2016, following community meetings and consultation with stakeholders, as well as review of data regarding its special education services and student performance, the District proposed a change to its co-teaching model for the next school year. Specifically, the District concluded that adjustments would be made so that some classes would no longer be co-taught every day for the entire class period by regular and special education teachers. Rather, special education teachers would be assigned 3 or 4 periods of direct instruction, with trained aides also assigned to certain classes. The teachers would be available for other responsibilities in managing special education programs outside of those periods of direct instruction. (N.T. 443; P-9, P-10)
54. In the former model, most academic classes were co-taught by a regular and special education teacher. In a few classes, instructional aides instead of a classroom teacher were in the classroom with a regular education teacher. (N.T. 443-44)
55. In the new model, special education teachers serve as consultants in addition to co-teaching, and are in the classroom for fewer class periods. The special education teachers have more flexibility to work with individual students in the resource room because they are not required to be in as many classrooms for entire class periods, and may not be in a given class at all if scheduling conflicts would arise. The District's proposed model was provided to the state as part of its Special Education Plan Revision Notice approved by the Pennsylvania Department of Education. (N.T. 444-45, 458-62; P-2)

2016-17 SCHOOL YEAR

56. Student began the 2016-17 school year in seventh grade receiving itinerant autistic support "in a co-teaching and/or inclusive setting." (J-9 p. 5)
57. At the start of the school year, the Parent expressed concerns about the changes to the co-teaching and inclusion setting because she believed Student had done well with classes co-taught by a general education and a special education teacher. She communicated those concerns with a number of District representatives. The IEP team discussed the Parent's concerns with the changes in September 2016. (N.T. 73, 76, 79, 303, 305-06; P-5A; S-8 pp. 3-4)

58. Students in seventh grade are required to transition to a different classroom for each period, traveling a farther distance than in sixth grade. A teacher generally escorts the students to the different classes, so Student no longer needed to leave classes early to transition to the next class. The students have up to twelve different teachers. (N.T. 273-74, 310-11; J-9 p. 8)
59. The special education teacher was assigned as a co-teacher in Reading, Language Arts, and Mathematics (Pre-Algebra). She is in those classrooms most days for part of the class period (approximately 30 minutes), and assists any student who needs academic or behavioral support. She also assists in co-planning lessons. The teacher checks in with Student during those classes. (N.T. 264-67, 487-88, 498-99)
60. The special education teacher is in the Science and Social Studies classes at times, and also sees Student during resource time. There are two aides and a general education teacher in those classes. (N.T. 348-49, 487-88)
61. A paraprofessional is in Student's classroom for three periods each day: Language Arts, Science, and Social Studies. Another aide in addition to the teacher is in the Science and Social Studies classes. The aide assigned to Student is usually in close proximity to Student and redirects Student as needed, and also collects data on Student's behaviors. (N.T. 484-91, 493-94; J-19 pp. 12-13)
62. The aide assigned to Student started in approximately October 2016. (N.T. 494)
63. At the start of the seventh grade school year, Student exhibited very concerning problematic behavior, including physical aggression toward peers and objects, refusing to transition to the next class, failing to communicate with others, and refusing to complete assignments. Overall, Student did not experience a successful transition to the seventh grade. (N.T. 269-72, 286, 313)
64. The special education teacher attempted to meet and talk with Student to address Student's behaviors at the beginning of the school year, but Student did not communicate with her. Student was provided preferential seating to avoid problematic interactions with peers. (N.T. 272-75, 322-23)
65. The special education teacher was alarmed about Student's behavior at the start of the school year. She tried to speak with Student during an incident in class when Student became aggressive toward a peer and refused to comply with various teacher directives, but Student would not talk with her or the instructional aide. It was the end of the class period and Student left the classroom. (N.T. 275-77; P-5A p. 22)
66. Student's seventh grade teacher left a voicemail message for the Parent describing Student's refusal to sit properly in class, verbal and physical aggression (throwing an object) toward a peer, and refusal to comply with teacher directives; Student also did not have homework that had been assigned. The teacher stated that this type of behavior would need to be addressed at a meeting and could not continue; she "didn't know what to do for [Student]" (N.T. 345). (N.T. 71-72, 275-76, 280-81, 345; P-1; S-13 pp. 29-30)

