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 Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number
23059-19-20

Child's Name
A.O.

Date of Birth
[redacted]

Parent(s)/Guardian(s)
[redacted]

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Hearing Officer
Brian Jason Ford, JD, CHO

Date of Decision
05/18/2020

Introduction

This matter concerns a child with disabilities (the Student). The Student's parent (the Parent) requested this due process hearing and alleges that the Student's school district (the District) violated the Student's educational rights under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.; Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*.; and the Americans with Disabilities Act as Amended (ADA), 42 U.S.C. § 12101 *et seq*.

More specifically, the Parent alleges that the District failed to develop and implement a special education program to appropriately address the Student's behaviors. The Parent alleges that the District's program failed to provide an appropriate response to the Student's behaviors and failed to provide appropriate services to curb the Student's behaviors.

The Parent alleges, and the District concedes, that the Student was excluded from school for a period of time.

The Parents demand compensatory education to remedy these violations.

For reasons discussed below, I find partly in favor of the Parent and partly in favor of the District.

Issues

The parties parse and phrase the issues differently but, except as noted, there is no dispute that these issues are presented:

1. Did the District violate the Student's right to a free, appropriate public education (FAPE) during the 2018-19 and 2019-20 school years by failing to develop an individualized education program (IEP) that appropriately addressed the Student's behavioral needs?

2. Did the District violate the Student's right to a FAPE by excluding the Student from school during the 2019-20 school year?

3. Did the District violate the Parent's right to meaningfully participate in the development of the Student's special education program?

During the hearing, the Parent presented some evidence concerning the Student's academic progress. The Parent alleges in the Parent's closing statement that the District violated the Student's rights by failing to provide appropriate academic interventions and argues that this is an independent basis to award compensatory education. No claims concerning the Student's academic performance were raised in the Parent's complaint, and so I will not address that issue. Such evidence was proper at the hearing to establish the impact of the Student's behaviors upon the Student's academics, which is relevant to the method of compensatory education calculation that the Parent advances.

The Parent also alleges that the Student's current placement violates the Student's right to be educated in the least restrictive environment (LRE). The Parent filed the complaint on November 26, 2019, and the Student began attending the current placement in late January 2020, after the first session of this hearing. Claims concerning the appropriateness of the Student's current placement (LRE or otherwise) are not raised in the complaint because the Student's current placement started while this hearing was under way. I cannot hear an issue that was never pleaded and so I cannot address this issue.[1]

[1] Procedurally, I had no authority to accept an amended complaint at the time that the Student's current placement started without the District's agreement. The Parent did not present an amendment or (to my knowledge) seek the District's consent to file an amendment. Further, the IDEA explicitly permits the Parent to file subsequent complaints concerning issues that were not raised in this due process hearing. To my knowledge, the Parent has not filed a subsequent complaint as of the date of this decision.

Findings of Fact

While the parties reach different conclusions about whether the facts of this case evidence a violation of any law, there is nearly complete agreement between the parties as to what the facts of this case are. Comparing the parties' opening statements and written closing statements underscores this point and forces me to wonder if this matter could have been more efficiently resolved on a stipulated record.

Regardless, I have reviewed the record in its entirety. I make findings only as necessary to resolve the issues before me. I find as follows:

2017-18 School Year [redacted]

1. The Student attended school in a different school district (the Prior District) for nearly the entirety of the 2017-18 school year. The Student transferred into the District in May 2018. P-4, P-5, S-16, S-17.

2. The Prior District evaluated the Student, determined that the Student should receive Speech and Language services, and drafted a Section 504 Service Agreement for the provision of such services. P-2, P-3, S-14, S-15.

3. Documents from the Prior District indicate that the Student carries an Autism diagnosis predating the Prior District's evaluation, and that the Parent had ongoing concerns about the Student's behaviors at home. However, the Prior District concluded that the Student did not satisfy the IDEA's definition of a child with Autism based on its evaluation. Further, the Prior District's evaluation affirmatively found that the Student had no significant behavioral needs in school and did not require school-based behavioral interventions. *See* P-5.

4. The Student's evaluation and Section 504 plan transferred with the Student from the Prior District to the District. Upon receipt of those documents, the District drafted an IEP for the Student to provide comparable Speech and Language services. P-5, S-16.

5. The District provided Speech and Language services through an IEP because it views such services as special education accommodations, not because it reached a different conclusion about the Student's needs from the Prior District's evaluation. *Passim*.

