

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
Final Decision and Order

CLOSED HEARING

ODR File Number: 19401-16-17

Child's Name: T.S. **Date of Birth:** [redacted]

Date of Hearing:
11/29/2017

Parents:
[redacted]

Counsel for Parent
Kristen Weidus, Esq.
Ruder Law, LLC
429 Forbes Avenue, Suite 450
Pittsburgh, PA 15219

Local Education Agency:
Upper St. Clair Township School District
1820 McLaughlin Run Road
Pittsburgh, PA 15241-2396

Counsel for the LEA
Patricia Andrews, Esq.
Andrews & Price LLC
1500 Ardmore Boulevard, Suite 506
Pittsburgh, PA 15221

Hearing Officer: Brian Jason Ford, JD, CHO **Date of Decision:** 3/2/2018

Introduction and Procedural History

This special education due process hearing was requested by the Parents, on behalf of the Student, against the School District (District).¹ The Parents allege that the District violated the Student's right to a free, appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.* The Parents' complaint raises allegations starting in the 2010-11 school year (kindergarten), but the Parents seek remedies only for claims arising during the 2015-16 and 2016-17 school years (5th and 6th grade).

The Parents and Student moved to another state, and a school in the other state became the Student's local educational agency (LEA) at the start of the 2017-18 school year. Consequently, the Student's current right to a FAPE is not an issue in this matter.

A hearing session for this matter convened briefly on November 29, 2017. After reviewing the pleadings, hearing the parties' opening statements, and having a discussion with counsel, it became clear that the underlying facts of this case are not in dispute. Rather, the parties disagree about whether the facts constitute a violation of the Student's rights. Upon this realization, the parties agreed to proceed on a stipulated record. NT 35. District Exhibits S-1 through S-25, and Parent Exhibits P-1 through P-55 were admitted to the record via stipulation. All of that evidence was carefully reviewed. The parties also requested, and were granted, multiple extensions so that they could draft briefs both highlighting facts in those documents and making legal arguments.

Timelines were extended, in part, so that the parties could draft joint stipulations of fact. Ultimately, the parties were unable to accomplish that task and submitted individual proposed findings of fact. The Parents submitted their proposed findings and their legal brief as separate documents. The District submitted a combined document.

For reasons discussed below, I find almost entirely in favor of the District and find that the Parents are not entitled to the relief that they seek.

Issues

The Parents allege that the Student was completely denied a FAPE during the entirety of the 2015-16 and 2016-17 school years, and their corresponding summer extended school year (ESY) periods. The Parents demand compensatory education and reimbursement for private tutoring expenses. More specifically, the issues are:

1. Were the Individualized Education Programs (IEPs) developed and implemented during the 2015-16 and 2016-17 school years appropriate?
2. Was a June 2016 Reevaluation Report (RR) appropriate?
3. Did the District know, or should the District have known, that the Student was a child with Attention Deficit Hyperactivity Disorder (ADHD) prior to the completion of an Independent Educational Evaluation (IEE) in October 2016?

¹ Except for the cover page, identifying information is omitted to the greatest extent possible.

4. Did the District fail to timely conduct a Functional Behavioral Assessment (FBA) and develop a Positive Behavioral Support Plan (PBSP)?
5. Did the District fail to provide appropriate special education to address the Student's reading disability?
6. Are the Parents entitled to reimbursement for private tutoring obtained during the 2015-16 and 2016-17 school years and in the summers of 2016 and 2017?
7. Did the District offer appropriate ESY services?

Regarding remedies, the Parents demand two full years of compensatory education, reimbursement for tutoring services, and reimbursement for private tutoring services.

Findings of Fact

As noted above, the parties did not submit joint stipulations of fact. However, comparing the parties' proposed findings reveals numerous facts that are not in dispute. The Parents submitted 170 proposed findings. The District proposed findings within its brief. To the extent that those proposed findings are aligned with each other, and are consistent with the evidence, I adopt them as my own. To the (smaller) extent that the parties are not obviously in agreement about the facts, the findings below are based on my review the evidence. Citation in this section is to the Parents' proposed findings (PPF) by number, the District's brief (DB) by page, the Parents' evidence (P-#), and the District's evidence (S-#).

1. The Student was initially found eligible for special education in 3rd grade (the 2013-14 school year). At that time, the District identified the Student as a child with a specific learning disability (SLD) in the area of basic reading skills. DB at 1.
2. The Student's first IEP was offered on November 12, 2013. P-14, P-15. Subsequent IEPs were offered on November 7, 2014, November 5, 2015, March 30, 2016, June 7, 2016, February 10, 2017. P-18, P-21, P-23, P-24, P-25.

