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Pennsylvania Special Education Hearing Officer

FINAL DECISION AND ORDER

CLOSED HEARING

ODR File Number: 19032 16 17

Student's Name: M.B.

Date of Birth: [redacted]

Dates of Hearing:

06/26/2017, 06/27/2017, 06/28/2017, 08/08/2017, 08/16/2017

Parent:

[redacted]

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Hearing Officer: Brian Jason Ford, JD, CHO

Date of Decision: 9/25/17

Introduction

This special education due process hearing concerns the educational rights of a former student (Student) of the School District (District).¹ The Student's parents (Parents) allege that the District denied the Student a free appropriate public education (FAPE) from the 2010-11 school year until the Student aged out of programming after the 2016-17 school year.

For reasons discussed below, I find in favor of the Parents in part and in favor of the District in part. I fashion a remedy to address the denial of FAPE.

Issues²

1. Was the Student denied a FAPE from the 2010-11 school year until the Student aged out of IDEA eligibility at the end of the 2016-17 school year?
2. If the Student was denied a FAPE, how much compensatory education is owed, and how may that compensatory education be used?

Findings of Fact

I carefully considered all evidence and testimony that was made part of the record in this case. I make findings of fact, however, only as necessary to resolve the issues presented. Consequently, not every document moved into the record, and not every aspect of each witnesses' testimony, is referenced below.

In this case, a large quantity of evidence was ultimately irrelevant to the issues presented. The legal standards described below set the parameters for the evidence that I must consider. The temporal scope of this hearing is broad, but the single issue within that scope is discrete. I do not mean to diminish the importance of the evidence to the parties.³ Rather, my focus is exclusively limited to the evidence that establishes the Student's needs, and the District's response to those needs.

¹ Except for the title page of this decision, identifying information is omitted.

² In their Complaint, the Parents also demand development of an appropriate program and placement. That issue is now moot, and the Parents only demand compensatory education. Similarly, the Parents demanded reasonable attorneys' fees and costs. I have no authority to award fees and costs, and so I read that demand as a reservation of the Parents' rights to raise claims for fees and costs after these proceedings.

³ Some evidence does nothing but establish the acrimony between the parties. This evidence was clearly important to the parties during the hearing, but is not relevant to the issue presented. For example, the level of everyone's anger during IEP Team meetings tells me nothing about the Student's needs, or how the District's program was designed to meet those needs. See, e.g. NT 553.

Further, the parties duplicated exhibits, entering the same exhibits twice, but marked differently. For convenience, I sometime refer to one copy without the other.

Finally, the parties agreed that no issue was raised regarding the appropriateness of the Speech and Language Therapy that the Student received. I make some findings below concerning Speech and Language Therapy, but only as necessary for context.

I find as follows:

Background – General

1. There is no dispute that, for the time in question, the District was the Student's LEA, and that the Student was a "child with a disability," specifically Autism and Speech and Language Impairment, as defined by the IDEA at 20 U.S.C. § 1401.
2. In February 2017, through an IEE, the Student was found to meet criteria for a child with an Intellectual Disability. P-31.
3. The Student does not proceed from grade level to grade level on academic standards, and so the concept of grade level has limited probative value for this hearing. However, associating grade level with school year is helpful for reference. During the hearing, the parties referred to school years after 12th grade as the "12 plus 1" and "12 plus 2" school years. I adopt that nomenclature for consistency.
 - a. The 2010-11 school year was the Student's 8th grade year.
 - b. The 2011-12 school year was the Student's 9th grade year.
 - c. The 2012-13 school year was the Student's 10th grade year.
 - d. The 2013-14 school year was the Student's 11th grade year.
 - e. The 2014-15 school year was the Student's 12th grade year.
 - f. The 2015-16 school year was the Student's 12 + 1 school year.
 - g. The 2016-17 school year was the Student's 12 + 2 school year.
4. Prior to the 2010-11 school year, the Student attended the District's intermediate school.
5. The Student transferred to the District's middle school for the 2010-11 (8th grade) school year, and remained in the middle school for the 2011-12 (9th grade) and 2012-13 (10th grade) school years.
6. The Student transferred to the District's high school for the 2013-14 (11th grade) school year, and remained in the high school for the 2014-15 (12th grade) and 2015-16 (12 + 1) school years.
7. The Student received homebound instruction during the entirety of the 2016-17 (12 + 2) school year.

Background – Work Experiences

8. In addition to the services described below, the Student participated in work experiences both in and out of school.
9. In the 2010-11 through 2012-13 school years, the time that the Student attended the District's middle school, the Student was assigned to in-school work-like jobs, such as delivering mail in the school building. NT 429-431, 883-884.
10. In the 2013-14 through 2015-16 school years, the time that the Student attended the District's high school, the Student participated in class trips to the library, where the Student would clean CDs, and to a local supermarket, where the Student would stock shelves with supervision. NT 432, 886, 1264-1265. These trips occurred between six and eight times per year, except for the 2015-16 school year, during which time the Student went on four trips. *Id.*

Background – 2008-09 and 2009-10 School Years

11. The Student received special education in accordance with an IEP dated March 5, 2009, from that date until March 3, 2010. P-1, P-2.
12. The 2009 IEP included a measurable, objective, baselined reading goal. The goal called for the Student to comprehend text at an instructional 3rd grade level. The reading goal was also broken into measurable short-term objectives. P-1.
13. The 2009 IEP included a measurable, objective, baselined math goal. The goal called for the Student to score in the instructional level on a 5th grade math assessment. The math goal was also broken into measurable short-term objectives. P-1.
14. The 2009 IEP included a measurable, objective, baselined writing goal. The goal called for the Student to write one paragraph "with good focus, a topic sentence, three supporting details, and a concluding sentence." P-1 at 26. The writing goal was also broken into measurable short-term objectives. P-1.
15. The 2009 IEP included two measurable, objective, baselined speech and language goals. Both of those speech and language goals were also broken into measurable short-term objectives. For both goals, the target of the goals themselves was for the Student to master short-term objectives. For one goal, the short-term objectives mostly related to vocabulary and articulation. P-1 at 18-19. For the other goal, the short-term objectives mostly related to language pragmatics. P-1 at 20.