6. There is no evidence that the Student displayed inappropriate behaviors in school from the Student's transfer into the District through the end of the 2017-18 school year. *See, e.g.* NT 609.

2018-19 School Year [redacted]

7. There is no evidence that the Student displayed inappropriate behaviors in school from the start of the 2018-19 school year until April 2019. *See, e.g.* NT 482.

8. The Student exhibited a series of inappropriate behaviors in school starting in April 2019. Those behaviors, and the discipline that the District imposed, are as follows:[2]

Date	Behavior	Discipline
04/05/2019	Inappropriate Contact [redacted]	1 Day Out of School Suspension (OSS)
04/10/2019	Defiance, Disruption	Conference with Student
04/11/2019	Defiance, Disruption	Office Timeout

[2] This chart is adopted from a chart within the Parent's written closing statement and is supported by evidence (P-13 in particular). The chart in the Parent's closing indicates a 1-day OSS on 5/21 and a .5-day OSS on 5/22. I find that forms within P-13 dated 5/21 and 5/22 report the same incident, for which the Student received a .5-day OSS. *See* P-13 at 14, 15, 16.

Date	Behavior	Discipline
04/16/2019	Defiance, Disruption	1.25 Days OSS
04/25/2019	Destruction of School Property	2 Days OSS
05/07/2019	Defiance, Vandalism, Throwing Objects	1 Day OSS
05/15/2019	Insubordination	Removal from Classroom
05/22/2019	Defiance, Disruption, Throwing Objects	.5 Day OSS
06/11/2019	Physical Aggression	2 Days OSS

9. The first instance of the Student destroying school property occurred on April 25, 2019. *See above*. I take notice that April 25, 2019 was a Thursday. The following Tuesday, April 30, 2019, the District sought the Parent's consent to evaluate the Student. P-6, S-18.

10. The District's proposed evaluation was to include standardized assessments of cognitive ability and academic achievement, assessments of social, emotional, and behavioral functioning, an Autism assessment, a Speech and Language assessment, curriculum-based assessments, Parent input, and teacher input. P-6, S-18.

11. The District convened an IEP team meeting for the Student on May 16, 2019. *See, e.g.* P-9 at 2.

12. I find that the Parent provided consent for the District to conduct the proposed reevaluation on May 16, 2020 either during, immediately before, or immediately after the May 16, 2019, IEP team meeting. *See* P-6, S-18.

13. The District did not complete the evaluation during the 2018-19 school year. P-11, S-5.

14. The District presented a safety plan during the May 16, 2019 IEP team meeting. S-1, NT 616. The safety plan was not attached to an IEP that the District also presented during the May 16, 2019 meeting and was never separately issued to the Parent. *See, e.g.* P-8.

15. The May 2019 IEP is a revision to the Student's prior IEP. Both IEPs provided 30 minutes of Speech and Language support per week. The Prior IEP included no program modifications or specially designed instruction (SDI). The May 2019 IEP included three items in the modifications and SDI section (*c/f* P-5, P-8):

    a. Staff will follow [Student's] safety plan.

    b. Trained staff will follow Safety Cares training procedures when [Student] is demonstrating escalated behavior.

    c. Staff will monitor [Student's] behavior. If [Student] is showing escalated behaviors, the main office staff will be contacted.

16. There is no dispute that the Parent approved the May 2019 IEP through a Notice of Recommended Educational Placement (NOREP). *See, e.g.* Parent's Closing Statement at 10-13.[3]

[3] Were it not for the lack of dispute on this point, I would find to the contrary. Exhibit P-9 is a four-page document titled by the Parent's attorney "P9 NOREP 5.16.19.pdf." The first two pages are pages of a NOREP dated May 16, 2019. The second two pages are an invitation to the May 16, 2019 IEP team meeting. The NOREP's signature page (the mechanism by which the Parent can approve or reject the IEP revision) is not included. However, the first page of the NOREP includes a description of the action that the District proposed. That description says nothing about adding the safety plan to the Student's IEP. NOREPs need not, and should not, include a verbatim copy of IEP changes. NOREPs must, however, include enough information for parents to receive notice of proposed changes. The NOREP at P-9 is silent about only change to the IEP, making it an ineffective *notice of the recommended educational placement*. Without such written notice, the District simply did not offer the May 2019 IEP – at least not in any way that complies with the IDEA's procedural protections.