2015-16 School Year – 5th Grade

3. The Student started 5th grade (the 2015-16 school year) under the November 7, 2014 IEP (the 2014 IEP). P-18. The 2014 IEP was an annual IEP. P-19.
4. The 2014 IEP included present levels of academic achievement and functional performance. Specifically, the Student's progress through the District's reading and math curriculum were described, as well as the Student's progress towards Occupational Therapy (OT) goals in the prior IEP. P-18.
5. Regarding functional performance, the IEP included a statement that the Student's functional performance was age-appropriate in all areas. P-18.
6. The 2014 IEP included a reading goal, a reading comprehension goal, and an OT goal. P-18.

7. The reading goal called for the Student to use previously taught skills to decode and understand new words with 90% accuracy in seven of eight activities. Curriculum-based assessments were used to measure the progress. P-18.
8. The reading comprehension goal called for the Student to read a text, and then write complete sentences, with at least one detail from the text, in response to reading comprehension questions with 80% accuracy in 4 out of 5 activities. This was also to be measured by the Student's performance on curriculum-based assessments. P-18.
9. The OT goal called for the Student to print a five-sentence series with correct letter size and spacing with 90% accuracy over three consecutive OT sessions. The IEP called for 60 minutes of individual OT per month. P-18.
10. The 2014 IEP included several program modifications and specially designed instruction (SDI). These included the breakdown of larger assignments into smaller pieces, homework and testing accommodations and modifications, checking for understanding, and frequent communications with the Parents. P-18.
11. The IEP team reconvened for an annual review on November 5, 2015. The IEP of the same date (the 2015 IEP) included a report of the Student's progress towards the reading and reading comprehension goals in the 2014 IEP. This report was embedded in the present levels section of the 2015 IEP. P-21.
12. Regarding the reading goal, the Student could decode new words with 83% accuracy, and use context and background knowledge to define new words with 80% accuracy. The IEP team continued this goal but adjusted to the 5th grade level. P-21.
13. Regarding the reading comprehension goal, the Student could use textual evidence to demonstrate comprehension with 79% accuracy. On quizzes testing comprehension of novels, the Student was able to cite evidence with 75% accuracy. That score improved to 93% on "reading post tests." As with the reading goal, the IEP team continued the reading comprehension goal but adjusted to the 5th grade level. P-21.
14. The 2015 IEP also included a summary of the Student's scores on curriculum-based reading assessments, which were benchmarks given at the start of 5th grade. The Student was able to read 18 of 20 words from a list at the 4th grade level, and 15 of 20 words from a list at the 5th grade level. The Student was able to read 4th grade level texts with 98% accuracy and demonstrate comprehension of 4th grade level texts with 87.5% accuracy. Based on these results, the Student had essentially mastered 4th grade skills at the beginning of 5th grade but was found to be "instructional" at the 4th grade level at that time. P-21.
15. Regarding OT, the 2015 IEP included an OT update but did not specifically report the Student's progress towards the 2014 OT goal. The update suggests in general terms that the Student made progress and recommends continuing OT services. P-21.

16. Regarding functional performance, the 2015 IEP includes a more detailed statement than the 2014 IEP. On the whole, the Student's functional performance was strong. The transition to 5th grade was "positive," and the Student could follow the daily schedule and go from class to class without adult support. The Student regularly completed classwork and homework, but required "redirects, prompts and cues ... to focus [the Student] on task." The Student always followed and complied with redirection. Further, the Student "occasionally needs moderate to maximum support during unstructured times." P-21.
17. On the whole, the IEP team determined that the Student did not exhibit behaviors that impede the Student's learning or that of others. P-21.
18. Ultimately, the reading and reading comprehension goals were reduced to a single goal in the 2015 IEP. That goal called for the Student to use classroom reading materials and a graphic organizer to demonstrate reading comprehension with support from the text with 90% accuracy in 4 of 5 occasions as measured by classroom assessments and work samples. In context, this means that the Student would have to read and show understanding of 5th grade texts to demonstrate mastery of this goal.² P-21.
19. A writing goal was added in the 2015 IEP. This goal called for the Student to write sentences in response to a prompt, earning 85% on a 5th grade writing rubric. P-21.
20. The 2015 IEP included two OT goals. One goal was for the Student to legibly write the Student's name in cursive. The other goal, somewhat confusingly, called for the Student to use "consistent letter proportions and spacing between words" to "print or type 2 paragraphs." P-21.³
21. The modifications and SDIs offered in the 2015 IEP were substantively identical to those offered in the 2014 IEP. The same amount of OT was offered as well. P-21.
22. The Student was found to be ineligible for ESY services. P-21.
23. Around January 2016 (roughly two months after the 2015 IEP was issued), the Student's behavior changed. PPF 61, 62; DB 2; P-36, P-40, P-41. The change started after returning from winter break, and gradually escalated through March 2016. The Student was distracted and unfocused in class and became disruptive and disrespectful to teachers. *Id.*
24. On March 30, 2016, the IEP team reconvened by phone to revise the IEP. Modest revisions were made to the SDIs. The frequency of communication between the District and the Parents was increased, a completion checklist was added when larger