67. Student frequently experienced difficulty with peers during the 2016-17 school year; and, the Parent communicated with the teacher and other District staff about those peer conflicts, bullying concerns, noncompliance, and incomplete or missing assignments. Two peers whom Student believed were bullying Student were moved to a different section in mid-September 2016. (N.T. 278, 288-90, 317-19; J-9 p. 7; J-20 pp. 26-29; P-5A pp. 1, 20, 39, P-5D pp. 1-3, 8-9, P-5E; S-13)
68. Student had difficulty with physical education class in seventh grade, in part because it requires social interaction with peers. (N.T. 269, 290-91)
69. Because of Student's difficulties with peers in the lunchroom, in early September Student started having lunch in an autistic support classroom with several other students. (N.T. 286-87; J-9 p. 7, J-20 pp. 34, 41)
70. Student was to participate in a social skills group that meets once each week during lunch period. That group had not started as of October 31, 2016. (N.T. 292-95; P-5A p. 42)
71. The behavior specialist began to check in with Student beginning in September 2016. An incentive plan was also developed by the behavior specialist with stickers for exhibiting positive behavior. However, Student stopped using that plan within two weeks. (N.T. 279-80, 295-97; J-9 pp. 7-8; J-20 p. 31; P-5A pp. 33-37, P-5D p. 4)
72. The aide provided testing accommodations to Student and a few other students. They go to a different room for tests which are read aloud by the aide. Student's tests are sometimes adapted with fewer answer choices than other students have. (N.T. 497-98, 505, 511)
73. Student is able to earn free time for completing assignments and homework and recording and organizing homework assignments. (N.T. 490-91; J-19 pp. 12-13)
74. An FBA was completed in October 2016. Behaviors of concern were noted as refusal to complete tasks and engaging in off-task behaviors. The hypothesized function of those behaviors was to escape/avoid a demanding task or to obtain a desired item or activity. The FBA did not reveal information that was not already known. (J-18; S-13 p. 30)
75. A new RR was completed in November 2016. This RR, essentially a record review, described Student's difficulties with peers at the start of the school year and summarized previous evaluations. Recent assessment and grade information was also provided. Teacher concerns were noted to be assignment completion, problematic and immature behavior, peer and group interactions, compliance with teacher directives, and disrespect of teachers, with performance in Mathematics class a notable exception. Parent input had been sought a mere three days before the completion of the RR. The RR concluded that Student remained eligible for special education on the bases of Autism and a Specific Learning Disability in Oral Expression. Identified strengths included performance in Mathematics class and some writing skills, with needs noted in social interactions with peers, managing frustration, completing assignments, organization, and written expression. (J-11)

76. Student's annual IEP was developed in November 2016. This document indicated that Student was engaging in behavior that impeded Student's learning or that of others; and the results of the FBA were included. The IEP indicated a below basic score on a Scholastic Reading Inventory. Speech/language therapy information reflected continued work on those goals. Identified needs were for social skills and peer interactions, managing frustration, written expression skills, completing assignments, and organizational skills. (J-9)
77. The annual goals in the November 2016 IEP are virtually identical to those from the December 2015 and May 2016 IEP, addressing written expression based on a rubric, reading comprehension at Student's grade level, vocabulary, and expressive/receptive/pragmatic language skills. The goal for managing frustration was targeted for ESY. Program modifications/items of specially designed instruction provided for test accommodations/adaptations and language activities; speech/language therapy, social skills sessions, a classroom aide in core classes, and a shared aide in Language Arts, Social Studies, and Science were identified as related services. Student's program was for itinerant speech/language and autistic support. (J-9)
78. A Positive Behavior Support Plan (PBSP) was also developed in November 2016 to address noncompliance (refusal to complete tasks and assignments, failure to respond to teacher directives). Antecedent strategies provided for a behavior chart, positive reinforcement, verbal reminders and cues, a structured setting, wait time, an available area to cool down, choices, and preferential seating. A homework sheet was also created. (J-19)
79. The team discussed providing Student with post-it notes to use to indicate frustration or a need for help. It is unknown whether that was ever done. (N.T. 298-99; J-9 p. 8)
80. Student has not used assistive technology in seventh grade. (N.T. 291-92, 334)
81. Progress monitoring through the first half of the 2016-17 school year reflected significant growth on the managing frustration goal; unclear performance on the writing goal and fairly stable performance on all other goals, with reading comprehension specified at level 3-4. (J-21)
82. As of early December 2016, the Parent was considering moving Student from the District schools. Student's significant difficulties with peers continued through the dates of the due process hearing. (N.T. 60-61, 65; P-5B p. 25)
83. Student attends a weekly social skills group outside of school [redacted] where Student is learning skills such as asking for a break and asking for help. (N.T. 39, 66-68)
84. Student currently exhibits difficulty with receptive and expressive language, including pragmatic language; social skills, including physical boundaries; written expression; reading comprehension; and reading fluently and accurately. Student does not care for and struggles with writing tasks. Mathematics is a strength for Student. (N.T. 23-27, 29-31, 40, 158-60, 163, 283-84; J-11)