17. Safety Cares is a protocol and training program through which school personnel learn de-escalation techniques and, should those fail, procedures for physically restraining children. *Passim*.

18. The safety plan called for teachers to watch the Student for signs of escalating behavior and call building personnel trained in Safety Cares if the Student's behaviors escalate. Those personnel would then implement de-escalation strategies and restraints if required. Whether or not restraint was required, the safety plan called for school personnel to contact the Parent, who was to come to school and take the Student home. The safety plan also called for documentation of behavioral incidents requiring intervention by Safety Cares-trained personnel and following general crisis intervention procedures. P-7.

19. Three behavioral incidents occurred after the May 2019 IEP and safety plan were in place. Two of the three occurred in the classroom. Safety Cares-trained personnel were called on both of those occasions. The Student was not restrained. The third occasion occurred on the playground. There is no evidence that Safety Cares-trained personnel were called in response to the third incident, which was the only incident involving a [redacted]. All three incidents resulted in out of school suspensions. P-13.

20. As part of the reevaluation, a Functional Behavioral Assessment (FBA) was completed by the Intermediate Unit (IU) in which the District is located. The FBA was completed on June 5, 2019, before the remainder of the evaluation.P-10.

21. A Positive Behavior Support Plan (PBSP) was attached to the FBA.P-10. The PBSP was a lightly modified version of a generic, template behavior plan. NT 235-239. The PBSP contemplated restraint and included a protocol for what the District (or any school) must do after a restraint. The protocol parrots the District's legal obligations whenever any child with a disability is restrained.P-10.

22. The PBSP includes skills that the Student should learn, like self-calming strategies, and replacement behaviors (things that the Student should do instead of the problematic behaviors). P-10.

23. The Student's [redacted] grade teacher retired at the end of the 2018-19 school year. *Passim.*

The 2019-20 School Year [redacted]

24. The District reconvened the Student's IEP team on September 16, 2019. *See, e.g.* S-4. At that time, the PBSP was incorporated into the Student's IEP.[4]

25. The District completed the reevaluation with the issuance of a Reevaluation Report on September 24, 2019 (the 2019 RR). S-5, P-11.

26. The 2019 RR included (S-5, P-11):

    a. a review of the Student's educational records,

    b. input from the Student's [redacted] grade teachers concerning the Student's academic performance from the start of the 2019-20 school year through September 24, 2019,

[4] There is no dispute that the PBSP was incorporated into the IEP on September 16, 2019. But, as with the May 2019 IEP, there is no documentary evidence in the record of this hearing that the District ever offered the September 16, 2019 IEP or that the Parent accepted the offer. This time, the absence goes beyond a flawed NOREP. No NOREP accompanying the September 2019 IEP was entered into evidence.

c. classroom observations by the District's school psychologist and the District's guidance counselor,

d. a review of the accommodations that the Student was receiving at the time of the evaluation,

e. standardized, normative tests of the Student's cognitive abilities and academic achievement,

f. a standardized Autism assessment based on evaluator observations,

g. standardized behavior rating scales including a broad-based behavior rating, and other more targeted scales used to assess behaviors associated with Autism, executive functioning, and emotional disturbance, and

h. A summary of the June 5, 2019 FBA.

27. The District's evaluator sought no information from the Student's [redacted] grade teacher.

28. The standardized testing found that the Student's full-scale IQ is squarely in the average range, with index scores ranging from average to high average. S-5, P-11.

29. The standardized testing found that the Student's academic achievement was also average across all composite scores (Total Reading, Basic Reading, Reading Comprehension and Fluency, and Mathematics). The Student scored in the average range on all sub-tests that make up those composite scores. S-5, P-11.

30. The standardized Autism evaluation was completed by the District's evaluator by observing the Student in school and scoring the Student's behaviors in a standardized way. The evaluator found that the Student's behaviors in school were "Non Spectrum," meaning that the Student's observed behaviors in school were not consistent with an Autism diagnosis. S-5, P-11.

31. The Autism-specific, broad-based, and executive functioning behavior rating scales are designed to be completed by parents and teachers so that the evaluator can compare the rater's responses and the subject's behaviors in different environments. The District sent these rating scales to the Parent and the Student's [redacted] grade teacher. S-5, P-11.

32. The Parent did not complete the rating scales. S-5, P-11.

33. The [redacted] grade teacher's responses to the Autism-specific rating scale indicated that the Student was not exhibiting behavioral symptoms of Autism in school. S-5, P-11.