² The 2015 IEP provided a graphic organizer and highlighter to help with reading, and an iPad to help with written expression. The 2015 IEP did not, however, modify the District's 5th grade ELA curriculum. Technically, the IEP provided an itinerant level of learning support.

³ I do not understand how OT will improve the consistency of letter proportions or spacing between words when typing. I assume that this is some sort of typo in the IEP. However, the Parents bring no issue specifically concerning the appropriateness of the OT services that the Student received.

assignments were broken down, expectations were reviewed at the beginning of each week, frequent checks for understanding were tied specifically to teaching new concepts, and homework reduction became up to the teacher's discretion. S-3.

25. On March 31, 2016, the Parents requested a reevaluation. DB 2, PPF 65.
26. In response to the Parents' request, the District sent an evaluation consent form and a parent input form. The Parents completed both and returned them to the District on April 3, 2016. S-6.
27. On the evaluation consent and parental input forms, the Parents expressed concerns with the Student's written expression, reading, and visual and physical processing. The Parents requested differentiated instruction, guided notes, rubric given to student prior to the start of an assignment, and handwritten assignments not graded for content. S-6.
28. The Student's learning support teacher noted that the Student required minimal in-class support, but also noted that the Student more recently refused to follow directions, was unfocused, was disruptive, argued with staff, talked at inappropriate times, and was disrespectful when an adult would tell say something that the Student did not want to hear. S-10.
29. The Student's math teacher noted that homework was not consistently completed, and the quality was often poor – a change from reports in prior IEPs. The math teacher also reported that the Student required maximum in-class support and would not write or work unless prompted and given maximum help. According to the math teacher, the Student "seems to have friends ... [and] has moments of being a great kid, but only if you are not giving [the Student] work to do." S-10.
30. The math teacher identified the following concerns: quality of written work, lack of class participation, inability to maintain focus during instruction, math skills, test/quiz scores, working below potential, the time it takes to complete work, and note-taking skills. S-10.
31. The Student's social studies teacher reported similar concerns, but fewer negative behaviors in class. The social studies teacher reported that the Student required only "moderate in-class support to be successful" in the social studies class. S-10.
32. The Student's language arts teacher also reported similar concerns but reported that the Student required only minimal in-class supports to be successful. The language arts teacher also reported arguments with peers when there were differences of opinion. S-10.
33. The Student's physical education teacher reported that the Student was meeting expectations and fully participating in class for the most part. However, the Student could be impulsive, did not always follow safety rules, did not always listen to the teacher, and occasionally got into disputes with classmates or became upset when things did not go the Student's way. P-10.