16. The 2009 IEP included a baselined social and behavioral skills goal. That goal, viewed in isolation, was not objective. However, the goal was broken into short-term objectives, and those objectives were objective and measurable.
17. The 2009 IEP included several modifications and specially designed instruction (SDI), which provided small group instruction in content areas, positive reinforcement for desired behaviors, accommodations for tests and assignments, and “direct adult supervision for all academic areas and specials, cafeteria, and unstructured activities.” P-1 at 32-33.
18. The 2009 IEP specified that the Student was to receive two Speech and Language Therapy sessions per six-day cycle, 30 minutes per session. P-1.
19. The 2009 IEP placed the Student in a supplemental level of learning support, meaning that the Student received more than 20% but less than 80% of the school day receiving services provided by special education personnel. More specifically, the 2009 IEP called for the Student to participate in regular education classes, with the modifications provided through the IEP, except for reading instruction and time spent receiving Speech and Language Therapy.⁴
20. The Student’s IEP Team reconvened on March 3, 2010 (now in the 2009-10 school year). P-2. The Student was [early teenaged] at that time. The IEP Team updated the Student’s IEP, and issued a new IEP on the same day. The Parents approved the 2010 IEP via a Notice of Recommended Educational Placement (NOREP), also on the same day. P-2.
21. The 2010 IEP included a section for transition services. In that section, the IEP Team indicated that the Student had no plans for post-secondary education at that time, but would require supported employment when the Student was old enough for employment, and listed supported employment as an employment goal. P-2.
22. Regarding transition, the 2010 IEP also indicated that the Student had taken a Career Interest Picture Inventory, called for the Student to complete another interest inventory, and improve self-advocacy, direction-following, and social skills. These were not goals, but rather were listed as services or activities related to the Student’s transition needs. P-2.
23. Regarding transition, the 2010 IEP also indicated that the Student’s goal was to live with the Parents after graduation, and listed living with the Parents as an

⁴ The 2009 IEP also contemplated that the Student could receive math outside of regular education if necessary to achieve the IEP’s math goal. The 2009 IEP also specified that the Student was not expected to read novels presented to other 8th grade students.

independent living goal. Self-advocacy and social skills were again listed as services or activities related to the Student's independent living goal. P-2.

24. The 2010 IEP included two Speech and Language goals. For the most part, these goals were substantively identical to the Speech and Language goals in the 2009 IEP. However, new objectives were added that called for the Student to work through "hypothetical problematic situations." See P-2 at 15.⁵
25. The 2010 IEP included a reading goal that was substantively similar to the 2009 reading goal, maintaining a focus on reading comprehension. The 2010 IEP, however, did not call for the Student to reach a reading grade level, but rather called for the Student to demonstrate comprehension at the Student's current instructional level. At that time, the Student's reading level was inconsistent, but around the 1st or 2nd grade (as measured by accuracy and fluency on Qualitative Reading Assessments – comprehension scores were lower). The 2010 IEP also called for the Student to demonstrate comprehension skills with less accuracy than what was expected in the 2009 IEP. P-2.
26. The 2010 IEP included a math goal that, like the 2010 math goal, called for the Student to demonstrate 5th grade math abilities. However, the short-term objectives were changed to emphasize functional math skills (estimating weight and length, calculating sales tax and other functional money problems). P-2.
27. The 2010 IEP repeated the 2009 IEP's paragraph writing goal, but with some minor changes to target specified grammar conventions. P-2.
28. The 2010 IEP included a social skills goal that was different than the 2009 IEP's social skills goal. The 2009 goal focused on the Student accepting corrections from teachers. The 2010 goal focused on the verbal turn-taking and maintaining conversations with peers. P-1, P-2.
29. The 2010 IEP includes modifications and SDIs that are substantively similar to those in the 2009 IEP – including the same amount and type of Speech and Language Therapy. In some cases, the SDIs are carry-overs, but broken into greater detail. The 2010 IEP also calls for teachers to provide completed study guides in Science and Social Studies two days prior to unit tests. P-2.
30. The 2010 IEP continued to place the Student in supplemental learning support, with the same breakdown of the Student's time in regular and special education classes. P-2. The 2010 IEP also placed the Student into an itinerant level (meaning less than 20%) of Speech and Language Support. This additional

⁵ Exhibit P-2 is a copy of the 2010 IEP. In the goals section, each goal is printed twice. The same is true for each SDI and modification. This is a small indication of the overall difficulties that the District had with its IEP management software throughout the hearing.

designation did not indicate that the Student spent more time receiving services from special education personnel. Rather, this is a different way to indicate the Student's receipt of Speech and Language Therapy. P-2.

31. The Student was educated in accordance with the 2010 IEP for the remainder of the 2009-2010 school year.

2010-11 (8th Grade)

32. The Student started the 2010-11 school year under the 2010 IEP at the District's middle school.

33. On January 31, 2011, the District sought the Parent's consent to reevaluate the Student. The Parents provided consent one day later. Six days after that, the District drafted a Reevaluation Report (2011 RR). P-3.

34. The 2011 RR relied upon information available to the District at that time, including the Student's current performance on curriculum based assessments, teacher observations, and input from the Speech and Language Therapist (which included the results of an informal assessment). Teacher and Parent input was also solicited, but no new testing was completed. P-3.

35. The 2011 RR concluded that the Student was at the primer level in reading and the 3rd grade level in math. P-3.

36. The 2011 RR recommended placement in a Life Skills program (or at least noted that was recommended by the Student's teachers, if not the Student's IEP team), and continuation of Speech and Language Therapy. The 2011 RR included no other recommendations to the IEP Team. P-3.

37. The 2011 RR concluded that the Student continued to qualify for special education as a child with a disability, with a primary disability category of Autism, and a secondary disability category of Speech or Language Impairment. P-3.

38. The Student's IEP Team reconvened on February 14, 2011. P-4. At that meeting, the District offered a NOREP that provided the following:

- a. Continuation of the 2010 IEP for the remainder of the 2010-11 school year.
- b. A full-time Life Skills extended school year (ESY) program through the local Intermediate Unit in a neighboring school district during July 2011.
- c. An itinerant Life Skills program for the Student in the District's middle school from the start of the 2011-12 school year through February 14, 2012.

39. The Parents approved the NOREP on February 14, 2011. P-4.

2011-12 (9th Grade)

40. Although the Parents approved an itinerant Life Skills placement, the only IEP in place for the Student at the start of the 2011-12 school year was the 2010 IEP (which contemplated supplemental Learning Support and itinerant Speech and Language Support). *Passim*.

41. Further, although the Parents approved an itinerant Life Skills placement, in practice the Student received more. It is not clear if the Student received supplemental Life Skills or a full-time Life Skills placement (meaning the Student received instruction from special education personnel in a Life Skills program for more than 80% of the school day) at the start of the 2011-12 school year. It is clear, however, that the Student immediately started the 2011-12 school year spending more than 20% of the day in Life Skills programming. *Passim*.