34. The [redacted] grade teacher's responses to the broad-based rating scale placed the Student in the average range in the Externalizing Problems, Internalizing Problems, and School Problems composites. The responses placed the Student in the "At Risk" range in the Behavioral Symptoms Index (an overarching rating that draws from the prior composites that reflects the Student's "overall level of problem behaviors"), and the Adaptive Skills composite (which rates emotional control, social skills, and board executive functioning). S-5, P-11.

35. The evaluator described the "At Risk" findings as a "slight elevation" based on the [redacted] grade teacher's reports that the Student could sometimes have problems with temper, peer relationships, compliance with teacher directions, and remaining on task. S-5, P-11.

36. The [redacted] grade teacher endorsed ratings that the Student would lose temper "too easily, defy teachers, and tease peers… at times refuses to speak, isolates [self] from others, and prefers to play alone takes time to recover after a set back [sic], does not make positive comments about peers, offers to help others, or encourages others to do their best. In addition, [Student] at times is unclear when presenting ideas, has difficulty remaining on task, and is unable to describe … feelings accurately." S-5, P-11.

37. The 2019 RR concluded that the Student continued to be a child with a disability who required special education. Specifically, the Student was found to be a child with a Speech or Language Impairment, but no other disability category. S-5, P-11.

38. The 2019 RR recommended that the Student should receive speech and language support services in a small group, one session per week, 30 minutes per session, to target the production of the /r/ sound. S-5, P-11.

39. The 2019 RR also recommended that the Student should "receive school counseling services one time per week for 30 minutes to teach, model, and practice appropriate self-regulation skills, coping skills, problem solving strategies, communication skills and social skills through role play, activities, social stories etc." P-11 at 22.

40. The 2019 RR also recommended consistent implementation of the PBSP. S-5, P-11.

41. The IEP team reconvened on October 18, 2019. During that meeting, the District proposed a revised IEP that added the social skills group recommended in the 2019 RR. *See, e.g.* S-6, P-12.

42. The District offered the October 2019 IEP with a NOREP dated October 14, 2019 but actually issued on October 18, 2019 (the day of the IEP team meeting). The Student's father approved the NOREP the same day. P-12.

43. I take notice that October 18, 2019 was a Friday. The October 2019 IEP was to be implemented starting on October 21, 2019 (the following Monday). P-12.

44. The Student did not receive the social skills group indicated in the October 2019 IEP. *See* NT 107, 692.

45. There is no record of the Student exhibiting behaviors warranting a significant disciplinary response during the 2019-20 school year prior to October 29, 2019.

46. On October 29, 2019, the Student began to exhibit the same sort of behaviors seen at the end of the 2018-19 school year, but this time with a more physical component. *See* P-13. Those behaviors, and the discipline that the District imposed, are as follows:[5]

Date	Behavior	Discipline
10/29/2019	Physical aggression towards a [redacted]	1 Day OSS
11/01/2019	Aggressive behavior and refusal to follow adult direction	1 Day OSS
11/08/2019	Physical aggression resulting in the [redacted] and destruction of school property.	3 Days OSS increased to 6 day OSS.

[5] As with the prior chart, this chart is adopted from a chart within the Parent's written closing statement and is supported by evidence (P-13 in particular).

47. For context, I take notice that October 29, 2019 was a Tuesday. The Student was suspended out of school on Wednesday and returned Thursday. There were no incidents on Thursday, but the Student again exhibited aggression and refusal to follow instructions that Friday, November 1, 2019. The Student was suspended out of school on Monday, November 4, 2020. The Student returned and made it to the end of that week before the next (and final) incident on November 8, 2019. *See* P-13.

48. During the November 8, 2019 incident, the Student became dysregulated, destroying school property. The Student took actions resulting in an [redacted]. The Student also [redacted]. NT 568-573, 579, 618, 621, 623, 698.

49. Based on the record before me, I find that no District employee physically restrained the Student by holding the Student during the November 8, 2019 incident. *Passim*. Rather, the District called the [redacted]. [redacted]. NT 568-573, 579, 618, 621, 623, 698.

50. The District initially issued a three-day suspension following the November 8, 2019 incident (November 11-13, 2019).

51. The Parent requested a meeting, and the District convened a meeting on November 13, 2019. Both parties were accompanied by attorneys. During that meeting, the District announced that it was increasing the Student's suspension from 3 days to 10 days. The Parent informed the District that a 10-day suspension would trigger the need for a manifestation determination. The District then reversed itself, extending the suspension from 3 says to 6 days. *See, e.g.* NT 593.

