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Pennsylvania Special Education Hearing Officer
Final Decision and Order

HEARING

ODR File Number: 19551-17-18

Child's Name: A. D. **Date of Birth:** [redacted]

Dates of Hearing:

10/25/2017, 12/4/2017 and 12/5/2017

Parent:

[redacted]

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Hearing Officer: Mr. Brian Ford Esq.

Date of Decision: 01/26/2018

Introduction

This matter arises 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 allege that the District failed to provide the Student a free appropriate public education (FAPE) during the 2015-16 school year and the 2016-17 school year, and that the Student’s current IEP is inappropriate.¹ The Parents demand compensatory education to remedy the alleged denials of FAPE, and demand that the District provide a Wilson-certified instructor to implement portions of the Student’s current IEP. The District denies the Parents’ allegations and opposes their demand for relief.

For reasons discussed below, I find for the Parents in part and for the District in part.

Issues

1. Was the Student denied a FAPE for the entirety of the 2015-16 school year?
2. Was the Student denied a FAPE for the entirety of the 2016-17 school year?
3. Is the Student’s current IEP appropriate?
4. Is the District required to secure a Wilson-certified instructor to provide services required by the Student’s current IEP?
5. If the Student was denied a FAPE, is the Student entitled to compensatory education?

Findings of Fact

Overwhelmingly, the facts of this case are not in dispute. Rather, the parties do not agree about whether those facts establish a denial of FAPE. Unfortunately, the parties did not proceed on a stipulated record, and presented evidence over a three-day hearing. All of the evidence was carefully considered. However, I make findings of fact only as necessary to resolve the issues before me. Consequently, not all evidence that was presented is cited herein. Further, facts that are both not in dispute, and supported by the record in its entirety, are presented here without citation. I find as follows:

1. For reference:
 - a. 2012-13 school year – Kindergarten
 - b. 2013-14 school year – 1st grade
 - c. 2014-15 school year – 2nd grade
 - d. 2015-16 school year – 3rd grade
 - e. 2016-17 school year – 4th grade
 - f. 2017-18 school year – 5th grade

2013-14 School Year – 1st Grade

2. During the Student’s 1st grade year, the Parents had the Student evaluated by a private evaluator.

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

3. The private evaluator drafted a report dated October 29, 2013. The private evaluator diagnosed the Student with attention deficit hyperactivity disorder (ADHD) – combined type, and writing difficulties.
4. The Parents shared the private evaluation report with the District sometime after they received it.
5. On January 17, 2014, after receiving the private evaluation report, the District identified the Student as a student with a disability and offered a Section 504 Plan. The Parents accepted that plan. P-2.

2014-15 School Year – 2nd Grade

6. On September 23, 2014, the Student’s Section 504 team reconvened. The team determined that the Student required the following accommodations (P-2):
 - a. Seating in proximity to the teacher;
 - b. Frequent reassurance and positive feedback for attending and completing tasks;
 - c. Limited use of verbal redirections and with a preference for non-verbal and visual cues;
 - d. Testing in a one-to-one setting both so that the Student could read text aloud on reading tests and to provide prompting to remain on task in math tests;
 - e. Chunking and check-ins during multi-step work;
 - f. Repeated directions;
 - g. Checks for understanding after directions are given;
 - h. An incentive chart, targeting work invitation and completion;
 - i. Adapted paper;
 - j. Adapted written work load;
 - k. Written work that was not completed at school was to be sent home for completion;
 - l. Avoidance of negative consequences for behaviors related to ADHD;
 - m. Providing a sit and move cushion;
 - n. Providing a pencil grip.
7. On September 25, 2014, the District agreed to provide the above-listed accommodations and modified the Student’s Section 504 agreement accordingly. P-2.
8. In September 2014, the Student was not participating in Title I reading. The Parents asked the District why the Student was not participating in Title I reading.
9. In October 2014, the Parents asked the District to evaluate the Student to determine eligibility for special education. The District agreed to evaluate the Student.
10. As part of the evaluation, the District considered input from the school principal and the Student’s classroom teachers. All reported significant distractibility and need for

redirection. The classroom teacher also reported deficits in reading fluency, written expression, and math facts. S-1.