42. The Student's IEP team reconvened on February 7, 2012, and drafted a new IEP for the Student. P-5.

43. According to the present education levels in the 2012 IEP, the Student's *functional* math abilities were at the "early 4th grade" level. The Student could count money, but had "trouble knowing what to give the cashier if [Student] does not have the exact amount needed." Outside of a functional context, the Student needed "more prompting" to complete basic math problems. P-5.

44. According to the present education levels in the 2012 IEP, the Student was an excellent sight-word reader (meaning that the Student could read a list of words), and the Student could read primer level material for QRI testing. However, the Student's reading comprehension of primer level material was 58%. At the time of the 2012 IEP, the sight word instruction focused on community sight words, which are written words that the Student may encounter in the community. In addition to reading those words, the Student could demonstrate understanding of their meaning. P-5.

45. According to the present education levels in the 2012 IEP, the Student worked on pre-vocational skills – cooking in particular. The Student was able to follow recipes and use fractions when measuring, but required significant adult prompting or reassurance. P-5.

46. Regarding transition services, the 2012 IEP continued to state that the Student did not plan on postsecondary education, would require supported employment, and intended to live with family. Services and activities related to transition included functional reading and math, participation in a pre-vocational skills and

domestic skills classes, community-based instruction, and completion of an interest inventory. P-5.

47. The 2012 IEP included an updated Speech and Language goal. P-5.
48. The 2012 IEP included a functional math goal, mostly related to using money. The goal itself is not objectively measurable, but was broken into measurable short-term objectives. The objectives were related to the Student's present education levels (e.g. "given a pre-determined amount of money and an item to purchase, [Student] will determine if [Student] has enough money and how much to give the cashier...") P-5.
49. The 2012 IEP included a goal for the Student to know how to contact and use community resources (transportation, emergency services). As with the functional math goal, this goal itself is not objectively measurable, but was broken into measurable short-term objectives.
50. The 2012 IEP includes a goal for the Student to follow multi-step directions. This is related to pre-vocational skills. As with the functional math and community resources goals, this goal itself is not objectively measurable, but was broken into measurable short-term objectives.
51. The 2012 IEP included a reading goal that targeted reading comprehension. This goal is substantively identical to prior reading comprehension goals, but for the addition of a short-term objective calling for the Student to increase understanding of community and household sight words.
52. The 2012 IEP included a goal for the Student to make simple meals, following one or two step recipes. This was related to the Student's independent living needs. The goal, like the others, was not objectively measurable, but was broken into measurable short-term objectives. The objectives contemplate the Student completing recipes "with at least 5 steps ...". P-5.
53. Although the Student was now in a Life Skills program, the modifications and SDI provided through the 2012 IEP were substantively similar to those in the prior IEPs. Again, changes were made to provide clearer information about what accommodations and supports were to be provided "outside of functional academic programming," but those modifications do not substantively differ from what was provided before (e.g. study guides, reading material above the Student's reading level, use of a calculator, modified tests and quizzes, etc.). See P-5 at 30-32.
54. The 2012 IEP reflected the IEP Team's determination that the Student was eligible for ESY in the summer of 2012. ESY goals were drafted to continue the Student's functional math and reading comprehension work. P-5.

55. The 2012 IEP offered full-time Life Skills and itinerant Speech and Language Support. P-5.
56. The Parents approved the IEP when it was offered during the IEP Team Meeting, via a NOREP, on February 7, 2012. P-5.
57. The Student received programming pursuant to the 2012 IEP for the remainder of the 2011-12 school year.

2012-13 (10th Grade)

58. The Student started the 2012-13 school year under the 2012 IEP at the District's middle school.
59. Prior to this school year, the District's middle school housed 8th and 9th grades. At the start of this school year, the District changed its structure, and the middle school now housed 7th and 8th grades. This pushed 9th grade into the District's high school, and caused some overcrowding there. *Passim*.
60. The Parents, and parents of other students in the District's Life Skills program were asked to remain in the middle school both to alleviate some of the overcrowding, and because of resource scarcity for Life Skills. The Parents agreed and, consequently, the Student (now, biologically a 10th grader) remained in a building that housed 7th and 8th grade. *Passim*.⁶
61. On January 15, 2013, the District completed another reevaluation of the Student and drafted another Reevaluation Report (2013 RR). The 2013 RR was presented to the Parents at a meeting on February 1, 2013. P-7.
62. Like the 2011 RR, the 2013 RR team decided that no new testing was needed, but rather current information collected by teachers, new teacher and parent input, and input from the Speech and Language Therapist was sufficient. P-7.

⁶ During the hearing, there was significant confusion about which buildings housed which grades during which years. There was also a significant factual dispute between the parties about the age range of other students in the Student's Life Skills classroom during this time. Neither party presented preponderant evidence regarding the age range in the Student's classroom during the 2012-13 school year. More importantly, if I were to assume that the Student attended a Life Skills program with 7th graders as a 10th grader, no evidence was presented to establish what harm that caused the Student, or where the Student would be now but for that error. Nothing in the IDEA specifies classroom age ranges. To the extent that Pennsylvania law specifies classroom age ranges, establishing a violation of that law does not establish an IDEA violation *per se*.

63. Parent information in the 2013 RR, provided through a questionnaire, includes the Parents' opinion that the 2012-13 school year had been "a bit of a repeat" for the Student, that "some work is too easy" and the Student "should be challenged more." P-7 at 2.
64. Teacher input in the 2013 RR indicates that the Student was "at an instructional level of early 4th grade" in academic math. This is up from the 3rd grade level reflected in the 2011 RR, but the same as the present levels indicated in the 2012 IEP, which had been in place for a bit less than a year at that point. In contrast, teacher comments indicated that the Student was performing better in functional math, but provided no objective information that rated the Student's functional math performance relative to IEP goals. P-7.
65. Teacher input in the 2013 RR indicates that word identification remained a strength, but that the Student's reading comprehension ability, as measured by the QRI, regressed. The present levels in the 2012 IEP indicated that the Student could read primer level QRI material with 58% comprehension. The 2013 RR noted that the Student's comprehension score fell to 33% when tested with primer level material. P-7.
66. Although the Student's reading comprehension score on the QRI regressed, the 2013 RR notes that the Student was participating in a "small group functional reading program with a focus on community based sight words." P-7. This was already a strength for the Student when the 2012 IEP was drafted, and reading comprehension remained an IEP goal for the Student even after the Student began attending the Life Skills program.
67. The Student's IEP team reconvened on February 6, 2013, and drafted a new IEP for the Student (the 2013 IEP). P-8. The Parents approved that IEP, via a NOREP, the same day. P-8.
68. Regarding transition, the 2013 IEP is substantively identical to the 2012 IEP, with two exceptions. The 2013 IEP calls for the Student to research jobs in the community and "practice using coping skills in order to deal with nervousness and frustration when assigned tasks that [Student] considers hard" as services or activities related to transition. P-8.
69. The 2013 IEP included a Speech and Language Therapy goal. P-8.
70. The 2013 IEP included a math goal that mostly repeats the 2012 IEP's functional math goal. Two, new, short-term objectives were added for academic math skills (word problems, and multiplication and division problems). P-8.
71. The 2013 IEP repeated the 2012 IEP's multi-step direction goal, related to pre-vocational skills. The short-term objectives were modified, however, to focus on the Student's ability to complete "an application or other important form." P-8.