34. On June 2, 2016, the Student's Reevaluation Report was completed by the District (the 2016 RR). S-10.
35. As part of the 2016 RR, the Student's teachers completed the BASC rating scales. S-10
36. Three teachers reported attention problems, functional communication deficits, learning problems, and negative emotionality. S-10.
37. Two teachers also identified clinically significant deficits in the areas of anger control, leadership skills, and social skills. S-10.
38. The Parents were not asked to complete BASC rating scales. S-10.
39. The 2016 RR included the WISC-V, which is intended to be a standardized, normative assessment of cognitive ability. However, the WISC-V was not used for that purpose in the 2016 RR, as only selected sub-tests were administered.⁴ Specifically, a Visual Spatial Index and Processing Speed Index scores were obtained. S-10
40. Regarding the Visual Spatial Index, the Student's ability to understand visual details and construct spatial relationships was in the average range. However, a significant difference between Block Design and Visual Puzzles tests suggested that visual-motor skills may be a weakness relative to the Student's overall abilities in this domain. S-10.
41. Regarding the Processing Speed Index, the Student's speed and accuracy of visual identification, decision-making, and decision implementation were scored in the average range, with no significant discrepancy in sub-test skills. S-10.
42. The 2016 RR included an administration of the Comprehensive Trail Making Test (CTMT). The CTMT is a standardized assessment of visual search and sequencing tasks that are "heavily influenced by attention, concentration, resistance to distraction, and cognitive flexibility." The Student scored in the average range, despite some discrepancies between the five sequencing trials of which the test is composed. S-10.
43. The 2016 RR included an administration of the Test of Visual Perceptual Skills, 3rd edition (TVPS). The TVPS is a standardized, normative test designed to assess the Student's ability to visually process information. The Student scored in the average range overall, and in the average range on all but one sub-test. The Student received a lower score on a Visual Discrimination sub-test, which required attention to detail. S-10.
44. At the time of the evaluation, the Student was passing all classes, demonstrating strong academic knowledge in math, social studies, and science. Academic knowledge in ELA was a comparative weakness, as was the Student's daily performance in social studies. These grades were not standardized or normative. S-10.

⁴ Previously, when the Student was in 3rd grade, a complete WISC-IV (the then-current standard) was administered resulting in a measured full-scale IQ of 99 – the 47th percentile.

45. The 2016 RR reports progress towards IEP goals. Regarding the reading goal, the Student had reached 81% accuracy overall, with individual probes ranging from 76% at the lowest to 85% at the highest. Regarding the writing goal, the Student had reached 80% accuracy overall, with scores on individual writing assignments ranging from 70% at the lowest to 85% at the highest. S-10.
46. The 2016 RR concluded that the Student continued to qualify as a child with a specific learning disability in the area of basic reading. That conclusion was explicitly based on a discrepancy between ability and academic achievement that was assessed in 3rd grade. *See* S-10 at 12.
47. The 2016 RR included recommendations for the IEP team. Specifically, based on the teachers' concerns about the Student's behavior, the 2016 RR recommended adding a behavior goal to the IEP, and further recommended a functional behavioral assessment to be completed "in the fall." S-10 at 15. The 2016 RR also recommended continuation of academic goals because the Student had made progress towards those goals but had not yet mastered them. Finally, the 2016 RR recommended the discontinuation of OT, as the Student was functioning in the average range.
48. All members of the 2016 evaluation team agreed with the 2016 RR except for the Parents, who noted their disagreement on a form attached to the 2016 RR. S-10.
49. On June 7, 2016, the IEP team met to revise the IEP based on the 2016 RR. S-11. The revised IEP (2016 IEP) included information from the 2016 RR and did not change the academic goals. S-11.
50. In the 2016 IEP, the Student was found to exhibit behaviors that impede learning or the learning of others. S-11.
51. A behavioral goal was added: "When presented with a problem (non-preferred task, frustrating situation, criticism/correction), [Student] will accurately determine the size of the problem and determine the appropriate emotional response (take a break, talk with teacher) and return to the task at hand in 4 out of 5 trials with 85% accuracy." S-11 at 13. This goal was to be monitored through teacher observation, teacher collected data, and the parent communication checklist of weekly behaviors. *Id.*
52. SDIs were amended to include a parent communication checklist, and to permit the Student to resubmit assignments if the Student's handwriting was unacceptable. S-11.
53. The 2016 IEP continued to find the Student ineligible for ESY. S-11.
54. Throughout the 2015-2016 school year, the Student received private tutoring at the Parents' expense for approximately one hour each week.
55. The Student received private tutoring at the Parents' expense during the summer of 2016 for approximately two hours per week.