85. Student struggles with homework and refuses to complete work that Student feels is too difficult. Homework typically takes at least one hour to complete. (N.T. 26, 29-31, 34)

SPEECH/LANGUAGE AND OTHER SUPPORTS – 2014-15 SCHOOL YEAR THROUGH PRESENT

86. The Speech/Language Therapist has seen Student twice each week for thirty minutes throughout fifth, sixth, and seventh grades. Some sessions have been individual and some have been in a small group with one other student. Student has missed a resource period and one class period for those sessions. The Speech/Language Therapist monitored Student's reading goals. (N.T. 148, 358-59, 385)
87. The Speech/Language Therapist worked with Student on reading comprehension. She has used a free computer program where the students read passages and answer questions, and move to a higher level if they answer a certain number of questions correctly. Progress monitoring on that goal is obtained through performance on the computer program. Over the fifth, sixth, and seventh grade school years, Student's performance has fluctuated. (N.T. 338-39, 362-66, 380-81, 394-95)
88. The computer program used for reading comprehension provides a grade level equivalency; Student's level has been inconsistent over the time period in question. (N.T. 367-69)
89. For vocabulary, the Speech/Language therapist has provided a number of activities at varying grade levels, and uses Student's performance on those for progress monitoring on that goal. Vocabulary was drawn from core class content. (N.T. 147, 149, 362, 365-66, 370-71, 379)
90. The Speech/Language Therapist also worked on written expression skills by asking the students to provide written responses to open-ended questions. (N.T. 366-67)
91. The Speech/Language Therapist has worked with Student on social skills. (N.T. 386-87)
92. In fifth, sixth, and seventh grade, Student's teachers or an aide reviewed Student's agenda to ensure it accurately reflected all homework assignments. The Parent could also check teacher email and the online portal for confirmation of assignments. (N.T. 32-33, 496-97)

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 Parent who requested this hearing.

Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be credible, testifying to the best of his or her recollection, and the testimony was generally consistent rather than contradictory. 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 education 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 permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of*

Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). LEAs meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Recently, the U.S. Supreme Court considered a lower court’s 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.” *Andrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S.Ct. 988, ___, 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.”

Andrew F., ___ U.S. ___, 137 S. Ct. 988, ___, 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.” 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.” *Id.* at 352. This standard is consistent with the above interpretations of *Rowley* by the Third Circuit.⁶

As *Andrew* 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).

STUDENT'S EDUCATIONAL PROGRAM

The Parent has focused her complaint on several aspects of Student's program: reading needs including assistive technology and accommodations, writing needs including accommodations, behavior, social skills and peer relationships/bullying, the absence of needed IEP goals, and the District's policy changes regarding co-taught classes. (J-1; Parent's Closing at 2-8) The District has countered that the real concern of the Parent is the District's special education policy change, and that Student has demonstrated growth and success despite its

⁶ At least two federal District Courts in Pennsylvania have recently opined that the *Andrew* decision did not change Third Circuit jurisprudence regarding the standards for judging whether a special education program is appropriate. *E.D. v. Colonial School District*, No. 09-4837, 2017 U.S. Dist. LEXIS 50173, at *36 (E.D. Pa. Mar. 31, 2017); *Brandywine Heights Area School District v. B.M.*, 2017 U.S. Dist. LEXIS 47550, at *29 n. 25 (E.D. Pa. Mar. 28, 2017).

implementation. (J-2; District's Closing at 2-7)

While it may well be that the District's policy change was a significant factor in the Parent's election to pursue a Due Process Complaint, the Legislature has granted specific authority to school boards to comply with the various provisions of the Public School Code of 1949. *See* 24 P.S. §§ 1-101 *et seq.*; Chapters 4 and 11, 22 Pa. Code. The District's spring 2016 decision regarding its implementation of the various laws governing special education does not, in and of itself, weigh on any determination of whether the District has responded appropriately to Student's educational needs. Moreover, the claims in this case span time periods before and after implementation of those changes.