72. The 2013 IEP repeated the 2012 IEP's reading comprehension goal, with some changes to the short-term objectives. The objective related to sight words, which was mastered by this point, remained unchanged. The other objectives in the 2012 IEP called for the Student to answer questions about a story. This changed in the 2013 IEP. The Student was no longer required to answer questions, but was now expected to "find the main idea" and "give a sequential retelling" of either a story that the Student read (at the Student's instructional level) or of a story read to the Student.⁷ C/f P-5, P-8.
73. The 2013 IEP repeated the 2012 IEP's food preparation goal. Although some language in the short-term objectives was changed, the goal is substantively identical. C/f P-5, P-8.
74. The 2013 IEP substantively repeated the 2012 IEP's modifications and SDI, albeit with some semantic changes, except as follows:
- a. The SDI for "immediate adult supervision through the school day..." was replaced with "shared paraprofessional support throughout the school day." C/f P-5, P-8.
 - b. The 2013 IEP added an SDI for "small group, parallel math class outside of the regular education class."
75. The 2013 IEP contemplated the Student remaining in the District's middle school for the remainder of the 2012-13 school year, and then moving to the District's high school for the 2013-14 school year. P-8.
76. The 2013 IEP reflected the IEP Team's determination that the Student was eligible for ESY in the summer of 2013. ESY goals were drafted to continue the Student's functional math, reading comprehension, and multi-step direction work. However, in the SDI section, the 2013 IEP lists "ESY services to be provided upon agreement between parents and school faculty" and lists the ESY placement as "to be determined." P-8.
77. The 2013 IEP continued to provide a full-time Life Skills program with itinerant Speech and Language Support. P-8.
78. The Student received programming pursuant to the 2013 IEP for the remainder of the 2012-13 school year.

⁷ This goal, as written, is concerning. Reading a story to the Student, and then asking the Student to retell that story, may produce a measure of the Student's *listening* comprehension, but not the Student's *reading* comprehension. No evidence was presented on this point and, absent such evidence, I cannot substitute my own understanding for those of the educational professionals who drafted the IEP.

Summer 2013

79. On June 9, 2013, the Parents wrote to the District, expressing their dissatisfaction with the Student's program, and requesting an independent educational evaluation. P-9.
80. On June 11, 2013, the District invited the Parents to an IEP Team meeting. The purpose of the meeting, as stated on the invitation, was to revise the Student's IEP as needed and to convene an MDT (multidisciplinary team) meeting. P-10.
81. The IEP Team met on June 13, 2013. The document entered into evidence at P-10, duplicated at S-8, purports to be a revision of the 2013 IEP. The 2013 IEP was not revised at this time. S-13 at 7. However, testimony indicates that the "revised" IEP at P-10 / S-8 was the document implemented after June 13, 2013. I will refer to the document as the revised 2013 IEP for consistency.
82. On June 20, 2013, the District sought the Parents' consent to reevaluate the Student. The District sought to conduct the same sort of reevaluation that it previously conducted, relying upon existing information to determine if new testing was warranted. The Parents consented to the reevaluation on June 24, 2013.
83. The reevaluation took place during the 2013-14 school year, resulting in a report dated October 31, 2013. P-14. The Parents and the District also agreed to a psychiatric evaluation, provided at the District's expense, through the local Intermediate Unit, by a medical doctor. P-12. The evaluation was conducted and reported in October 2013.

2013-14 (11th Grade)

84. The Student started the 2013-14 school year under the revised 2013 IEP at the District's high school, [] now 9th through 12th grades.
85. On October 11, 2013, the Student underwent a psychiatric evaluation. The evaluator, a medical doctor, issued a report of the evaluation the same day (Psychiatric Evaluation). P-12.
86. The Psychiatric Evaluation relies heavily upon information provided by the Student's mother that was not corroborated by District personnel. Even so, the Psychiatric Evaluation confuses some of the Parents' statements (at one point conflating the Parents' objections to the Learning Support teacher and the Life Skills teacher).
87. The Psychiatric Evaluation reports the Parents' understanding that, at that time, the Student had friendship with another student of the opposite sex in the Life

Skills class that had become problematic. The Student had become fixated on the other student. The District intervened by separating them, but this caused the Student to persevere more. The Parents' account of the situation was corroborated by the evaluator's clinical observation of the Student. P-12.

88. The Psychiatric Evaluation notes that the Student's full scale IQ was found to be a 70, with verbal IQ, performance, and memory scores all in the high 60s, while processing speed was average (105). However, the evaluator noted that an adaptive behavioral skills assessment was pending. Without information about the Student's adaptive skills, the evaluator could not determine whether the Student had an Intellectual Disability. See, P-12.
89. The Psychiatric Evaluation concludes that the District should conduct a "very specific [Functional Behavior Assessment (FBA)] which captures the dynamics across all of the environments in the school setting that have been identified as challenging." P-12.
90. The Psychiatric Evaluation also concludes that the Parents' efforts to secure services for the Student outside of school (outside behavioral intervention and participation in the PA Autistic Group) have been beneficial. The Psychiatric Evaluation also recommends medical interventions that the Parents could consider and explore with the family's medical providers. P-12.
91. While the Student received the Psychiatric Evaluation, as noted above, the District also completed another reevaluation of the Student. P-14. IQ scores reported in the Psychiatric Evaluation come from this testing, even though the Psychiatric Evaluation was completed before the District's reevaluation. The reevaluation report was dated October 31, 2013 (2013 RR). P-14.
92. The IQ scores were derived using the Wechsler Adult Intelligence Scale, fourth edition (WAISC-IV). P-14. The Student was over 17 years old at the time of testing.
93. The Student's reading, writing, and math achievement was measured using the Wechsler Individual Achievement Test, third edition (WIAT-III). P-14.
94. The Student's Basic Reading composite was assessed at a 62, which corresponds to the 1st percentile in the "low" range. Nearly identical scores were derived for the Student's Total Reading Composite. However, on the Oral Reading Fluency sub-test, the student was found to be in the "average" range (91, 27th percentile). P-14.
95. The Student's Mathematics Composite score was assessed at a 68, which corresponds to the 2nd percentile in the "low" range. All math sub-tests scores were in the "below average" range. P-14.

