

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: 20167 1718

Child's Name: S.I.

Date of Birth: [redacted]

Date(s) of Hearing:

April 30, 2018

Parents:

[redacted]

Counsel for Parent

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Hearing Officer: Linda M. Valentini, Psy.D.
Certified Hearing Official

Date of Decision: June 13, 2018

Background

Student¹ is an elementary-school aged student who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) and PA Chapter 14 under the classifications of autism and other health impairment (generalized and social anxiety). As such, Student is also an individual with a disability as defined under Section 504 of the Rehabilitation Act, 29 U.S.C. §794 and a protected handicapped student under Pennsylvania Chapter 15.²

The Parents³ requested this hearing, asserting that the Intermediate Unit (IU) denied Student a free appropriate public education (FAPE) when Student was a preschool child by failing to provide all the early intervention services to which Student was entitled for the period from January 19, 2016 through August 5, 2016. The Parents are seeking compensatory education. The IU counters that at all relevant times it proposed appropriate services for Student and that no remedy is due.

In reaching my decision I carefully considered the witnesses' sworn testimony, documents admitted into the record, and the parties' written closing arguments. Below I reference the evidence that I found to be directly relevant to deciding the issues before me; hence not all testimony nor all documents comprising the record are cited.

Based upon the preponderance of the evidence before me I find in favor of the Intermediate Unit.

Issues

1. Did the IU deny Student FAPE by failing to provide all the early intervention services to which Student was entitled during the period from January 19, 2016 through August 5, 2016?
2. If the IU failed to provide Student with FAPE, is compensatory education due and if so, in what type and amount?

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are set forth in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14) 29 U.S.C. § 794. The federal regulations implementing Section 504 are codified in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

³ When the singular "Parent" is used in this decision it references Student's mother with the understanding that she was acting on behalf of both Parents.

Findings of Fact⁴

1. Student has been eligible for special education services since age three-and-a-half. The IU began providing Student with early intervention programming at about age four. [NT 19, 26]
2. Student has a sibling, 22 months younger, who has disabilities including seizures, cognitive delays, inability to ambulate and legal blindness. The sibling receives services through the IU. [NT 21-23, 146]
3. The Parents elected to keep Student in early intervention for a year past the age of kindergarten eligibility. [NT 20]
4. Student received early intervention services in several settings; the Parents found the first three unacceptable. [NT 27]
5. In the first setting there were schedule conflicts with the sibling's services and the physical layout of the building made it difficult for the Parent to enter with the sibling. [NT 27-28]
6. With regard to the second setting, the IU's autistic support program, the Parent alleges that the teacher told her the program was not appropriate for Student because the children in the class were non-verbal. [NT 28]
7. Student's speech/language therapist, based on Student's evaluation and her experience providing services to Student, notes that Student is midway between being non-verbal and being able to hold a coherent conversation. [NT 226-227]
8. An evaluating school psychologist noted that Student's speech was very difficult to understand such that at times the Parent had to translate what Student was saying. [NT 256]
9. The Parent alleges that in the third setting the IEP was not being followed. [NT 28-29]
10. During the time leading up to the relevant period in dispute, Student was attending a fourth program, a small private school (Private School) providing autistic support programming in a restrictive setting. The IU was funding Student's placement at Private School as Student was placed there through a Notice of Recommended Educational Placement (NOREP). [NT 179; IU-2, IU-32]
11. Initially the Parents considered the Private School "ideal" as Student had been successful in extended school year (ESY) programming there, but in September 2015 Student had a hard time transitioning back to the program. [NT 29, 74, 179; IU-2, IU-3]

⁴ Parent exhibits are marked P; IU exhibits are marked S. In the transcript the IU exhibits are usually referenced as IU. [NT 69] If the same document was presented by both parties, only one exhibit will be referenced.