The 2016-17 School Year – 6th Grade

56. At the June 7, 2016, IEP team meeting, the District presented a Notice of Recommended Educational Placement (NOREP) with the 2016 IEP. S-12.
57. On June 17, 2016, the Parents returned the NOREP, rejecting the 2016 IEP, and requesting an Independent Educational Evaluation (IEE) at the District's expense.⁵ S-14.
58. The District agreed to fund the IEE, which was completed by an evaluator selected by the Parents on October 24, 2016. DP at 4; PPF 113, P-5.
59. The IEE included aptitude and achievement testing. The WJ-IV COG was used as a standardized, normative assessment of the Student's general intellectual ability. The Student scored in the upper end of the low-average range. Fluid reasoning and short-term working memory sub-tests were also in the low average range. The cognitive efficiency sub-test was in the low range. P-5.
60. The WJ-IV ACH was used as a standardized, normative assessment of the Student's academic achievement. The Student scored in the low average range in "broad reading" with average scores in basic reading skills and low average scores in reading fluency. The evaluator characterized these scores as "a level slightly below [the Student's] same-aged peers. P-5.
61. Similar to reading, the Student's "broad math" and math calculation scores were in the low average range as measured by the WJ-IV ACH. The evaluator characterized these scores as a level "somewhat below ... same-aged peers" and that the Student's math calculation was slow and laborious, although the Student was able to produce correct answers. P-5.
62. The Student's writing ability, as measured by the WJ-IV ACH, was squarely in the average range (again, a comparison to same-aged peers) both in "broad written language" and across all sub-tests except for spelling. Spelling was assessed in the low range. P-5.
63. The evaluator and both the Parents and the Student completed their respective sections of the BASC (the teacher sections of the BASC were completed in the 2016 RR), and a BRIEF, which assesses executive functioning. P-5. By comparing the BASC and BRIEF scores, the evaluator concluded that sustaining attention and working memory was significantly difficult for the Student (consistent with cognitive assessments) and that the Student had difficulty with both with adaptive behaviors and the ability to shift between topics and activities in school. P-5.

⁵ The Parents did not explicitly ask the District to pay for the IEE on the face of the NOREP, but there is no dispute about this. The Parents also checked a box on the NOREP expressing an intention to request a due process hearing. It does not appear that they requested a hearing at that time.

64. The evaluator observed the Student in school and wrote a detailed accounting of that observation. In summary, the evaluator noted that the Student participated in all classroom activities, exhibited mild fidgeting, and showed some difficulty with sustained attention to task, task initiation, completing multistep problems during independent work. P-5.
65. The IEE included a significant amount of teacher input, which was consistent with the 2016 RR. P-5.
66. The IEE included the Student's final grades from the prior school year, which were excellent across the board but were not all consistent through the school year. P-5.
67. Although the evaluator was not qualified to make a medical diagnosis of ADHD, the evaluator concluded that the Student qualified for special education as a student with Other Health Impairment, based on "a pattern of behavior consistent with a diagnosis of ADHD," and exhibited consistently through multiple evaluations. P-5.
68. The evaluator noted that the Student's IEP provided accommodations that enabled the Student to access the curriculum. However, the evaluator did not recommend continued SLD eligibility, and affirmatively found no significant difference between cognitive ability and academic achievement. P-5 at 36. Rather, the evaluator opined that the SDIs currently in place did not target the Student's underlying attention and executive functioning deficits and did "not provide useful information to monitor progress." P-5 at 31.
69. After the IEE was issued, the District and Parents went through a series of procedural measures so that the District could consider the IEE and revise the IEP.⁶ S-19, P-35, S-20. Through these steps, the District adopted much of the IEE as its own, including the evaluator's conclusions about the Student's eligibility category. S-20.
70. On February 10, 2017, the Student's IEP team met with the independent evaluator in attendance to revise the IEP based on the IEE and the Student's progress as measured by curriculum-based assessments. S-21.
71. A draft IEP was presented at the February 2017 IEP team meeting (2017 IEP). S-21.
72. The curriculum-based assessments still indicated that written expression was a need, even if the Student was no longer a child with an SLD. S-21.
73. Written expression and task initiation were listed as areas of need. S-21.
74. The Student's writing goal was modified. The goal now called for the Student's writing to meet 6th grade standards at 85%, as measured by a rubric, in four out of five trials. S-21.

⁶ As a technical matter, some of these steps were unnecessary. While I appreciate the District's caution, LEAs never require additional paperwork or parental consent to consider documents that parents hand them.