2014-15 SCHOOL YEAR

The evidence regarding the 2014-15 school year is relatively sparse. Student began the fifth grade school year in an inclusive setting with an IEP that targeted needs in reading comprehension at a fourth grade level, expressive/receptive/pragmatic language skills, managing frustration, and following multi-step directions. Although there was no goal for reading fluency at the start of the school year, Student had a reading class where texts were read together. The District did suggest a reading intervention period that Student declined for quite understandable reasons. When the IEP was revised in December 2014, goals were added for reading fluency and accuracy, vocabulary, and written expression, all of which aligned with Student's needs at the time.

There were a few instances of problematic behavior at the beginning of the school year, but the teachers addressed those and communicated with the Parent. The PBSP was removed in December with the IEP team in agreement that one was no longer needed. By the end of the 2014-15 school year, Student had met some but not all goals in the December 2014 IEP, which is

to be expected on annual goals. Viewed as a whole, the evidence simply does not support a conclusion that the District failed to develop and implement an educational program for Student that was responsive to Student's needs during the 2014-15 school year.

2015-16 SCHOOL YEAR

As had occurred in the prior school year, Student experienced difficulty at the beginning of the fall term. Student reported significant difficulties with peers that continued through the fall, despite accommodations such as Student having lunch outside of the cafeteria and opportunities to discuss those conflicts with the special education teacher. While one would certainly expect that a child with Student's profile would experience challenges at school, as did Student, by early December 2015 the communication between the Parent and teachers reflected significant concerns with peer conflicts and Student's frustration, verbal disruptions, and physical aggression. It is rather puzzling that the IEP developed in December did not indicate that Student was engaging in behavior that impeded Student's learning or that of others, as Student clearly was; Student was only managing frustration appropriately 50% of the time. Had a PBSP been developed and implemented at that time, it is reasonable to conclude that Student's behaviors would have been appropriately addressed by the start of the second semester of that school year when Student began incurring disciplinary referrals. It is also evident that, despite the accommodations provided in an effort to diminish the peer conflicts that Student perceived as bullying, other interventions beyond the social skills groups were required.

There can be no question that bullying is a grave concern in our nation. As the U.S. Department of Education recognized, "Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full

potential.”⁷ “Disability harassment that adversely affects an elementary or secondary student's education may also be a denial of FAPE under the IDEA; [and h]arassment of a student based on disability may decrease the student's ability to benefit from his or her education and amount to a denial of FAPE.”⁸ Our own Third Circuit has recognized that a student who is the victim of bullying and whose education is adversely impacted as a result can be denied FAPE. *Shore Regional High School v. Board of Education*, 381 F.3d 194 (3d Cir. 2004). A New York District Court more fully addressed a claim that a school district deprived a student of an appropriate special education program in failing to prevent bullying of the student by other students, thereby negatively affecting the student’s opportunity for an appropriate education in *T.K. v. New York City Department of Education*, 779 F.Supp.2d 289 (E.D.N.Y. 2011). The Court explained that, “[w]here bullying reaches a level where a student is substantially restricted in learning opportunities [he or she] has been deprived a FAPE.” *Id.* at 318.

Applying the above concepts to the facts in this case, there can be no doubt that, although the District has implemented bullying-prevention measures both generally and specific to Student, those have not been adequate to address Student’s specific needs in that respect. While some accommodations such as preferential seating were reasonably responsive to peer concerns raised early in the school year, it is also evident that Student has been denied learning opportunities: Student has been permitted to go to an autistic support room for a portion of the school day to avoid peers with whom Student experienced conflict; Student dropped a foreign language class because of bullying and a resulting physical assault; and Student engaged in disruptive behavior in part to be removed from peers and receive disciplinary consequences.

⁷ U. S. Department of Education, Office of Civil Rights, Dear Colleague Letter: Bullying and Harassment, at 1 (October 26, 2010).

⁸ U.S. Department of Education, Office of Civil Rights, Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2000).

These circumstances amount to a substantial restriction on learning opportunities for Student, and thus a denial of FAPE.

With regard to academics, the December 2015 IEP reflected Student's continued weaknesses in reading fluency and accuracy as well as written expression. Although those areas were addressed in small groups, Student was performing far short of the goal expectations. Inexplicably, that IEP discontinued the goal for reading fluency and accuracy based not on Student's individualized need, but on a belief that such goals were not possible in sixth grade; and, the reading comprehension goal provided for text at Student's unspecified reading level.⁹ The Speech/Language Therapist was responsible for working with and monitoring Student's progress on reading comprehension and vocabulary, but the description of the activities Student engaged in toward addressing those needs (such as use of a free computer program) appeared to be nothing akin to the specially designed instruction that Student plainly required in order to make meaningful gains. Moreover, the lack of objective specificity in the goals and progress monitoring in reading precludes one from discerning whether Student truly did show growth. Finally, Student's written expression skill deficits were exacerbated by behavioral needs that required additional intervention.