96. For writing, the Student's Written Expression Composite score was assessed at a 57, which corresponds to the 2nd percentile in the "low" range. Essay composition and spelling sub-tests were also in the "low" range, and sentence composition was in the "very low" range. P-14.
97. The 2013 RR included the results of the Behavior Assessment Scale for Children, second edition (BASC-II),⁸ completed by the Student's Life Skills teacher in January 2013. Nothing in the record sufficiently explains why the Life Skills teacher completed the BASC-II for the Student in January 2013, why only one rater is reported, or why the results were not reported at the time the BASC-II was completed. Regardless, the Life Skills teacher rated the Student in the "at-risk" range on the Behavioral Symptoms Index, and Externalizing Problems. The teacher rated the Student in the "clinically significant" range for Internalizing Problems. "School Problems" and "Adaptive Skills" were both rated in the average range. P-14.
98. The 2013 RR included the results of the Adaptive Behavior Assessment System (ABAS), completed by the Student's Mother and the Student's Life Skills teacher in October 2013. The Student's mother rated the Student in the "below average" range (86, 13th percentile) for the General Adaptive Composite. The Mother's ratings produced similar scores for Conceptual Skills and Social Skills. The Mother rated the Student in the "average" range for Practical Skills (91, 27th percentile). The Life Skills teacher's ratings were lower across the board, placing the Student in the "borderline" range in the General Adaptive Composite (78, 7th percentile), the "extremely low" range for social skills (66, 1st percentile), and the "below average" range for practical skills (82, 12th percentile). P-14.
99. The 2013 RR included the results of a FBA. The FBA was not based on a structured observation across settings, as recommended by the Psychiatric Evaluation. Rather, an initial line of inquiry was used to draw hypotheses about the Student's behaviors. Consistent with the Psychiatric Evaluation, the team hypothesized that the function of the Student's behavior was to gain access from preferred people (the other student that the Student perseverated about) and attention from adults. P-14.
100. The 2013 RR included the results of a QRI administered in September 2013. The Student was found to be at the pre-primer level. Using pre-primer text, the Student read 25 words per minute with 99% accuracy and correctly answered 1 of 5 (20%) comprehension questions. P-14. These scores are significantly lower than prior QRI administrations at the primer level. However, at the same time, the Student could correctly identify 191 of 200 community sight words.
101. The 2013 RR reported that, in math, the Student was instructional at the 2nd grade level, and frustrational at the 3rd grade level, according to curriculum

⁸ The BASC is currently in its third edition, but the BASC-II was current in 2013.

based assessments (CBAs). Generally, the CBAs aligned to some of the academic math objectives in the Student's IEPs, but did not align with the functional math curriculum that the Student had been educated under since entering the Life Skills program (the Student did get two of two money problems correct on the CBAs). P-14.

102. The 2013 RR reported that a writing sample taken in September 2013 did not show mastery of the IEP's writing goal. P-14.
103. The 2013 RR included extensive observations from teachers and related service providers identified items listed in the SDIs of the revised 2013 IEP as successful for the Student. P-14. Teachers reported that the Student was progressing through the functional curriculum, and using the functional skills that were instructed. The only difficulty reported by the teachers was the Student's behaviors, which they viewed as a function of the Student's peer relations. P-14.
104. The 2013 RR recommended continuation of the Student's current identification and program. The only change recommended in the 2013 RR is the creation and implementation of a Positive Behavior Support Plan (BPSP) in response to the FBA. P-14.
105. On November 20, 2013, the IEP Team reconvened. S-13. At this meeting, the Parents refused to sign any document presented by the District other than a meeting attendance form.⁹ S-13. District personnel on the IEP Team drafted and presented a revised IEP during the meeting (November 2013 IEP).
106. As suggested by the 2013 RR, the November 2013 IEP, substantively, is a continuation of the revised 2013 IEP with the addition of a PBSP and a behavioral goal. The transition services section of the IEP was also revised at this time. S-13.
107. The behavioral goal called for the Student to use coping strategies to maintain "age appropriate behaviors" and refrain from behaviors of concern (crying, whining, yelling, stomping, clenching fists) for 10 minutes at a time, with two or fewer prompts. According to baseline data derived from the FBA and observations, the Student engaged in behaviors of concern daily. S-13.
108. The PBSP included modifications and SDIs targeting the behavior goal. These included journal writing, going for a walk, prompts to use coping strategies, and opportunities to practice age-appropriate peer interactions.¹⁰

⁹ The Parents refused to sign a form to confirm that they received a copy of their procedural safeguards. There is no dispute that the Parents had notice of their procedural safeguards.

¹⁰ I note, again, that the parties agree that no issue is raised concerning the Speech and Language Therapy that the Student received.

109. The transition services section of the November 2013 IEP was revised, and became longer, but did not change in substance. S-13. The vocational goal was still for the Student to obtain supported employment, and the independent living goal was still for the Student to live with family. However, aspects of the Student's program that the Student had received for years were now written as services or activities related to transition. In practice, no transition services were added or changed.
110. The November 2013 IEP also changed the Student's placement from full-time to supplemental Life Skills. No explanation is given for this change, and I find that amount of time that the Student received instruction from special education personnel did not change.¹¹
111. The District issued a NOREP with the November 2013 IEP. The Parents refused to sign the NOREP. In doing so, the Parents neither approved nor rejected the November 2013 IEP. S-13.
112. With the Parents' refusal to sign, the November 2013 IEP became operative on November 29, 2013. The Student received programming pursuant to the November 2013 IEP for the remainder of the 2013-14 school year.
113. On February 8, 2014, the Parents declined the District's ESY offer. P-16.