11. The District drafted an Evaluation Report (ER) dated January 15, 2015. Through the ER, the District concluded that the Student is a child with a disability, entitled to special education, as a student with an Other Health Impairment (OHI) resulting from the Student's ADHD, and a Specific Learning Disability (SLD), resulting from discrepancies between ability and achievement in reading (oral reading fluency), writing (written expression), and math (calculation, problem solving). The report also concluded that the Student required Occupational Therapy (OT). S-1.
12. In January 2015, the District also placed the Student into Title I reading.
13. The Student's IEP team convened on February 11, 2015. The IEP team developed an IEP offering an itinerant amount of learning support (the 2015 IEP). P-4.
14. The 2015 IEP incorporated the ER. The 2015 IEP included 12 goals (P-4):
 - a. Two goals were speech goals; one targeting speech articulation, and another targeting expressive language skills.
 - b. Two goals targeted reading; one targeting reading comprehension, and another targeting reading fluency at the 3rd grade level.
 - c. Two goals targeted math; one targeting math calculation, and another targeting math reasoning.
 - d. One goal targeted written expression.
 - e. One goal targeted behavior (attention to task and measured by prompts).
 - f. Four goals were OT goals; one targeting motor skills (cutting out shapes along a line), another targeting the Student's ability to write the Student's own name legibly, a third targeting the Student's ability to copy from the board, and a fourth targeting fine motor coordination.
15. The 2015 IEP included modifications and specially designed instruction. This included 22 group speech therapy sessions "per IEP year." P-4. The "IEP year" ran from February 12, 2015 through February 10, 2016, bridging 2nd and 3rd grade. *See* P-4 at 1.
16. The SDI in the 2015 IEP also included 30 minutes of small group, direct instruction in reading per day; ten minutes of direct instruction in math, three times per week; a slant board, pencil grip, and adapted paper; and several other accommodations that essentially mirror the accommodations in the Section 504 Plan. P-4
17. The Parents immediately approved the IEP via a Notice of Recommended Educational Placement (NOREP) on February 11, 2015. P-5.
18. On March 19, 2015, the District prepared a progress report. Progress monitoring on the reading comprehension and reading fluency goals indicate that the Student was reading

and understanding text at the 2nd grade level, as measured by adapted texts, but otherwise was struggling with text at the 1st grade level. *See, e.g.* P-6.

19. The same progress report indicated that the Student had not made progress towards either math goal but was receptive to instruction. P-6.
20. The same progress report indicated that the Student could complete the tasks in the written expression goal, but only with “maximum teacher assistance.” P-6, underlining original.
21. The same progress report indicated that the Student had met the behavior goal, meaning that the student could maintain attention and complete classroom tasks with no more than two reminders or prompts 83% of the time (on average) over three weeks. P-6.
22. Progress was reported again on May 22, 2015. Progress monitoring on the reading comprehension and reading fluency goals indicate that the Student was still reading and understanding text at the 2nd grade level, as measured by adapted texts. The Student could now read 2nd grade level text, but less fluently than what is expected of a student in the spring of 2nd grade. P-6.
23. The same progress monitoring indicated that the Student made progress towards the math calculation goal, as measured by averaging the results of addition and subtraction tests. There was considerable variability between tests. The Student mastered the math reasoning goal. P-6
24. The same progress monitoring indicated that the Student regressed in written expression, relative to the prior progress monitoring, and continued to require “maximum teacher assistance.” P-6, underlining original.
25. The same progress monitoring indicated that the Student continued to meet the behavior goal and could now maintain attention and complete classroom tasks with no more than two reminders or prompts 89% of the time (on average) over three weeks. P-6.
26. Progress towards OT goals was not reported with the March 19 or May 22, 2015 progress reports. P-6.

2015-16 School Year – 3rd Grade

27. On August 25, 2015, the IEP team reconvened to revise the OT sections of the Student’s IEP. The present levels were changed to reflect significant progress towards OT goals. The OT goals were revised: the cutting shapes goal was replaced with a typing goal; the fine motor goal was replaced with a handwriting goal; and the expected level of achievement for the name writing and copying goals were increased. P-8.
28. On September 16, 2015, the Parents provided consent for a reevaluation. P-9.