12. Student's behaviors escalated such that at an IEP meeting on December 1, 2015 the Private School reported that Student was now kicking at objects, emitting a louder more intense scream, and hitting Student's own head with an open hand, behaviors which disrupted the learning environment for others. [NT 30, 59-61; IU-1, IU-6]
13. The IU agreed to add two hours per month of a Behavior Specialist Consultant (BSC) to support the Private School staff in addressing Student's behaviors. The Parents approved the NOREP for the increase in behavioral support. [NT 62; IU-2, IU-3]
14. On December 10, 2015 the IEP team met again because Student's behaviors had escalated and Student had broken a staff member's nose and had injured another staff person. To limit Student's opportunities for negative peer interaction the IEP team decided to change the time of day Student would attend Private School (11 am to 3 pm instead of the regularly-scheduled session of 8:30 am to 12:30 pm); the change maintained the same number of hours of programming. [NT 62-63, 66, 191; IU-4, IU-5, IU-6, IU-29]
15. The IU also agreed to increase behavioral support by adding a second Personal Care Assistant (PCA) for Student. [NT 66-67; IU-5, IU-6]
16. Given behaviors that were dangerous and disruptive, the Private School eventually situated Student in a room with two PCAs and no other children. [NT 247, 267-268]
17. On December 16, 2015 the parties engaged in a third IEP meeting, by telephone, because despite the increased support Student continued to display disruptive, destructive, aggressive and unsafe behaviors multiple times a day. [NT 73-74; IU-7, IU-8, IU-9]
18. Given Student's escalating difficulties in Private School, the IU issued a NOREP in conjunction with the December 10, 2015 IEP meeting, noting that the IU's Preschool Intervention Program (PIP) was also an option considered. Following the December 16, 2015 meeting the IU issued another NOREP in which PIP was again referenced as an option considered. [NT 68-69, 75-76; IU-6, IU-9]
19. The PIP program is a partial hospitalization program within an IU preschool classroom, developed for young children with emotional and social difficulties. It is a therapeutic setting for children who present with emotional dysregulation. Embedded within the program is a strong educational component offering special educational instruction and any related therapies that a child might require. [NT 178-180, 209-210, 212-213, 257, 261]
20. PIP had a special education teacher and mental health resources available in the classroom to work on helping Student develop necessary self-regulation skills, while also challenging Student intellectually with appropriate materials and facilitating social interactions with peers. [NT 262-263]

21. The IEP team believed that the PIP program was appropriate for Student given Student's emotional and social difficulties and because it could also support Student's educational needs. [NT 179, 216]
22. The Parent had already visited the PIP program on December 8, 2015. At the time of that visit, the Parent told a staff member that the PIP area was "a dungeon, dirty, and [that she] would not send [Student] there". The Parent testified at the hearing that she did not want to place Student at PIP because, as the program was working on hiring another teacher and a room was being painted, she thought the PIP program was not yet ready to accept Student. [NT 68-73; IU-29]
23. The Parent also believed that the PIP program was not equipped to handle the types of behaviors Student had displayed at the Private School. [NT 48]
24. It was explained to the Parent that although in December 2015 the PIP classroom was within the appropriate class size limits, the program was expanding and adding another teacher and a second classroom in order to be able to offer smaller class sizes to more children. The room being painted was not the classroom in which Student would be placed. [NT 262-263]
25. The PIP program had a slot open and was ready to accept Student in December 2015 at the time of the Parent's visit. [NT 171-173]
26. On January 13, 2016 the parties held a fourth IEP meeting, at which the Private School's preschool director and educational director reported that Student was presenting with extreme distress and anxiety, and that the frequency and intensity of Student's behaviors had increased. [NT 76-77, 191-192, 267; IU-11]
27. Since at the time it was still anticipated that the IEP would be implemented in a classroom setting, Student was to receive the following: individual and group speech therapy; individual and group occupational therapy; behavior support; group academic instruction; and personal care assistants. [P-4]
28. The Parents approved the NOREP on January 26, 2016. [NT 33; P-5]
29. Private School again revised Student's attendance schedule so that Student would have "minimal to no opportunities to interact with children." The Parents decided to voluntarily keep Student at home in lieu of attending Private School with no peer interaction. [NT 78; IU-11, IU-12]
30. Private School stipulated that a condition for Student's return was a psychiatric evaluation as well as placement in a partial hospitalization program to stabilize Student's self-regulation abilities. Anticipating that the Parents would meet these conditions and that Student would return to Private School, the IU and the Private School began to develop a crisis plan to be finalized upon Student's return. Ultimately, as Student did not return to Private School, the crisis plan was not completed. [NT 200, 268-273]