52. During the November 13, 2019 meeting, District personnel recommended that the Student transfer to a diagnostic placement located outside of the Student's school and run by the IU. *See, e.g.* NT 756-757.

53. While the exact date is not clear (and ultimately not relevant), the District decided that it would not permit the Student to return to its elementary school. *Passim, see also* District's Complaint, ODR 23040-19-20.

54. The Parent toured the IU placement. During the tour, the Parent formed the impression that IU personnel understood that they were about to accept the Student into a full-time Emotional Support placement for the remainder of the 2019-20 school year.[6]

55. On November 20, 2019, the District issued a NOREP stating that a third-party Medicaid management program determined that it was medically necessary for the Student to attend the IU program, and that the Student would receive special education from the IU program as well. P-18. These statements are not true, and the NOREP was issued in error.

56. On November 21, 2019, the District issued a corrected NOREP indicating that the IU placement was a diagnostic placement. P-19. While the NOREP in evidence is not marked, there is no dispute that the Parent rejected the District's offer.

[6] The Parent's testimony concerning what IU personnel told the Parent during the tour is hearsay if used for the purpose of establishing what IU personnel understood. I accept the Parent's testimony on this point as one basis of the Parent's own understanding of what the IU placement was intended to be.

57. On November 22, 2019, the District filed a due process complaint naming the Parent as a respondent. ODR assigned that matter, No. 23040-19-20, to me. In its complaint, the District sought an order approving the IU placement. The District alleged that permitting the Student to return to the elementary school would create a danger to the Student and others.

58. November 22, 2019 was a Friday. The Parent filed a complaint initiating this matter on November 26, 2019 – the following Tuesday. ODR assigned the new matter to me.

59. The parties continued to discuss placement options for the Student.[7] They identified and agreed to a different facility for a diagnostic placement, ending the dispute raised in the District's complaint. The District withdrew its complaint on December 31, 2019, and the Student began attending the new placement on January 27, 2020. NT 822-824.

60. Between November 8, 2019 and January 27, 2020, the District provided no instruction or special education to the Student whatsoever. *Passim.*

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must 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). One purpose of an explicit credibility determination is to give courts the information that they need in the event of

[7] My impression is that these discussions were intermediated by attorneys, but I make no finding in that regard.

judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *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 hearing, the parties interpret the facts differently and reach different conclusions about what the law requires, but almost none of the underlying facts are in dispute. Some facts were stipulated. All documentary evidence was entered via stipulation. While I cite to testimony as the bases of some of the facts that I found, it is not clear if any of those findings were ever truly in dispute.

Nevertheless, to the extent that an explicit credibility determination is necessary in all due process hearings, I find that all witnesses testified credibly despite strong differences in opinion and memory.

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 its 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 is 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 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.

Third Circuit consistently 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). In substance, the *Endrew F.* decision in no different.

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. Grade-to-grade progression, therefore, is not an absolute indication of progress even for an academically strong child, depending on the child's circumstances.

In sum, 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.

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). In *Reid*, the court 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. *Reid* is the leading case on this method of calculating compensatory education, and the method has become known as the *Reid* standard or *Reid* method.

The more nuanced *Reid* method 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 *Reid* 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) are warranted. Such awards are fitting 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*. 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. 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. Full-day compensatory education can also be awarded if that standard is met. 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.

Section 504/Chapter 15

At the outset, it must be noted that an LEA may completely discharge its duties to a student under Section 504 by compliance with the IDEA. Consequently, when a Student is IDEA-eligible, and the LEA satisfies its obligations under the IDEA, no further analysis is necessary to conclude that Section 504 is also satisfied. Conversely, all students who are IDEA-eligible are protected from discrimination and have access to school programming in all of the ways that Section 504 ensures.

"Eligibility" under Section 504 is a colloquialism – the term does not appear in the law. That term is used as shorthand for the question of whether a person is protected by Section 504. Section 504 protects "handicapped persons," a term that is defined at 34 CFR § 104.3(j)(1):

> *"Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."*

Chapter 15 applies Section 504 in schools to prohibit disability-based against children who are "protected handicapped students." Chapter 15 defines a "protected handicapped student" as a student who:

1. Is of an age at which public education is offered in that school district; and
2. Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program; and
3. Is not IDEA eligible.