In sum, the District denied Student FAPE in those areas during the 2015-16 school year, and an award of compensatory education will be ordered to remedy that deprivation.

2016-17 SCHOOL YEAR

Student began this school year with significant behaviors, including aggression and noncompliance, that alarmed the special education teacher as well as Student and the Parent. As

⁹ Progress monitoring in the fall of 2016 at the third to fourth grade level, compared to the fourth grade level noted in the December 2013 IEP.

in the prior year, peer conflicts became evident very early throughout the school day and did not abate despite accommodations and a delayed social skills group. Suggestions and interventions by the behavior specialist and special education teacher were clearly inadequate in helping Student to manage behaviors, despite some contrary indication in the progress monitoring. While it was unquestionably reasonable to conduct an FBA as was done in October 2016, it is quite surprising that one had not been considered in January. In any event, the concerning behaviors continued to the point that the Parents began to consider removing Student from the District altogether. The same analysis of these claims for the 2015-16 school year applies to the 2016-17 school year.

Academically, the goals in the November 2016 IEP were virtually identical to the prior year, with the same flaws regarding reading as noted above. Additionally, as discussed, Student's written expression weakness continued to be impacted by behavior. It is quite possible that assistive technology would have been appropriate for and beneficial for Student in overcoming weaknesses in reading, vocabulary, and written expression during all of the school years in question, and the IEP team will be directed to reconsider a new SETT process and/or trials of potential AT.

For all of these reasons, the record as a whole establishes that Student was denied the benefit of FAPE during the 2016-17 school year.

REMEDIES

The first remedy will be a directive to the District to convene an IEP team meeting to discuss revisions to Student's IEP to address, at a minimum, needs in the areas of reading fluency and accuracy, vocabulary, and written expression. The team shall also discuss a new AT evaluation and/or trials of appropriate technology.

The Parent seeks compensatory education, which is an appropriate remedy where an LEA 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. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). 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 another 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).

This hearing officer concludes that the record does not include sufficient evidence on an appropriate equitable remedy that would place Student in the position where Student would be had FAPE been provided. Thus, the *M.C.* hour-for-hour remedy shall be applied for the denial of FAPE for the second half of the 2015-16 school year and the 2016-17 school year from the first day of school through the date of this decision. Recognizing that Student had good days and bad days and that portions of school days that were better than others, this remedy shall be equitably estimated to achieve a balance. Class periods at the middle school are approximately one hour. Student shall be awarded one hour per day of compensatory education to remedy the FAPE denial regarding appropriate reading programming, and two hours per day to remedy the FAPE deprivation regarding behavior, social skills, and peer conflicts that impacted Student’s ability to

function throughout the day including during writing tasks. There will be no deductions for days when Student was absent, since Student at times was reluctant to go to school because of negative experiences there.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parent 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 academic or social/emotional/behavioral needs and skills. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents, and may be used at any time from the present until Student turns age eighteen (18). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District did deny FAPE to Student for a portion of the time period in question, and shall award compensatory education to remedy the deprivation.

ORDER

AND NOW, this 15th day of April, 2017 in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Within ten school days of the date of this decision and Order, the District shall convene a meeting of the IEP team to discuss revisions to Student's IEP to address, at a minimum,

needs in the areas of reading fluency and accuracy, vocabulary, and written expression. The team shall also discuss a new AT evaluation and/or trials of appropriate technology that would assist Student in these academic areas.

2. The District failed in its FAPE obligations to Student under the IDEA during the 2015-16 school year.
3. The District failed in its FAPE obligations to Student under the IDEA during the 2016-17 school year.
4. The District shall provide Student with three hours of compensatory education for the denial of FAPE during the 2015-16 and 2016-17 school years, for each day school was in session beginning on the first day of the second semester of the 2015-16 school year through its last day, and from the first day of the 2016-17 school year through the date of this Order, subject to all of the following conditions and limitations:
 - a. Student's Parent 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 academic or social/emotional/behavioral needs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District.
 - b. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent, and may be used at any time from the present until Student turns age eighteen (18).
 - c. The compensatory services shall be provided by appropriately qualified professionals selected by the Parent. The costs to the District of providing the awarded hours of compensatory education may be limited to the average market rate for private providers of those services in the County.
5. Nothing in this 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