31. Conversely, the Parents maintain that they were waiting for a crisis plan to be developed before they sent Student back to Private School. [NT 78, 130, 150; P-19]
32. On January 21, 2016 the Parents did take Student for a psychiatric evaluation, and although they chose the evaluator and accessed Student's medical assistance benefits to fund the evaluation they were critical of the psychiatrist's process. Because of concerns including family history they ultimately decided against allowing Student to take the prescribed medication. [NT 84-85, 201-204, 211-212, 235-238]
33. On January 27, 2016, the IU Case Manager and the IU lead psychologist had a conference call with Parent to discuss the option of the children's partial hospitalization program recommended by Private School. [IU-31]
34. The partial hospitalization program is a dually licensed facility, with an inpatient as well as an outpatient program, serving children with autism as well as various other mental health disorders. The IU's lead psychologist, a mental health services specialist, personally called the facility regarding Student and confirmed that based on Student's clinical presentation services were available to Student; the facility is licensed to serve children with autism. The IU frequently refers children with autism to the facility. [NT 205-207]
35. Although the IU could not itself place Student in the children's partial hospitalization program, it endorsed the referral because this mental health facility was an appropriate recommendation given Student's need to be emotionally self-regulated and stabilized prior to returning to the Private School. [NT 208-209]
36. Had Student participated in the partial hospitalization program, Student would have received educational services provided by the IU on-site at the facility. [NT 208, 215]
37. The Parents did not visit the program, which was very close to their home, or take part in an intake assessment, but the Parent spoke with someone at the program on the phone. The Parent alleged forming the belief that the program did not serve children with autism. [NT 83, 131, 204, 206]
38. Further, the Parents rejected having Student participate in the hospitalization program because they perceived that it was not an educational program, and were concerned that there would be other children present with problems possibly similar to Student's. [NT 80-83; IU-31]
39. As the Parents did not fully comply with its conditions for allowing Student to return to its program, Private School, as was its prerogative as an independent private program, did not permit Student to return. [NT 269-273]
40. Because the Parents were rejecting the PIP program as well as participation in the partial hospitalization program where the IU would have provided educational services, on

February 6, 2016 another IEP meeting was convened by telephone. The IU proposed that the interim IEP be implemented in the family's home. [P-7]

41. Given that the services were not going to be provided in a classroom setting but instead in the home, in the February 6th IEP the level of services was revised from the previous January 26th IEP. Instead of up to 20 hours per week of specialized educational services in a group, Student was offered one hour of individual specialized educational services per week. Because group therapies could not be provided in the home setting, individual speech and occupational therapy was increased. Instead of two 30-minute individual sessions of speech therapy and one 60-minute group speech therapy a week, the IEP provided for 90 minutes of individual speech therapy per week. Instead of one 30-minute session of individual occupational therapy and one 30-minute session of group occupational therapy, Student was to receive 60 minutes of individual occupational therapy. Instead of two hours of behavior specialist consultation per month there were to be two hours of behavior specialist consultation per week. [NT 38, 78, 153-154, 165; P-7]
42. PCAs were not needed in the home because Student's behaviors were different in the home than they were at the Private School. Parent reported to the evaluating school psychologist that Student was not having the same types of behavioral challenges at home that were seen in school. [NT 81, 166-167, 255]
43. The IEP team made appropriate changes in type and level of services in light of the types of settings in which the IEPs were going to be implemented and in light of the child's circumstances in those settings. [NT 164-165]
44. The NOREP associated with the February 6, 2016 IEP meeting also noted that the PIP program and the IU's autistic support program, the first and the second original placements offered but rejected, were options also considered. [IU-15]
45. The Parents maintained that home based services were "not an option" and rejected the NOREP on February 16, 2016. [NT 21-26, 45, 85; IU-12, IU-13, IU-15]
46. The Parents' reasons for rejecting the NOREP offering home-based services were: scheduling issues because sibling was already receiving some home services; home was small; too much foot traffic in the home is disruptive and agitates Student if both children had therapy there; both children receiving therapy in the home was tried but the Mother was supposed to participate in the therapies for both children; the sibling's part-time schedule at a placement outside the home involved instances when the Parents had to drop off and pick up the sibling; the sibling had various appointments with medical specialists. [NT 37-41, 87-88; P-8]
47. Student's Mother was not working outside the home between January 2016 and June 2016; she did work outside the home between June 2016 and August 2016. Student's Father worked outside the home between January 2016 and August 2016; his hours were