See 22 Pa. Code § 15.2.

Section 504 and Chapter 15 prohibit schools from denying protected handicapped students' participation in, or the benefit of, regular education. See 34 C.F.R. Part 104.4(a). Unlike the IDEA, which requires schools to provide special education to qualifying students with disabilities, Section 504 requires schools to provide accommodations so that students with disabilities can access and benefit from regular education.

To accomplish this, a "school district shall provide each protected handicapped student enrolled in the district, without cost to the student or family, those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities." 22 Pa Code § 15.3.

Students are evaluated to determine what related aids, services, or accommodations that a student needs. Chapter 15 includes for conducting such evaluations. 22 Pa. Code §§ 15.5, 15.6.

The related aids, services or accommodations required by Chapter 15 are drafted into a service agreement. Chapter 15 defines a service agreement as a "written agreement executed by a student's parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected handicapped student." 22 Pa. Code § 15.2. Service agreements become operative when parents and schools agree to the written document; oral agreements are prohibited. 22 Pa Code § 15.7(a).

For IDEA-eligible students, the substance of service agreements is incorporated into IEPs. Such students do not receive separate service agreements.

When parents and schools cannot reach an agreement, a number of dispute resolution options are available, including formal due process hearings. 22 Pa Code §§ 15.7(b), 15.8(d).

Discussion

The Student came to the District at the end of the 2017-18 school year as a [redacted] with a Section 504 Service Agreement. While the records available to the District at that time indicated both an Autism diagnosis and parental concerns about the Student's behavior at home, those same records indicated that the Student did not exhibit negative behaviors in school. The Parent argues that these records should have alerted the District to potential behavioral problems. I disagree. These records show that, according to the Prior District, the Student needed nothing more than Speech and Language support at the time of the transfer.

Shortly after the transfer, the District drafted an IEP for the Student. While the District's reasoning is not technically relevant, it provides important context. It is not as if the District received the Student and concluded that the Prior District misclassified the Student or failed to provide a sufficient level of service. Rather, the District provides Speech and Language support through IEPs. The District drafted an IEP for the Student so that the Student could receive the same supports provided by the Prior District.

The District's action in offering the Student an IEP, however, forces the conclusion that the Student is protected by the IDEA as a matter of law (the parties do not dispute that the Student satisfies the IDEA's definition of a child with a disability). While the IEP may have been the District's mechanism to provide Speech and Language support to the Student, the action of issuing an IEP to the Student enhanced the Student's protections.[8]

There is no evidence to suggest that the Student exhibited behaviors in school during the 2017-18 school year that should have prompted the District to assess the Student's behavioral needs.

The same analysis applies through the 2018-19 school year until April 5, 2019. During that period of time, there is nothing to suggest that the Student's behavioral needs in school were unmet, or that further evaluation was required.

I find no volition of the Student's right to a FAPE for the period of time that the Student attended the District in the 2017-18 school year, or the 2018-19 school year from the start of the 2018-19 school year through April 5, 2019.

The Student's behavior in school changed suddenly and significantly starting on April 5, 2019. From that date through the end of the 2018-19 school year, the Student engaged in 10 behavioral incidents yielding discipline. Seven of those incidents resulted in out of school suspensions totaling 8.75 days out of school. The calendar reveals a pattern. The District would suspend the Student, the Student would come back to school for about a week and then would be suspended again.

[8] The IDEA cautions against offering IEPs to children who do not satisfy its definition of a child with a disability. It does this in two ways: 1) it establishes evaluation criteria that must be used in eligibility determinations and 2) requires statistical reporting as a check against overrepresentation.

At the same time, the District learned that the Student's parents were [redacted]. No evidence was presented establishing a causal connection between the Student's behaviors starting in April 2019 and the Parent's [redacted]. More importantly, even assuming that the Student's behaviors were triggered by events at home, that conclusion does not alter the District's obligations to the Student under the IDEA.

Five incidents occurred between April 5, 2019 and April 30, 2019 (the last incident in that timeframe was April 25). Those five incidents resulted in 4.25 days of OSS. All five incidents were objectively serious and potentially dangerous to the Student or others.[9] With or without a parental [redacted], this sudden and dramatic behavioral change is exactly the sort of "red flag" that schools must be on the lookout for. The District's request to evaluate the Student was consistent with IDEA mandates and the timing of the request (April 30, 2019) was appropriate.