75. A task initiation goal was added. This called for the Student to interpret direction and complete the task with 85% accuracy with no more than two prompts in four of five opportunities. S-21.
76. The writing and task initiation goals were the only goals in the Student's IEP.
77. SDIs were revised. Previously, although instruction was provided in the regular education classroom, the Student had opportunities to review reading, writing and math skills in the Special Education Classroom. Use of a highlighter, frequent checks for understanding for new concepts being taught, a review of weekly expectations at the beginning of each week, other SDIs developed with the goal of letting the Student express feelings appropriately were also removed. S-21.⁷
78. An SDI was added so that the Student could use books on tape for novels and lengthy reading assignments. Another SDI called for teachers to ask the Student to repeat instructions for a task before starting the task, to ensure that the Student understood the instructions. S-21.
79. The Student continued to be found ineligible for ESY. S-21.
80. At the time that the IEP was issued, the Student's behavior had significantly improved. The record does not [con]tain objective data about the extent to which behaviors improved. However, during the classroom observations completed for the IEE, the evaluator did not notice the significant behaviors reported in the prior school year. Also, input from the Student's 6th grade teachers indicates that the Student's homework was now completed on time and with good quality, that the Student did not use any available accommodations consistently and required only minimal in-class support. P-20.
81. More specifically, 6th grade teachers noted: "a few times in the beginning of the year when [Student] seemed to question authority and be argumentative with teachers, but [Student] has settled into a very different pattern of interactions since then." P-20 at 16. At the same time, 6th grade teachers noted that the Student "can seem unhappy or sad" and were concerned about the Student's "inability to maintain focus during instruction." *Id.*
82. In the IEE, the independent evaluator made several recommendations about how to collect data for accurate reporting of the Student's functioning in the classroom, communications checklists, strategies to improve retention and recall, supporting planning and organization, improving task initiation and task completion, helping set goals, self-monitoring, and increasing understanding. P-5, *see also* DB at 6.

⁷ This does not imply that teachers would no longer help the Student appropriately express feelings. Rather, the change placed that back into the domain of good teaching, as opposed to an accommodation specifically for the Student.

83. The 2017 IEP included no new data tracking tool or self-monitoring tools. The IEP did not include any requirement or method for tracking the Student's behaviors. The IEP did not include instruction or strategies of any kind to improve retention and recall. An IEP goal targeted task initiation and completion, but the IEP did not include SDIs (or anything else) designed to teach the Student the skills necessary to obtain that goal. S-21.
84. The evidence does not clearly point to the Parents' approving the implementation of the 2017 IEP. However, there is no dispute that the 2017 IEP was implemented for the remainder of the 2016-17 school year. *See*, PPF 144; DB at 6-7; S-25 at 6.
85. According to progress monitoring, the Student mastered the writing goal by April 4, 2017, and continued at the mastery level through June 6, 2017. S-25 at 6.
86. There was a disconnect between the task initiation goal as written in the 2017 IEP and the goal that the District tracked. The District tracked the Student's assignment completion when given an organizational framework. Progress monitoring indicated that the Student achieved 46% towards the goal that was monitored by April 4, 2017, and 67% by June 9, 2017. Unfortunately, it is not clear that the District was tracking the goal in the Student's IEP. S-25.
87. The Student completed 6th grade receiving outstanding grades in all classes, and with no record of problematic behaviors in 6th grade beyond the initial, minor challenges to authority at the start of the school year. The Student's lowest "academic knowledge" grade was an 86 in ELA. S-24.

Applicable Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the 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 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 an 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 an 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). Compensatory education is not an appropriate remedy for a procedural violation unless the procedural violation results in a substantive denial of FAPE or a significant impediment to parental participation in IEP development. *See, e.g.* 20 U.S.C. § 1415(f)(3)(E)(ii).

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 or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the “same position” method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

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

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

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

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

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

The 2015-16 IEP started under an IEP drafted the prior year (the 2014 IEP). The evidence in this case does not establish that the 2014 IEP was inappropriate at the time it was issued. The Parents highlight evidence suggesting that the District had knowledge of the Student's attention and focus issues as early as 2013. However, the record establishes that the Student's attentional issues were minimal prior to the 2015-16 school year and that the Student was amenable to basic redirection. At the time that the 2014 IEP was drafted, the Student's functional performance was age-appropriate, and negative behaviors were not a problem.

When the IEP team reconvened for an annual review in November 2015, the Student was progressing towards academic goals. However, progress reporting at that time noted that the Student "occasionally needs moderate to maximum support during unstructured times," but that the Student's work quality was good, and the Student always complied with basic redirection. Although some small signs of the behavioral changes to come were present, I find that the 2015 IEP was appropriate at the time it was offered. Nothing suggested that the Student required

anything more than good teaching practices to attend to school work, and the Student was thriving academically.

Both parties agree that the Student's behavior changed significantly approximately half way through 5th grade in the 2015-16 school year. For the first time, the Student showed blatant disrespect to teachers and off-task behaviors that were not corrected with basic redirection. At the same time, the quality and timeliness of the Student's academic work started to decline.