flexible so that he could be home when Student received services after his wife began full-time employment. [NT 25-26, 109]

48. The sibling attended a four-day a week, 2 ½ to 3 hour, morning program during the period home services were being offered to Student. Virtually all the sibling's services were delivered at that placement. Only one service provider, the classroom teacher of the complex support program, came out to the home one time per month during the time period under consideration for Student to receive home services. [NT 79, 135-138, 147]
49. The IU offered to schedule Student's home services at a time when the sibling was not at home. The Parents rejected this offer because there were times they had to pick up the sibling for appointments. [NT 79-80]
50. To avoid potential service timing overlap with the sibling, and remove the service from inside the reportedly crowded home, one provider offered to deliver the service in the library. The Parents maintained that the provider's and the family's schedules didn't work out. [NT 42, 90-91]
51. The Parents did accept the speech therapy services that were offered in the February 2016 IEP. One or the other parent was home while Student received speech services twice a week for about an hour in the mid-afternoon. [NT 109, 230]
52. Student's sibling was in the home while speech services were being delivered to Student. The sibling was not a distraction to Student during speech therapy. There were no other service providers in the home during the time Student received speech therapy. [NT 228, 231]
53. The speech therapist provided services in the family's kitchen/dining area, at a picnic table. When Student needed a movement break they used the rest of the kitchen and a hallway that went to the back of the house. The speech therapist and Student did not use the entire first floor during therapy. [NT 227-228, 230]
54. The Parents and the speech therapist were able to work out a satisfactory twice-weekly mid-afternoon consistent schedule such that all individual speech services were delivered in the home. The Parents were "extremely satisfied" with the speech services and are not making any claim for compensatory speech services. [NT 41-42, 103, 105-107]
55. The Parents did not ask the speech therapist to change her scheduled time to accommodate other therapists for Student. [NT 229]
56. Other than speech therapy Student did not receive any of the other services the IU offered in the pendent January 13, 2016 IEP. The Parents declined services from two providers offering specialized education services, two providers offering occupational therapy services and a provider offering behavior therapy services. [NT 42-43, 103-108, 168]

57. Two different private providers reached out to the Parents to arrange delivering specialized educational services in the home. The Parents declined, reportedly because of schedule conflicts, although the Parent told one provider that Student would be available after 5 pm. [NT 103-105]
58. Two different private providers reached out to the Parents to arrange delivering occupational therapy services in the home. The Parents declined, reportedly because of schedule conflicts, although they received multiple timeframe offers, and Student's Mother admitted that "we were just receiving phone calls from all these people and they were throwing time frames at us, and all we could do is look at the time frames and say yes or no". [NT 105-106]
59. A provider contacted the Parents to arrange providing behavior therapy services, but the Parents declined these services as well for scheduling reasons. [NT 106]
60. In spring 2016 the Parent visited the second placement Student had attended and again formed the belief that it was not appropriate for Student. [NT 48-49, 89-90]
61. On March 7, 2016 the parties held an IEP meeting with both counsel present. The Parents gave the IU permission to release information to two prospective placements, one of which was the PIP program and the other of which was a placement proposed by Parents' counsel. The Parent agreed to visit the proposed placements. [NT 46, 90-94, 183; IU-20, IU-35, P-11a]
62. The Parent maintained that the family wanted a "school readiness (program), a classroom placement appropriate for a child [Student's] age and with [Student's] needs, where [Student] would be able to get [Student's] services in that setting." [NT 91]
63. The March 7, 2016 IEP was drafted to be implemented in a classroom setting and included speech therapy, occupational therapy, behavior specialist support, PCA support and specialized instruction. As placements were to be explored a NOREP was not issued at that time. [P-12]
64. The day after the March 7th meeting, IU's counsel emailed Parents' counsel that PIP had a place ready for Student. [NT 177; IU-35]
65. The Parents rescheduled the visit to the PIP program several times, and the visit did not take place until about a month after the March meeting. The Parent concluded that the program was still inadequate. [NT 94-95, 118; IU-31]
66. The Parents did not tour the other placement, which had been suggested to the IEP team by their own counsel, because they deemed it too far from their home in the event that they would have to come get Student unexpectedly. [NT 56-58, 95-96, 120, 176]
67. On May 6, 2016 the IU's attorney again notified the Parents' attorney that PIP was holding a place for Student and that Student could begin on May 9th. [NT 96-97; IU-35]