2014-15 (12th Grade)

114. The Student started the 2014-15 school year under the November 2013 IEP at the District's high school, which housed 9th through 12th grades.
115. The IEP Team met on September 3, 2014. During that meeting, the District issued a NOREP for the Parents to approve the November 2013 IEP. Although not technically necessary at this point in time, the Parent approved the NOREP on the same day. S-15.
116. The IEP Team met again on November 17, 2014, for the Student's annual IEP Team meeting. It bears noting that the Student was 18 years old at the time.¹² S-16.
117. The resulting IEP (the 2014 IEP) is substantively identical to the November 2013 IEP, but with updated baselines to reflect the progress that the

¹¹ It is possible that the change from full-time to supplemental Life Skills reflects a change in the Student's schedule. It does not represent a decrease in the amount or type of special education that the Student received.

¹² For special education purposes, in Pennsylvania, the age of majority is 21.

student made during the 2013-14 school year. SDIs were added at the Parent's request to clarify grade reporting. S-16.

118. The updated baselines in the 2014 IEP indicate significant progress in reading from the September 2013 QRI reported in the 2013 RR. By the end of the 2013-14 school year, the Student was instructional at the primer level, and the goal was adjusted to present 1st grade texts. S-16.
119. The updated baselines in the 2014 IEP indicated some progress in math. The Student was instructional at the 3rd/4th grade level. In September of 2013, the Student was instructional at the 3rd grade level and frustration at the 4th grade level. The goal was adjusted accordingly. S-16.
120. The updated baselines in the 2014 IEP indicated some improvement in the vocational multi-step direction following task. It is difficult to gauge the significance of that progress, because it was not reported objectively in relation to the goal or prior baselines (the progress was presented objectively in the abstract). In contrast, the Student objectively made progress towards the cooking goal. Although the Student did not master the goal, the Student's performance increased 36% above the prior baseline, according to objective measures. The goal was adjusted accordingly. S-16.
121. The 2014 IEP indicates that the Student qualified for ESY services, but that the Parents rejected ESY services because they were not offered within the District. S-16.
122. The length of the transition services section of the 2014 IEP again increased but, again, did not change in substance. S-16.
123. The 2014 IEP was offered with a NOREP. The Parents refused to sign the NOREP. In doing so, the Parents neither approved nor rejected the 2014 IEP. S-16.
124. With the Parents' refusal to sign, the 2014 IEP became operative on November 27, 2014. The Student received programming pursuant to the 2014 IEP for the remainder of the 2014-15 school year.

2015-16 (12 + 1)

125. The Student started the 2015-16 school year under the 2014 IEP at the District's high school, which housed 9th through 12th grades.
126. The Student's IEP team reconvened on November 12, 2015. The Student was 19 years old at that time. The District offered an IEP at the meeting (the 2015 IEP). S-18.

127. According to present levels in the 2015 IEP, the Student was still instructional at the 3rd/4th grade level in math, improving 6% on third grade materials during the prior school year. Progress in reading was similarly stagnant, as was progress in all other domains except for behavior. However, these scores were obtained in September and October of the 2015-16 school year after a summer during which the Student was qualified for, but did not receive, ESY services. S-16, S-18.
128. Regarding behavior, subjective information was gathered during the prior school year, and reported in the present levels in the 2015 IEP. Although couched in positive language, the subjective nature of the reporting makes it impossible to determine what quantum of progress, if any, the Student made. Even so, the Student maintained mature behavior when interacting with preferred peers (meaning the other student), but such time was intentionally limited. More importantly, after the introduction of the PBSP, the Student had no “significant behavioral outbursts.” S-18.
129. The transition services section of the 2015 IEP again increased in length without any substantive changes. S-18.
130. The goals in the 2015 IEP were re-worded, and aligned to the modest changes in the Student’s present education levels but remained the same in substance (improved reading comprehension at the 1st grade level, improved scores on a 3rd grade math CBA, continued work on multi-step directions). The same is true for SDIs and modifications, and for the Student’s placement. S-18.
131. The 2015 IEP was offered with a NOREP. The Parents refused to sign the NOREP. In doing so, the Parents neither approved nor rejected the 2015 IEP. S-16.
132. With the Parents’ refusal to sign, the 2015 IEP became operative on November 22, 2015. The Student received programming pursuant to the 2014 IEP for the remainder of the 2015-16 school year.

2016-17 (12 + 2)

133. For the entirety of the 2016-17 school year, the Student was placed on homebound instruction. Documentary evidence of this placement is shockingly Spartan, consisting almost entirely of two forms prepared by the District and completed by the Parents and the Student’s primary care physician in August 2016 and January 2017. S-29.
134. In addition to the forms, on July 26, 2016, the Student’s primary care physician wrote a cursory letter to the District, saying that the Student was

“dealing with some anxiety issues pertaining to school.” Without further elaboration, the physician requested homebound instruction. S-29.

135. During the 2016-17 school year, while on homebound, the Student received approximately five hours of instruction per week. NT 141-142.
136. The District did not evaluate the Student or otherwise convene the Student’s IEP Team to determine whether or how the Student could transition back to school. See NT 1202-1204.
137. During the 2016-17 school year, the Student participated in a vocational program at [a local] Center for Independent Living (CIL). NT 1063-1106. There, the Student participated in structured, supervised, employment-like experiences. *Id.*
138. In December of 2016, the Student received an independent educational evaluation (IEE) that was reported on February 13, 2017. P-31. The IEE was comprehensive, carefully reviewing all prior information and including a new administration of the BASC (now in its third edition, with both parent and teacher ratings), the ABAS-3, the Woodcock-Johnson IV Test of Cognitive Abilities, the Wide Range Assessment of Memory and Learning, various tests of sensory and motor abilities, the WIAT-III, the CASL, and the GORT-5. P-31.
139. Generally, tests scores obtained through the IEE were consistent with prior evaluations. P-31.
140. The IEE concludes that, in addition to prior diagnoses, the Student meets diagnostic criteria for an Intellectual Disability. P-31.
141. The Student turned 21 years old at the end of the 2016-17 school year, and aged out of programming.

Legal Principles

The Burden of Proof

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

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a “free appropriate public education” to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child’s individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was recently confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court’s first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when “the individualized educational program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.” *Id* at 3015.

Historically in the Third Circuit has interpreted *Rowley* to mean that the “benefits” to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child’s potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003).

Under the historical meaningful benefit standard, a school district is not required to maximize a child’s opportunity; it must provide a basic floor of opportunity. See *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than “trivial” or “*de minimis*” benefit. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a “merely more than *de minimis*” standard, holding instead that the “IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be “appropriately ambitious in light of

[the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id*. Education, however, encompasses much more than academics — as is clearly evident in this case.