The record provides no satisfactory explanation about why the District *never* proposed to reevaluate the Student during the three months that the behaviors escalated, and academic work declined. When the Parents requested a reevaluation, that reevaluation focused primarily on the Student's behaviors and visual processing. Visual processing was a parental concern, and so the District was correct to assess this domain. It is clear, however, that the Student's behaviors were far more concerning to the Student's teachers. The record provides no satisfactory explanation as to why the District used only part of a BASC to assess the Student's behavioral needs.⁸ The record does explain, however, why an FBA was not completed at that time. The District acknowledged the need for an FBA but, since the evaluation was completed in June, waiting until the fall was a reasonable choice. The type of FBA that was needed requires observation of the Student in school. Since the 2016 IEP was drafted in June, that had to wait. Also, despite the decline in academic performance, the Student passed all classes, earning high academic marks on the whole.

Despite the lack of an FBA, the District proposed revisions to the Student's IEP (the 2016 IEP). The frequency of scheduled communication with the Parents was increased at the Parents' request, and a behavior goal was added. The IEP did not include SDIs designed to enable the Student to meet the behavior goal but, given the circumstances, that makes sense. The way to determine what behavioral interventions will enable the Student to achieve a behavior goal is to conduct an FBA. It would have been equally appropriate for the District to simply make its best guess (with an explicit note about what it was doing) and then reassess after an FBA was completed. Regardless, I do not fault the District for acknowledging further assessment was needed but could not be completed until the Student was in school in the fall of 2016.

Under these circumstances, I find that the 2016 IEP (technically a revision to the 2015 IEP) was appropriate at the time it was offered. The 2016 IEP included revisions targeting behavioral needs based on the information that was available at the time. The District also acknowledged that more information was needed and planned to get that information when it was possible to do so. Simultaneously, the 2016 IEP was also reasonably calculated to continue the Student's academic progress.

The Parents disagreed with both the 2016 RR and the 2016 IEP. The Parents requested, and the District ultimately granted, an IEE at the District's expense. Although not an FBA, the IEE included the type of school observation that was not possible when the 2016 RR was drafted. The independent evaluator included some criticism of the 2016 IEP in the IEE. In essence, the independent evaluator opined that accommodations were made, and some behaviors were

⁸ The BASC is designed to obtain information from multiple raters in multiple settings. The District collected information from multiple raters, but all in the same setting. The IEE corrected this.

tracked, without any acknowledgment of the underlying problem, and without any attempt to remediate the Student's symptoms. However, by the time that the 2016 IEP was drafted (with the independent evaluator as a member of the IEP team), the Student's behavior had returned to the same levels seen before the increase in 5th grade. By that point in time, an FBA was not necessary because the Student's behaviors were not impeding the Student's learning or that of others.

The IEE contained detailed information about the Student's ADHD-like symptoms, including information about deficits in the Student's ability to maintain attention and deficits in executive functioning. The IEE also contained numerous recommendations about what could be done in school both to accommodate those difficulties and, more importantly, remediate them. The IEE stressed the importance of objectively tracking these facets of the Student's disability – not just the problematic behaviors that prompted the 2016 RR. Unfortunately, the District ignored those recommendations. The serendipitous end of the Student's overly oppositional and defiant behaviors does not absolve the District from its failure to both track and target the attentional and executive functioning deficits that it now acknowledged by designating the Student as a child with an OHI.

The District's failure is sufficient to find liability. Damages are a different question. In IDEA parlance, I must determine if the District's failure to track and target the attentional and executive functioning deficits constitutes a substantive denial of FAPE. If it does, compensatory education is owed. If it does not, compensatory education cannot be awarded.

A careful review of the evidence presented in this case does not establish that the Student suffered any substantive harm or loss of educational benefit as a result of the District's failure. In 6th grade, the Student was able to complete 6th grade level work in all academic classes, earning consistently high marks across the board with very few accommodations. Education, of course, is not strictly limited to academics. Even so, no evidence establishes that the Student was substantively harmed in any other educational domain beyond academics.