68. On May 19, 2016 the IU's attorney again notified the Parents' attorney that PIP was holding a place for Student. [NT 98-99; IU-35]
69. On June 20, 2016 the IU's attorney again notified the Parents' attorney that PIP was holding a place for Student. [NT 99; IU-35]
70. The Parents were aware that they were being offered the PIP placement for Student at the time the emails were sent to their counsel. [NT 100]
71. On July 13, 2016 both parties with their respective attorneys participated in another IEP meeting. [NT 50-51, 101; IU-24, IU-26, P-15, P-16]
72. Via a signed NOREP, the Parents approved the July 13, 2016 IEP, to be implemented at PIP, the placement which had been holding a spot open for Student since December 2015. The Parents, represented by counsel at the meeting, accepted the level of services put forth in the IEP. [NT 67, 178; IU-28, P-15, P-16, P-17]
73. Student attended the PIP program five mornings a week from July 19 through August 5th. Once Student began at PIP, a therapeutic setting with intensive behavioral support built into the program, Student did not require PCAs for additional behavioral support. [NT 53, 111, 150, 190; IU-30, P-19, P-21]
74. Student's case manager notes that PIP was implementing all Student's services in their entirety. [NT 184]
75. From the time of Student's attendance at PIP until January 19, 2018 when they filed for this due process hearing, the Parents did not express any concerns to Student's case manager about the PIP program or any unspecified services purportedly not being delivered while Student was in attendance. [NT 111-114, 183]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the Parents asked for the hearing and thus assumed the burden of proof.

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).

The witnesses for the IU were credible. Although the Parent presented as a loving and concerned mother, her testimony raised credibility issues. Although it was not clear whether she misunderstood, misremembered, or misrepresented information she received, her assertions about the lack of readiness of the PIP program to accept Student as early as December 2015, about the PIP program’s inability to handle Student’s behaviors, about the IU’s autistic support program’s not being a good fit for Student because of the language levels of the other children in the class, and about the partial hospitalization program’s not working with children with autism were not supported in the record. Further, and more troubling, was the fact that all her reasons for not allowing services other than speech therapy in the home crumbled during her own cross-examination and through the testimony of the IU’s witnesses. Finally, the Parent presented no evidence to support her allegation that Student did not receive unspecified services to which Student was entitled during the few weeks of attendance at the PIP program.

FAPE: Student is entitled by federal law, the Individuals with Disabilities Education Act 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). ‘Special education’ is defined as specially designed instruction...to meet the unique needs of a child with a disability. ‘Specially designed instruction’ means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26.

A child’s special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (*Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982)). FAPE “consists of educational instruction specifically designed to meet the unique needs of the handicapped child supported by such services as are necessary to permit the child to benefit from the instruction.” *Ridley School District v. M.R.*, 680 F.3d at 268-269, citing *Rowley*. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. (*Ridgewood Board of Education*). The Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with “meaningful educational benefits” in light of the student’s “intellectual