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate, or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid* and explaining that compensatory education "should aim to place disabled children in the same position that the child would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the "same position" method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount of, or what type of compensatory education is needed to put the student back into that position. Cases that express a strong preference for the "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

“... the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district’s deficiencies.”

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student’s school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the LEA’s “failure to provide specialized services permeated the student’s education and resulted in a progressive and widespread decline in [the Student’s] academic and emotional well-being” *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. See also *Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove what type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education is warranted. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Discussion

At various points throughout the hearing, the District objected vociferously to various *ad hominem* attacks by the Parents against District personnel. It is ironic, therefore, that the District blames the Parents for deficiencies in its programming. Part of the District's defense is that the Student would have made progress but for the Parents' interference. The District argues that the Student should have received more special education (social skills instruction in particular) and should have spent less time in regular education classes. The District argues that the Parents kept the Student out of necessary programming because the Parents would change the Student's schedule. See, e.g. NT 1229-1231. Consequently, the District argues that the Student's functional skills would have improved more without the Parents' meddling.

I reject the District's argument. The District, not the Parents, was responsible for the Student's programming, including the Student's schedule, at all times. The District's argument implicitly draws a distinction between the *District's* obligations under the IDEA, and the *IEP Team's* obligations under the IDEA. There is no such distinction. It is the District's obligation to offer a FAPE to the Student. If the IEP Team crafts an IEP that offers a FAPE, and then District personnel outside of the IEP team alter the Student's program so that the Student does not receive a FAPE, then the District has not offered a FAPE.¹³ It is not as if the Parents unilaterally removed the Student to a private school that failed to meet the Student's needs. Rather, the District itself agreed to scheduling and class changes the Parents insisted upon. It is the Student's right to a FAPE. If the Parents insisted on something less than a FAPE, the District was obligated to say no.¹⁴ The fact that the Student's schedule was altered by acquiescence to parental demands is irrelevant. At all times, the Student was educated by the District, by and through programs that the District itself offered. The District is solely responsible for the appropriateness of those programs.

The District's argument that the IEP Team does not control the Student's schedule is, however, correct to the extent that an IEP is not intended to dictate every moment of a child's day. Further, the Parents do not allege an IEP implementation failure, or procedural errors resulting in substantive harm. This streamlines the analysis. My inquiry does not concern whether the IEPs were implemented as written, or whether the District and Parents agreed to deviate from the IEPs. Rather, my inquiry is limited to whether the IEPs satisfy the standard articulated by the Supreme Court in *Andrew F.*

¹³ Similarly, the Parents cannot be blamed for the apparent lack of communication between the IEP Team and other District personnel.

¹⁴ There are several mechanisms by which the District could have said no, the most basic of which is a NOREP. Also, nothing in the IDEA precludes "in lieu of FAPE" agreements, through which parents acknowledge that LEAs are providing something less than FAPE, and agree to hold LEAs harmless for doing so, in exchange for LEAs providing the Parents' preferred program.

For the same reason, as noted above, a significant amount of evidence presented by both parties is not relevant. A large quantity of evidence was presented concerning various transition and vocational placements that the Parents wanted the Student to participate in. The record clearly establishes that the District blocked the Student's participation in such programs because of either a fundamental misunderstanding of the programs' admissions criteria, an unwillingness to fund the programs, or both. None of that matters. The question before me concerns the appropriateness of what the District offered, not the appropriateness of what the District could have supported.

The above findings make it clear that the Student participated in substantively similar (nearly identical) programs from the 2011-12 through the 2015-16 school year. The same program would have been in place again for the 2016-17 school year, were the Student not on homebound. In that program, year after year, the Student made a small amount of progress. After the first year in that program, the District had no reason to believe that the Student's rate of progress would change with the same programming in place. Consequently, from the start of the 2012-13 school year, each IEP was calculated to provide that small amount of progress. The question, therefore, turns on whether that small amount of progress was meaningful for the Student (in the historic words of the Third Circuit) or appropriately ambitious education in light of the Student's circumstances (in the language of *Andrew F.*).

The difficulty with the FAPE test in this case is that no evidence establishes what the Student's rate of learning was expected to be. Said differently, nothing proves what progress the Student was capable of making, and therefore there is no yard stick against which to measure the progress that the Student actually made. To be clear, actual progress is a red herring in most IDEA cases, as the standard calls for an analysis of what was expected at the time IEPs were offered. In this case, I have concluded that the Student made the progress that the IEPs were calculated to provide, and so the question shifts to an analysis of that progress. In making this conclusion, I recognize that the Student did not always reach IEP goals. Rather, I note that the quantum of progress was relatively stable over time with no changes to the Student's programming.¹⁵

With no better evidence, I look to the Student's evaluations – particularly the 2017 IEE. Broadly speaking, as a person with an Intellectual Disability, Autism, and a Speech or Language Disability, the Student functions in the extremely low to borderline range of cognitive ability. The Student's cognitive ability is linked directly to the Student's performance on academic assessments. For example, by definition, the Student does not have a Specific Learning Disability despite academic performance well below grade level because the Student's academic ability is consistent with the Student's cognitive ability. Consequently, I find that the amount of academic progress that the Student made, although small by any measure, was appropriate in light of the Student's circumstances.

¹⁵ For example, the Student's math performing on academic CBAs increased slightly year-over-year, even when the Student's overall math level did not change.

The same is not true for the Student's functional skills. Testimony from District personnel describes the Student's progress in functional performance as significant. But the relatively small amount of objective data regarding the Student's functional performance indicates stagnation. For example, word identification has always been a strength for the Student, and identifying functional and safety words in the community is unquestionably important. Progress data communicated through IEPs, however, shows that the Student mastered community sight words quickly. The District offers no explanation as to why this objective was repeated year after year. The same is true for the Student's pre-vocational and independent living goals. The data suggests some progress at first, and then stagnation. Neither Student's IEP goals nor the Student's programming changed in response to this stagnation. Moreover, nothing in the record suggests that the Student's cognitive abilities are so impaired that the Student is incapable of mastering basic pre-vocational and independent living tasks.

In fairness, it is not the District's burden to prove that the Student could do no more than what the Student accomplished. However, the District's actions indicate that it believed that the Student was capable of more. The District routinely agreed to Parental demands for a greater emphasis on academics. As discussed above, if the District did not believe that the Student was capable, the District should have said no. Further, the District explicitly acknowledged that the Student ultimately desired some form of employment, and made that desire part of the Student's IEP in the transition services section. In doing so, the District did not guarantee employment for the Student. Rather, the District acknowledged that some form of employment was a reasonable goal for the Student. As such, the District was obligated to prepare the Student for employment. To this end, the District drafted pre-vocational goals, but did nothing when the Student's progress towards those goals flat-lined. As such, these aspects of the Student's IEPs were not appropriate in light of the Student's circumstances.