29. The 2015 RR concluded that the Student remained eligible for special education, with a primary disability category of OHI and a secondary disability category of ADHD.
30. On October 8, 2015, the IEP team met again. At this time, Title I reading was discontinued because the program did not appear to be effective for the Student. S-4, S-5. The District recommended that the Student continue the regular education reading program (Reading Mastery) used in 2nd and 3rd grade, and start the Wilson FUNdations program, which the District had recently obtained.
31. On October 26, 2015, the District reported the Student's progress towards IEP goals. The District noted regression in both the reading comprehension and math calculation goals. Progress towards other goals was, generally, either inconsistent or unchanged. S-27 at 1-12.
32. On October 30, 2015, the District completed the reevaluation report (2015 RR). The 2015 RR included the results of prior testing, updated classroom grades and IEP progress monitoring, and parental input. The 2015 RR also included an observation of the Student in school, described in the 2015 RR as a functional behavioral assessment (FBA). No new testing was completed, and the evaluator determined that there was no need for additional testing. P-9.
33. On November 4, 2015, the Student's IEP was revised to include updated information from the 2015 RR, as well as progress towards goals. A Wilson FUNdations-aligned goal was added, and the reading comprehension and fluency goal targets were increased. The Student's math calculation and math reasoning goals were also revised to target multiplication word problems instead of addition and subtraction. S-5, P-11.
34. The Student was pulled out of class to receive one-on-one or small group instruction in math, Reading Mastery, and Wilson FUNdations to implement the revised IEP. S-24.
35. In late January, 2016, the Parents expressed concern about the Student's reading progress. The District agreed to provide two, 60 minute Wilson sessions per week after school. NT 509. Consequently, the Student received reading instruction in three different reading programs: Reading Mastery and Wilson FUNdations during the school day, and Wilson after school.
36. On February 2, 2016, the IEP team reconvened. The IEP was revised to include a graphic organizer during reading assessments to help with reading comprehension. S-6. A math facts sheet was also provided. The team also discussed adding Wilson to the Student's IEP.
37. On March 18, 2016, the IEP team reconvened. The Student's math goal was revised to target addition and subtraction problems.

38. Around the time of the March 2016 IEP team meeting, the Parents requested an independent FBA at the District's expense. The District agreed. The District and Parents also agreed to reevaluate the Student to obtain information about the Student's memory.
39. The independent FBA was completed in late April and early May 2016, and a report was produced in early May 2016.² The independent FBA included two, in-school observations. During those observations, the Student required minimal prompting, and was able to attend to academic tasks. Based on those observations, parent and teacher input, and a review of records, the evaluator made recommendations that were generally consistent with the Student's IEP and the practices that the evaluator observed in school. P-20.
40. On May 16, 2016, the District issued a reevaluation report (2016 RR). The 2016 RR incorporated the independent FBA, summarized prior evaluations, and reported an assessment of the Student's memory. According to assessments, the Student's overall memory (GMI) was in the "borderline" range compared to same-age peers. However, the evaluator urged caution in drawing too broad conclusions from that one number, as there was extreme variability in memory sub-test scores. In general, the evaluator attributed the Student's memory difficulties to the Student's attention and focus difficulty, which are attributable to ADHD. P-19.
41. On May 26, 2016, the Student's IEP team reconvened to develop an IEP for the 2016-17 school year. At that time, the Student had mastered the FUNdations-aligned goal, but as measured using Level 2 Reading Mastery assessments. Progress towards the reading fluency goal revealed that the Student was instructional at the "equivalent to the beginning of second grade" level. The Student's independent reading level remained stagnant. The Student had mastered writing, math, and OT goals. S-7.
42. At the May 2016 IEP team meeting, the Student's present educational levels were revised to reflect the Student's progress. Goals were also revised. The fluency goal targeted a slightly higher level, and math goals were revised to include higher level skills. S-7.