potential.” *Shore Reg'l High Sch. Bd. f Ed. v. P.S.* 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir. 1988)); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Recently, the U.S. Supreme Court considered a lower court’s application of the *Rowley* standard, observing that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Andrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017). The Court concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* at 352. This standard is consistent with the above interpretations of *Rowley* by the Third Circuit. At least two federal District Courts in Pennsylvania have recently opined that the *Andrew F.* decision did not change Third Circuit jurisprudence regarding the standards for judging whether a special education program is appropriate. *E.D. v. Colonial School District*, No. 09-4837, 2017 U.S. Dist. LEXIS 50173, at *36 (E.D. Pa. Mar. 31, 2017); *Brandywine Heights Area School District. v. B.M.*, 2017 U.S. Dist. LEXIS 47550, at *29 n. 25 (E.D. Pa. Mar. 28, 2017)

However, Local Educational Agencies [LEAs] need not provide the optimal level of service, maximize a child’s opportunity, or even set a level that would confer additional benefits; the child must be offered 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); *Ridley Sch. Dist. v. MR*, 680 F.3d 260, 269 (3rd Cir. 2012). The IDEA entitles Student to an appropriate educational opportunity, but an IEP is not required to incorporate every program, aid, or service that parents desire for their child. *Mary Courtney T; Ridley*. 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, as noted in several federal district court decisions. *See, e.g., J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). 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). *Andrew F.* did not disturb this standard which entitles a child to what is reasonable, not to what is ideal.

Compensatory Education: Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). To compensate for past violations, “[a]ppropriate remedies under IDEA are determined on a case-by case basis.” *D.F. v. Collingswood Bd. of Educ.*, 694 F.3d 488, 498 (3d Cir. 2012).

SECTION 504: Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment, or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

An LEA’s obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *See for example Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Further, the substantive standards for evaluating claims under Section 504 are essentially identical. *See, e.g., Ridley*. Courts in this jurisdiction have long recognized the similarity

between claims made under Section 504 specifically when considered together with claims under the IDEA. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Consequently, the coextensive Section 504 claim will be considered together with the IDEA claim in this case.

Discussion

In their closing brief, the Parents present themselves as the IU's "scapegoat(s)"⁵ and emphasize that under the controlling law in this Circuit the IU had the responsibility to find an appropriate placement for Student where IDEA programming could be successfully implemented. In support of their argument they cite *M.C. v. Central Regional School District* and emphasize that: "[A] child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem)...(but) [r]ather, it is the responsibility of the child's teachers, therapists, and administrators—and of the multi-disciplinary team that annually evaluates the student's progress—to ascertain the child's educational needs, respond to deficiencies, and place him or her accordingly." Although the Parent did not present as unsophisticated, it is noted that she had the assistance of counsel during the relevant period.

Contrary to the Parents' characterization of themselves as scapegoats, I find that the Parents have taken a position that actually scapegoats the IU. Commonly a "scapegoat" refers to an innocent party upon whom blame is unfairly placed; in this matter the Parents have unfairly placed blame upon the IU. At all relevant times the IU made good faith attempts to provide Student with the services to which Student was entitled. The Parents rejected these offers based on misconceptions about the programs, or on logistical concerns on which they were unwilling, or perceived that they were unable, to compromise.

Preschool Intervention Program (PIP): The PIP program represented FAPE for Student at all relevant times. The program was first offered on December 10, 2015 when Student was experiencing significant difficulties at Private School, and after five more offers on December 15th, March 3rd, May 19th, June 6th and June 20th, the Parents finally accepted PIP seven months later, on July 13, 2016, the date of the seventh offer. Although PIP was holding a spot for Student, and Student could have attended PIP for the entire duration of this claim, the Parents rejected this program because of their opinion that the program was "not ready" to accept Student or was not able to address Student's behaviors. The PIP program was an appropriate program and placement for Student, as it addressed the needs of children like Student who displayed emotional and social difficulties, offered specialized educational instruction, and provided all the related services specified in Student's IEP.