The transition services themselves were also inappropriate for the same reason. As noted above, the Parents' focus on the transition programs that they believe the District should have provided is not relevant. I judge the District's transition services on their own merits, and find them lacking. The transition services section of the Student's IEPs simply state the Student's goals and then, at best, refer to other sections of the IEP to explain how the District will prepare the Student for those goals. Above, I find that those portions of the Student's IEPs were inappropriate in light of the Student's circumstances. Described below, the Student will be awarded compensatory education to remedy these denials of FAPE.

The Student was also denied a FAPE during the 2016-17 school year. The District insinuates that the Student's participation in [the] CIL during the 2016-17 school year establishes that the Student was out of school as a matter of Parental preference, not as a matter of the Student's need. I reject this argument. The information provided by the Student's doctor indicated that the Student had school related anxiety. Evidence from the various evaluations, the FBA, the PBSP, and data concerning the Student's

behavior goals is consistent with the doctor's conclusion. Nothing suggests that the Student experienced the same level of anxiety outside of school.

I agree with the District that information provided by the Parents specifically to support homebound is flimsy at best, despite the corroborating evidence. It is beyond strange, therefore, that the District accepted the Parents' homebound request without challenge. Moreover, after accepting the Parents' contention that the Student's school related anxiety was severe enough to preclude the Student's participation in school, the District did nothing to determine what could be done to bring the Student back. Neither the Student's age, nor the poor relationship between the Parents and the District diminished the District's obligations to the Student during the entirety of the 2016-17 school year. During the 2016-17 school year, the District provided a *de minimis* program. I find that the Student derived no benefit from that program at all. Given the Student's circumstances, the District had no reason to believe that the Student would receive any benefit from homebound instruction when it agreed to provide homebound instruction.

I reject the Parents' claims regarding the 2010-11 and 2011-12 school year. The Student started the 2010-11 school year under an IEP drafted in the previous school year. Assuming, *arguendo*, that the Student did not make progress during the 2010-11 school year, the District proposed an evaluation in January 2011, and then a significant change to the Student's program and placement starting in the 2012-13 school year (the move from Learning Support to Life Skills). As such, the District did what the IDEA requires: it recognized the lack of progress, evaluated to determine what program was necessary, and then proposed changes.

The Parents argue that they agreed to place the Student into Life Skills, starting in the 2011-12 school year, only because the Student's Learning Support teacher was not a good fit for the Student in the 2010-11 school year, and the District presented no other option to get the Student away from that teacher. The Parents argue that the Student missed out on academic instruction while participating in the functional Life Skills curriculum, and that the Life Skills work was too easy. See e.g. P-9. I reject this argument. Evidence in this case overwhelmingly proves that a functional, as opposed to academic curriculum was what the Student required. Work in Life Skills was not too easy for the Student.

The District had every reason to believe that moving the Student to Life Skills in the 2011-12 school year was appropriate. By the end of the 2011-12 school year, the District should have known that a substantively similar program would have produced substantively similar results. That is why the denial of FAPE begins in the 2012-13 school year.

In sum, the Student was denied a FAPE during the 2012-13 through 2015-16 school years. During that time, the Student was denied an appropriate functional program and appropriate transition supports. However, the academics that the Student received during this time, although small, were appropriate relative to the Student's circumstances. The Student was denied a FAPE completely during the 2016-17 school

year. The program of homebound instruction offered by the District was calculated to provide no educational benefit to the Student. Compensatory education is owed for these denials of FAPE.

Calculating compensatory education is impossible in this case under either standard recognized by the Third Circuit. No evidence suggests what amount of compensatory education is needed to put the Student in the position that the Student would be in but for the denial of FAPE. No evidence suggests what portion of the school day was, or should have been, dedicated to functional skills and transition goals. That teaching was imbedded throughout the Student's school experience. At the same time, portions of the Student's IEPs were appropriate, mitigating against full days of compensatory education – except for the 2016-17 school year.

To resolve this, I look to the line of cases that support the “same position” compensatory education standard. This line, and especially *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712 (3d Cir. Pa. 2010), also stands for the proposition that hearing officers may fashion unique remedies to ensure that denials of FAPE are remediated. Without evidence to calculate hours, I will instead focus on the Student's actual needs. In doing so, I will award compensatory education in the form of services.

The harm created by the District's denial of FAPE is that the Student lacks the vocational and independent living skills that the Student needs to progress to the transition goals that the District identified. I find that the appropriate remedy for this harm is placement in any transition program that teaches independent living or vocational skills to individuals of the Student's age and cognitive ability. The District must fund the instructional components of such a program for a period of no more than two years. The District is not obligated to fund the residential component of such a program, if any, or any other incidental expenses associated with such a program, or transportation to and from such a program. Nothing prohibits the District and Parents from working with each other to identify such a program, but the Parents may unilaterally select any program that satisfies these criteria. If the District is required to provide information to any such program as part of its application or intake process, the District shall provide accurate information without delay. The District [shall] take no action that bars the Student's participation in any such program. However, the District shall be held harmless for providing accurate information at the request of any such program, even if that information prompts the program to reject the Student.

Time is of the essence, but it may take some time for the Parents to identify and place the Student. The Parents must identify a potential placement for the Student, and share information about that placement with the District within six weeks of this decision and order. The District's payment obligation then runs from the Student's acceptance into the program through the Student's completion of the program, or two years after the Student's acceptance into the program, whichever comes first.

If the Student is rejected from the placement initially identified by the Parents, the Parents will have another six weeks to identify an alternative placement. The six-week

timeline will be extended upon each subsequent rejection, if any. However, if the Parents fail to place the Student within one year of this decision and order, the District's payment obligation terminates.

ORDER

Now, September 25, 2017, it is hereby **ORDERED** as follows:

1. The Student was denied a FAPE regarding the Student's functional skills and transition services, as described above, during the 2012-13 through 2015-16 school years.
2. The Student was denied a FAPE regarding all aspects of the Student's education during the 2016-17 school year.
3. The Student is awarded a Parentally-selected transition program to address deficiencies in the Student's vocational and/or independent living skills, as described above.
4. The [District] is obligated to fund the instructional portions of such a transition program, in accordance with the above.
5. All other claims raised by the Parents are **DENIED**.

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

/s/ Brian Jason Ford
HEARING OFFICER