2016-17 School Year – 4th Grade

43. On August 26, 2016, the Student's IEP team reconvened. At this time, the Parents and District agreed to replace the Student's regular education reading program with the Wilson program. The Student was pulled out for 60 minutes of Wilson instruction per day. The Parents and District also agreed to provide 30 minutes per day of Lindamood-Bell instruction, targeting the Student's reading comprehension. The District continued to provide Wilson tutoring three days per week after school. This increase in service moved the Student from an itinerant to supplemental level of learning support. S-8.
44. At this time, the Student was participating in two reading programs: Wilson (for reading) and Lindamood-Bell (to supplement reading comprehension).

² The report is dated February 5, 2016. The parties agree that this is a typo. NT 196-198.

45. On October 17, 2016, the Student's IEP team reconvened, and revised the Student's IEP. S-9. The primary function of this revision was to align the Student's reading goal with the Wilson program, so that the Student's progress could be measured using the Wilson program itself. S-9
46. On March 6, 2017, the Student's IEP team reconvened. The team revised the Student's IEP to include an offer of extended school year (ESY) services. S-10
47. On May 19, 2017, the Student's IEP team reconvened to draft an IEP for the upcoming 2017-18 school year. That IEP was revised on August 21, 2017. The IEP is essentially a continuation of the March 6, 2017 IEP, with goals revised to reflect the Student's progress, and providing daily instruction in both Wilson and Lindamood-Bell, Wilson tutoring after school, and both push-in and pull-out math support. S-11, S-12.
48. Progress reporting for the 2016-17 school year reveals the following (S-29):
- a. The Student's language goal had a mastery level of 80%. The Student started the 2016-17 school year at 66%, mastered the goal in March 2017, and maintained the mastery level in May 2017.
 - b. The Student's speech articulation goal had a mastery level of 85%. The Student's performance steadily increased throughout the year, and the Student had nearly mastered the goal by May 2017.
 - c. The Student's reading comprehension goal called for the Student to answer comprehension questions with 80% accuracy after independently reading middle 3rd grade level text. The Student's progress towards that goal was stagnant throughout the year. By May 2017, the Student could answer comprehension questions with 80% accuracy, but only after reading passages at the starting 2nd grade level. This goal was not measured using Wilson or Lindamood-Bell materials or assessments.
 - d. The Student's reading fluency goal called for the Student to read 4th grade text with 100 words correct per minute (WCPM). The Student's progress towards this goal was measured using 3rd grade texts. On individual probes, the Student hit the WCPM target on a few occasions, but using third grade text. This goal was not measured using Wilson or Lindamood-Bell materials or assessments.
 - e. The Wilson-aligned goal called for the Student to verbally produce letter sounds, forming both real and "nonsense" high-frequency words with 80% accuracy. The Student mastered that goal at Wilson level 3.1 in September 2016 and progressed steadily to mastery at level 8.2 by May 2017.
 - f. The Student's progress towards the writing goal, which called for the Student to write sentences based on reading comprehension prompts with correct grammar

and punctuation was variable.³ Overall, however, the general trend showed progress, and the Student consistently mastered most of the sub-domains used to measure the goal.

- g. Regarding math, the Student showed some variability on individual addition and subtraction probes but, on average, met the goal early on and maintained a mastery level during the school year. The Student also mastered basic multiplication, but showed somewhat poor math fluency.⁴ Finally, the Student's progress towards understanding and completing word problems was highly variable but, generally, the Student did much better with prompting.
- h. Regarding OT, the Student mastered the accuracy component of the typing goal, but did not reach the expected speed. The Student mastered the handwriting legibility goals.

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 Parent 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

³ To be clear, this goal was developed and implemented in such a way to assess the Student’s written expression, as opposed to the Student’s reading comprehension.

⁴ The Student was presented with 100 multiplication problems. Of those, the Student was typically able to complete around half in the allotted time. However, the Student correctly solved nearly all of the problems that the Student attempted.

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 minimus*" 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 *Andrew 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." *Andrew 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*.

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, more recently, the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* and explaining that compensatory education “should aim to place disabled children in the same position that the child would have occupied but for the school district’s violations of the IDEA.”).