Admission to a Children's Partial Hospitalization Program Followed by Return to Private School: Although Student's behaviors had escalated even with the presence of two PCAs, Private

⁵ From Merriam Webster Dictionary: 1: a goat upon whose head are symbolically placed the sins of the people after which he is sent into the wilderness in the biblical ceremony for Yom Kippur; 2 a: one that bears the blame for others; b: one that is the object of irrational hostility

School did not shut its doors to Student; rather, it asked⁶ that Student be assisted to re-establish self-regulation skills through attending a children's partial hospitalization program at a facility near the Parents' home. The IU spoke with the Parent about this short-term program on January 27, 2016. The Parents did not visit the partial hospitalization program, but instead, based upon a telephone conversation with someone there claimed that the program did not serve children with autism. In fact, the partial hospitalization program is dually licensed and does serve children with autism, some of whom have been referred by the IU's mental health services specialist. The Parents also purportedly rejected the program because it was not an educational program; in fact, the IU provides educational services to the children for whom it is responsible who are placed in that mental health facility.

Autistic Support Classroom: On February 9th and again on March 7th 2016 the IU offered to place Student in its Autistic Support classroom, a program Student had briefly attended in the past. While not presenting any evidence to support their decision other than that the Parent had viewed the classroom and spoken with the teacher, the Parents rejected this placement on the assertion that the teacher said that the students in the class were "non-verbal". Student's speech therapist assesses Student's skills as being between non-verbal and being able to hold a coherent conversation. An evaluating IU psychologist noted that Student's speech was very hard to understand, requiring frequent translations by the Parent.

Approved Private School (APS): On March 7, 2016 at the request of the Parent and the Parents' attorney the IU agreed to support placement at an APS. The Parent signed permission for a records release, and the IU set up a tour for the Parents. The Parents did not tour the APS and rejected the program their counsel had suggested because they determined that the program was too far from their home if they needed to retrieve Student unexpectedly and because responsibilities of caring for the sibling interfered.

Services in the Home: As soon as the Parents removed Student from Private School the IU offered to provide Student's services in the home during the time Student was not in a classroom-based program. Maintaining that services in the home were not an option, the Parents rejected all the offered home based services with the exception of speech therapy.

The Parents' stated reasons for rejecting the NOREP offering home-based services were: scheduling issues because sibling was already receiving some home services; home was small; too much foot traffic in the home is disruptive and agitates Student if both children had therapy there; both children receiving therapy in the home was tried but the Mother was supposed to participate in the therapies for both children; the sibling's part-time schedule at a placement outside the home involved instances when the Parents had to drop off and pick up the sibling; the sibling had various appointments with medical specialists.

However, the Parent's testimony under cross examination at the hearing revealed that in fact the sibling was receiving all services in a classroom setting and had only one person coming to the

⁶ Private School also requested that Student have a psychiatric evaluation. Although Student did receive the psychiatric evaluation at a practice chosen by the Parents, as was their right the Parents opted not to have Student take the prescribed medication, the only recommendation from the psychiatric evaluation that is on the record before me. The Parent was highly critical of the psychiatrist's procedures.

home once a month during the relevant period. Moreover, speaking to the issue of overcrowding and overstimulation, the IU offered to provide Student's related services at home during the times of the day that the sibling was in the classroom placement. The Parents maintain that other than speech therapy the family could not accept services in the home because the providers couldn't work with their schedules. However, although five different providers contacted the family and attempted to set up services on behalf of the IU, the Parent alleged that the providers wanted to schedule the services during the period that Student had speech therapy. The speech therapist noted that the Parent did not ever ask her to modify Student's speech schedule to accommodate other providers.

The need for a Parent to participate in related service therapies, and the Parents' unavailability due to their work schedules was another purported basis for rejecting home services beginning in February 2016. The Mother was not working from January 2016 to sometime in June 2016 and was home during the day with Student. When the Mother began working in June 2016 the Father was home during the day when Student received speech services.

Reduction of Services: Although, with the exception of speech therapy, the Parents rejected all the classroom-based and home-based services that were offered to Student, they now argue that compensatory education is owed to Student because the services they rejected were inappropriately reduced. The evidence shows that the IEP team made changes in type and level of services in light of the types of settings in which the IEPs were going to be implemented. I agree with the IU's position, articulated in its written closing statement, that the IEP team made its determinations about the level of services in various placements based on Student's needs and logic, not upon an arbitrary calculation of hours of service. Given the Parents' rejection of classroom-based placements, the IEP team made reasonably calculated choices to offer Student FAPE.