The District's next actions, presenting a safety plan and revising the IEP to reference the safety plan while the evaluation was pending, did not violate the Student's right to a FAPE. I make this determination in large part because the safety plan did not represent a substantive change in the Student's special education program.

The IDEA requires schools to develop special education services for each eligible child in response to data and evaluations. In this case, the District could not know what the pending evaluation would reveal, and therefore could not guarantee that anything added to the IEP while the evaluation was pending would be appropriate. At the same time, the District was aware of the Student's new, escalating negative behaviors. Therefore, it was appropriate under the circumstances of this case to review a safety plan

[9] *See* P-13 for a description of each incident.

with the Parent, *not* make the safety plan part of the Student's IEP, but revise the IEP to reference the safety plan. This holding is limited to the specific facts of this case.

The Parent argues that the safety plan's existence outside of the IEP indicates the District's effort to add restraints to the IEP in a roundabout way that subverted the Parent's right to meaningful participation. I disagree. The District made the Parent aware of the safety plan during a meeting, and both parties agreed to revise the IEP to reference the safety plan.

My analysis is predicated on my determination that the safety plan does nothing more than recite the practices that the District uses for all students. Its presentation during a meeting and reference in the IEP served only to highlight the policies and procedures that were already in place. Adding the Student's name to a template safety plan that was already in use in practice, and then referencing that document in the Student's IEP does not constitute a substantive change to the Student's IEP.

The FBA and PBSP were complete just before the end of the 2018-19 school year but the evaluation as a whole was still pending and within statutory timelines. The District's lack of action between the May 2019 IEP revision and the end of the 2018-19 school year, therefore, violated no IDEA mandate.

Under the standards that I must apply, I find that the District did not violate the Student's right to a FAPE during the 2018-19 school year. The District proposed an evaluation as soon as the Student's behaviors reached a point were an evaluation was clearly necessary. The District also highlighted its existing policies that it would use to help ensure the Student's safety while the evaluation was pending. The District also did not violate the Parent's right to meaningful participation in special education development during this time.

The FBA and PBSP were completed on June 5, 2019. The record in this case substantiates the Parent's claim that the PBSP is little more than a template with the Student's name added to it. In this way, the PBSP is very much like the safety plan implemented at the end of the 2018-19 school year. Unlike that safety plan, the PBSP was supposed to be based on information gathered through a Student-specific evaluation (the FBA).

It is possible, at least in theory, that an FBA could reveal that a student's needs and a template PBSP are a match. The Parents presented no evidence about what a Student-specific PBSP should have contained. For purposes of analysis, I will assume that the PBSP was appropriate.

In this case, FBA and PBSP signal that the Student did not have necessary skills to self-regulate emotions and behavior. Nothing in the PBSP explained how the District would teach those skills. More often than not, that explanation is contained within an IEP, which specifies what SDI the school will provide. The District did not specify how it would teach the Student the skills that the PBSP called for when it incorporated the BPSP into the Student's IEP on September 16, 2019.

I find that the incorporation of the PBSP into the IEP without a clear explanation about what the District would do to teach the Student the skills required by the PBSP did not substantively violate the Student's right to a FAPE from September 16, 2019 through October 18, 2019. The FBA and PBSP are part of the 2019 RR. The District was not obligated to revise the IEP until the 2019 RR was completed.

The District completed the 2019 RR eight days later on September 24, 2019 and convened an IEP team meeting on October 18, 2019. My analysis changes on the day of the IEP team meeting. The 2019 RR was complete, and so the status of the evaluation is not a defense from this point onward.

The 2019 RR was slightly flawed. I find no flaw in the 2019 RR except for the lack of caution in the evaluator's reliance on behavior rating scales completed by the Student's [redacted] grade teacher.

The Parent approved the 2019 RR on May 16, 2019. At that time, the District's evaluator had access to the Student's [redacted] grade teacher. The [redacted] grade teacher knew the Student for nearly an entire school year and had first-hand experience with the Student's behaviors. Unfortunately, by the time that the District started the evaluation in earnest, the [redacted] grade teacher had retired, and the District's evaluator sought information from the Student's [redacted] grade teacher. Based on the 2019 RR's completion date (September 24, 2019), the [redacted] grade teacher knew the Student for about a month and had not seen the Student exhibit behaviors similar to those exhibited starting in April of the 2018-19 school year.