The Parents argue that the Student could have gone further in Reading if the District had done a more thorough evaluation of the Student's reading ability and used a different reading program. It is worth noting that the District pushed to maintain a reading component in the Student's IEP after the IEE determined no eligibility in that domain. Further, the Parents point to an independent psychoeducational evaluation of the Student that they obtained after moving out of state. That evaluation found the Student's ability to read orally was significantly impaired, generally around the 3rd grade level, and oral reading comprehension was found to be at the beginning to middle 5th grade level in November 2017 (the Student's 7th grade year). A different reading assessment that did not require oral reading found that the Student was in the average range compared to same-aged peers. P-2. The out-of-state evaluator⁹ recommended a brand-name multisensory, systematic, phonemic, explicit, language-based approach to teaching reading. *Id.* That finding, taken as true, does not negate the fact that the Student, with average intelligence, was able to complete 6th grade reading and writing tasks throughout 6th grade.¹⁰

⁹ I do not use that description pejoratively. The out-of-state evaluator has excellent credentials.

¹⁰ Despite the out-of-state evaluator's excellent credentials, the evaluation loses some credibility for diagnosing the Student with developmental dyslexia based on DSM-5 criteria. It appears that this diagnosis was based in large part

Moreover, the only defect I have found in the 2017 IEP was its failure to address the Student's attentional and executive functioning needs. At the time, the IEE recommended removing the Student's SLD label, and affirmatively found no significant discrepancy between the Student's academic abilities and achievement. Regarding attention and executive functioning, the out-of-state evaluator diagnosed the Student with ADHD and other psychological conditions (OCD, adjustment disorder with anxiety). But the out-of-state evaluator made no school-based recommendations for those conditions and offered no opinion on what impact the District's failure to address those conditions had on the Student, if any.¹¹

In sum, the District's failure to address the attention and executive functioning aspects of the Student's OHI is tantamount to a procedural IDEA violation. The record does not support a finding that this violation resulted in a substantive denial of FAPE. Consequently, compensatory education is not owed.

Conclusions

The IEPs developed and implemented during the 2015-16 and 2016-17 school years were appropriate except for the one deficit described above. That deficit did not result in a substantive denial of FAPE. The Parents claim that the 2016 RR was inappropriate. Perhaps it was, given the incomplete BASC. Perhaps it wasn't, given the explicit acknowledgment of the need for an FBA and the plan to conduct one. But either way, the remedy for an inappropriate RR is an IEE, which was provided at the District's expense. Assuming that the 2016 RR was inappropriate, the Parents already have the relief that they are entitled to.

The Parents also claim that the district should have known about the Student's ADHD before the IEE was completed. I respectfully disagree. First, school personnel who are not medical doctors cannot make medical diagnoses. The IEE itself could not affirmatively diagnose ADHD for the same reason. Rather, school personnel can determine if a child qualifies as a student with OHI. The District's evaluation did not reach that conclusion but acknowledged that an FBA was warranted and would be completed when school resumed in the fall. The IEE was already in process by the time that the District would have conducted the FBA, and so the OHI determination was ultimately not delayed. By that time, the Student's oppositional and defiant behaviors had also subsided. Consequently, by the time that the District could have conducted an FBA and drafted a PBSP, there was no need to do so.

on tests that assess oral reading ability, or that were administered to determine the Student's *psychological* processes, not reading. Granted, those tests showed significant deficits in phonological awareness. However, the only reading-specific test administered that did not require the Student to read out loud placed the Student in the average or low average range as compared to same-aged peers. This included a sub-test of phonemic decoding efficiency, which called for the Student to decode nonsense words in isolation under timed conditions. The Student's score on that assessment was 101 / 53rd percentile – as close to an absolutely average score that this Hearing Officer has ever seen – on a task that should have been nearly impossible for a student with the level of dyslexia that the out-of-state evaluator found. P-2.

¹¹ The out-of-state evaluator recommended psychostimulant medication under close medical supervision and cognitive behavioral therapy. Both of those recommendations are exceedingly well-supported by the evaluation. Neither of those recommendations is school-based. P-2.

As discussed above, I find that the District provided appropriate special education to address the Student's reading. The Student completed grade-level reading work at a high level with minimal supports.

The Parents are not entitled to reimbursement for private tutoring obtained during the 2015-16 and 2016-17 school years and in the summers of 2016 and 2017 because the IEPs in place during those times were substantively appropriate. Similarly, no evidence supports the Parents' claims that the District failed to provide appropriate ESY services. ESY services were never offered, but the evidence does not preponderantly support entitlement to ESY services (regression/recoupment or otherwise).

ORDER

Now, March 2, 2018, it is hereby **ORDERED** that the Parents' claims are **DENIED** and **DISMISSED**.

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

/s/ Brian Jason Ford
HEARING OFFICER