Despite the clearly growing preference for the “same position” method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount 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 a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

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

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); The District Court “must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.” *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

In this case, although the parties hold very different views about several issues – most notably the meaningfulness of the Student’s progress – all witnesses testified credibly regarding the facts of this case and their opinions regarding those facts. Such is to be expected when it is hard to find any fact that is truly in dispute.

Discussion

As noted above, there is no true dispute in this case about what services the Student received, or what amount of progress the Student made. Rather, the parties present a legal dispute about whether what happened constitutes a violation of the Student's rights under the IDEA.

The Parents argue that the IEPs that governed the Student's education in the 2015-16 (3rd grade) and 2016-17 (4th grade) school years were neither appropriately ambitious nor reasonably calculated to enable the Student to make progress appropriate in light of the Student's circumstances. The Parents further argue that the District offered programming based on what it had at hand, not the Student's individual needs and, even then, programs were not delivered with fidelity. To make this argument, the Parents point primarily to the Student's progress as measured by regular education assessments, and progress monitoring. The Parents are correct that some data shows stagnation and regression – but this is (mostly) a red herring for two reasons: First, the FAPE tests depends not on what progress the Student made, but rather on 1) what progress was “reasonably calculated” at the time the IEP was drafted and 2) how the District responded to progress data as it came in. Second, in this case, some of the data is misleading because the District was not always measuring the effects of the Student's programs, as discussed below.

At the start of the 2015-16 school year, the Student was participating in Title I reading, using Reading Mastery in regular education, and Wilson FUNdations. The Student also received specially designed Math instruction. By October of that school year, the school identified Title I reading (a regular education intervention) as a bad fit, discontinued the program, and started a reevaluation. Since progress monitoring was showing regression, this was precisely what the District was supposed to do. When an IEP is not producing the results that it was “calculated” to produce, it is the District's obligation to figure out why, and then revise the IEP accordingly.⁵

Unfortunately, the District chose to not include new testing in its reevaluation, and ultimately offered an IEP that continued the same program, despite evidence of regression or stagnation in reading. The IEP was revised to match the programs that the Student was already receiving, not to address why the Student was not making reading progress in those programs. This constitutes a substantive denial of FAPE. That denial runs from October 30, 2015 (the issuance of the 2015 RR) through August 26, 2016 (the date that Wilson was added to the Student's IEP).

Between October 30, 2015 and August 26, 2016, there were no new assessments of the Student's reading. This indicates that the District had enough evaluative data to support adding Wilson to the Student's IEP by October 30, 2015 at the very latest. The fact that the District did not add Wilson at that time lends some credence to the Parents' argument that the District simply offered what it had at hand. That conclusion is tempered, however, by the District's decision to retain an after-school Wilson tutor for the Student. From January 16, 2016 onward, the District offered

⁵ The fact that the District took these actions based, at least in part, at the Parents' insistence is not relevant. The FAPE standard does not have any sort of intentionality element. The inquiry is to what the District did, not why the District did it.

Wilson tutoring after school. Given the Student's progress, I have no doubt that service was necessary, and so it should have been made part of the Student's IEP.

Starting on August 26, 2016, the District made major changes to the Student's reading program through the IEP process. At this point, the progress monitoring clearly shows that the Student was struggling both with reading and reading comprehension. The District began to provide Wilson every day, during school, as a part of the Student's IEP. Wilson is an Orton-Gillingham based, sequential reading program that teaches to automaticity. This means that a student must master a Wilson level before moving to the next level. Wilson levels correspond to sequential reading skills, not grade levels. Therefore, students who are progressing through the Wilson program will not necessarily show progress on grade-level or curriculum-based assessments. This is why the grade-level and curriculum-based assessments of the Student's reading do not show a large amount of progress (roughly half a school year) even after Wilson was added to the Student's IEP. Rather, moving through the Wilson program is its own progress monitoring.