Twenty hours of specially designed group instruction were provided weekly at Private School. The record is silent on the number of hours the IU's autistic support classroom or the APS offered. However, in July 2016 with consultation from their attorney, the Parents approved the PIP program which provides 15 hours of services weekly. Prior to that date, given that the Parents rejected PIP and the other classroom-based settings offered, the only remaining option for provision of these hours of specially designed instruction would have been to provide them in the home. As discussed above, the Parents claimed scheduling difficulties for all the services the IU offered to provide in the home except for two speech therapy sessions totaling one-and-a-half hours a week. Chances are exceedingly slim to none that they would have accepted twenty hours of home-based specially designed instruction had these been offered. Along with every other service except speech, the Parents rejected the hour of individual specialized education per week that was offered.

Group speech therapy and group occupational therapy could not be provided in the family's residence without bringing other non-related disabled children into the home, an exercise fraught with pitfalls that are not hard to conjure, including the Parents' renter's liability and the other children's confidentiality. Notably when the IEP team converted Student's weekly one hour of individual speech therapy and one hour of individual therapy at Private School to one-and-a-half

hours of individual speech therapy at home the Parents accepted this offer; they are not disputing the amount of speech services Student received.

At Private School Student received 30 minutes of individual occupational therapy and 30 minutes of group occupational therapy. When the IEP team crafted an IEP to be delivered at home, one hour of occupational therapy was offered, increasing the intensity of occupational therapy services.

At Private School Student had two full-time PCAs to handle aggressive behavior that was a danger to self, staff and other children. Additionally school staff received two hours per month of behavior specialist consultant services. The IEP team determined that PCAs were not needed in the home because Student's behaviors were different in the home than they were at Private School; the Parent reported to an evaluating school psychologist that Student was not having the same types of behavioral challenges at home that were seen in school. The IEP team increased the hours of behavior specialist consultation from two hours per month to two hours per week. The Parents rejected this service.

The Parents argue that once Student started attending PIP, the levels of behavioral support were not modified back to the levels offered at Private School. In fact, the PIP program is a therapeutic setting with intensive behavioral support built into the program such that Student did not require additional behavioral support. Student successfully participated in the PIP program during the weeks of attendance there, and no evidence was presented that Student's behaviors there were not manageable such that behavioral support needed to be increased.

Compensatory Education: Although Parents were undoubtedly within their rights to reject any or all offered services, their decisions did not impose upon the IU a legal duty to conform its offers to their preferences. I find that at all relevant times the IU offered Student FAPE in accord with Student's circumstances. Unfortunately, except for speech therapy and the several weeks of attendance at PIP, the Parents chose not to allow Student to receive the services the IU offered. The Parents' request for a remedy of compensatory education must be denied. Compensatory education is an equitable remedy; when Parents actively prevent the LEA from delivering FAPE, the remedy is reduced or eliminated.

Section 504 and PA Chapter 15: Section 504 and PA Chapter 15 require that children with disabilities be provided with FAPE. Although the provisions of IDEA/PA Chapter 14 and related case law in regard to providing FAPE are more voluminous than those under Section 504 and PA Chapter 15, the standards to judge the provision of FAPE are broadly analogous, and in fact the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. I conclude that the [IU], by offering Student a FAPE as defined in the IDEA, also offered Student appropriate services and accommodations that could have met Student's individual needs as adequately as the needs of non-handicapped children served by the IU are met. In this case, compliance with the IDEA is preponderant evidence that the IU also complied with section 504 and PA Chapter 15, and therefore no remedy is owed.

Order

It is hereby ordered that:

The IU offered Student FAPE during the period from January 19, 2016 through August 5, 2016.

As the IU offered Student FAPE during the relevant period, compensatory education is not due.

Any claims not specifically addressed by this decision and order are denied and dismissed.

Linda M. Valentini, Psy.D., CHO

June 13, 2018

Linda M. Valentini, Psy.D. CHO
Special Education Hearing Officer
NAHO Certified Hearing Official