The Parents argue that the Wilson program was not administered with fidelity. They argue that the Wilson sessions were not long enough, and that the program was not administered by a Wilson-certified instructor. Assuming, *arguendo*, that the District did not deliver the Wilson program in strict compliance with Wilson's own standards is not dispositive. Even if Wilson was not delivered strictly in accordance with the publisher's guidelines, the Parents do not challenge the validity of the Student's advancement from Wilson level to Wilson level. The Student's progress through the Wilson program is reported on progress monitoring reports. According to those reports, the Student progressed from Wilson level 3 through Wilson level 8 during the 2016-17 school year. The accuracy of those reports is not challenged. Again, it is not surprising that this advancement is not reflected on the majority of tools that the District used to monitor the Student's reading ability because Wilson levels do not correspond to grade levels or curriculum-based assessments. I find that that Student's progress through the Wilson program was meaningful during the 2016-17 school year.

Apart from reading, between October 30, 2015 and August 26, 2016, I find that the Parents did not substantiate their alleged denials of FAPE. As indicated above, progress was inconsistent in several domains, especially math. I find, however, that progress was meaningful relative to the Student's circumstances, which include both SLD and ADHD.⁶ I more flatly reject the Parents' claim that the District failed to provide appropriate behavioral interventions. All evidence, including the independent FBA, indicates that the Student could remain on task in school with minimal redirection. This is quite a step forward from the "maximum prompting" that was needed at the start.

The remaining question, therefore, is whether the Student is entitled to compensatory education for the denial of FAPE between October 30, 2015 and August 26, 2016. During this time, the District should have changed the Student's reading program through the IEP process in response to the data on hand. I commend the District as it ultimately made the necessary changes. I do not

⁶ The Parents highlight the Student's difficulty with math word problems. One would expect that to be the most difficult task for the Student in this case. Math word problems require the Student to focus, read, and do math. The Student's disabilities impact upon all three of those domains.

wish to punish the District for correcting its error. No award of compensatory education should discourage the District (or any other school district) from responding to data. When data shows that a program is not working as expected, LEAs are obligated to investigate the reason why, and then make changes as necessary through the IEP process. In this case, the District delayed these actions for nearly an entire school year, and so the Student is entitled to compensatory education.

Neither party presented evidence establishing what amount, or what type, of compensatory education is needed to make the student whole. In the absence of that evidence, I have no choice but to default to an hour-for-hour approach. Based on the changes that were made in August 2016 that brought the Student's IEP into compliance, I award 30 minutes of compensatory education for each day that the Student attended school from October 30, 2015 through the end of the 2015-16 school year, or August 26, 2016, whichever came first.

In ordering this award, I recognize that the Student's current reading program is calculated to remediate the Student's reading, even if the effects of that program may not be seen in grade-level assessments for quite some time. That remediation is part of the Student's current FAPE entitlement, and compensatory education cannot be used to offset the District's current FAPE obligation. Said differently, the District cannot spend down a compensatory education award by using compensatory education to provide services that are necessary to satisfy the Student's current entitlement to a FAPE. With that in mind, the compensatory education awarded below may be used as follows:

- a. The Parents may decide how and by whom the hours of compensatory education are provided.
- b. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service that furthers Student's academic or behavioral needs.
- c. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District.
- d. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent.
- e. The compensatory education may be used at any time from the present until Student turns age twenty-one (21).
- f. The compensatory services shall be provided by appropriately qualified professionals selected by the Parent.
- g. The costs to the District of providing the awarded hours of compensatory education may be limited to the average market rate for private providers of those services in the District's geographic region.
- h. Nothing herein prohibits the parents from reducing the compensatory education to a dollar amount, so that compensatory education can be used to purchase any appropriate developmental, remedial, or enriching educational product or device that furthers Student's academic or behavioral needs.

An order consistent with the foregoing follows.

ORDER

Now, January 26, 2018, it is hereby **ORDERED** as follows:

1. The District violated the Student's right to a FAPE between October 30, 2015 and August 26, 2016.
2. To remedy the denial of FAPE, the Student is awarded 30 minutes of compensatory education for each day that the Student attended school between October 30, 2015 and the end of the 2015-16 school year, or August 26, 2016, whichever came first.
3. The compensatory education may be used in accordance with the Decision accompanying this Order.

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

/s/ Brian Jason Ford
HEARING OFFICER