The [redacted] grade teacher testified voluntarily at the hearing and said that she would have completed behavioral rating scales in her retirement, had she been asked. I do not assume that the District's evaluator knew that at the time of testing. Asking retired teachers to complete behavior ratings scales is not common. It is understandable, therefore, that the District's evaluator did not seek out the [redacted] grade teacher. I do not fault the District's evaluator for getting information from the Student's [redacted] grade teacher. Rather, I am surprised that the District's evaluator knew about the Student's behaviors at the end of [redacted] grade but did not assess information from the [redacted] grade teacher with greater caution.

The applicable ratings scales do not simply ask whether the rater has observed those behaviors, but also collects information about the frequency of those behaviors. The [redacted] grade teacher's endorsements on the broad behavior rating scale are noted above. When those responses are

calculated using a standard method that factors frequency information and yields a standard score, the results support the District's evaluator's conclusion: the At Risk behaviors reported by the [redacted] grade teacher represented only a slight elevation above what is expected of a typical [redacted] grade student.

The broadest marker of the Student's overall level of problem behaviors, the Behavioral Symptoms Index, was 11 points off the expectation measured as a t-score (2 points off the average range). The same variance was found in the Adaptive Skills composite, albeit measured in the opposite direction. In this context, a t-score measures the difference between an expected behavior and an observed behavior. I take notice that, on the BASC-3, t-scores of 59 or lower are described as "Average," 60 to 69 are described as "At Risk," and 70 or above are described as "Clinically Significant." The Student's most elevated scores just broke into the At-Risk range and were not Clinically Significant as that term is used by the rating's publisher.

Those elevations, however slight, were in particularly important domains given the Student's behaviors at the end of [redacted] grade and the period of time that the [redacted] grade teacher knew the Student. While that period of time did not violate the publisher's validity guidelines, it is hard to conceptualize any rater describing a behavior as frequent after knowing a subject for a relatively short period of time. Additionally, the Student's Externalizing Behaviors composite score (a measure of the risk for aggression, hyperactivity, and conduct difficulties) was one point below the "At Risk" range.

The District's evaluator interpreted the [redacted] grade teacher's ratings in accordance with the publisher's guidelines, which includes both the minimum period of time that the rater must know the subject, and other validity measures. Such strict interpretation is necessary, but the IDEA

requires results of any particular assessment to be viewed in a broader context. *See* 20 U.S.C. § 1414. It is fairly common for evaluators to state the results of testing in strict accordance with a publisher's guidelines, and then add a note of caution to reports when the evaluators believe that the test results may not fully capture the child's circumstances.

In this case, standardized rating scales completed at the start of the 2019-20 school year did not reach clinically significant results for a child who, at the end of the prior school year, was so frequently dysregulated that the District though it wise to highly its own de-escalation practices that include physical restraint. The evaluator was aware of this and was also aware that the [redacted] grade teacher was the person with the least information about the Student's behavioral history. The evaluator was also aware that the [redacted] grade teacher was reporting behaviors similar to those exhibited at the end of the prior school year, albeit at a lower level. More caution was needed.

The Parent argues that the District's evaluation was fundamentally flawed and, consequently, the resulting IEP is the fruit of the poisonous tree. The Parent points to decisions I have written reaching that conclusion. I agree that IEPs derived from wholly inappropriate evaluations are also inappropriate. Appropriateness, however, is rarely binary for a document as a whole. The 2019 RR was almost entirely appropriate. Even the rating scales that the District's evaluator relied upon were administered and scored in accordance with their publishers' guidelines. The only flaw I find in the 2019 RR is the District evaluator's interpretation of those scores without consideration of the broader context in which they were obtained. Given the smallness of the error and the fact that the Parent did not complete and return the rating scales, I will not conclude that the October 2019 was inappropriate *as a matter of law*.

I also find no preponderant evidence in the record that the Parent was denied an opportunity to meaningfully participate in the development of the October 2019 IEP.

I find that the October 2019 was inappropriate. The District added nothing to the Student's IEP in September 2019 saying what it would do to teach the Student the skills necessary to curb inappropriate, sometimes dangerous behaviors. Rather, the District simply tacked on the FBA and PBSP. The PBSP explains what skills the Student should exhibit but provides little information about how to impart those skills to the Student. The District can be forgiven for failing to add such information to the IEP while the 2019 RR was pending. By October 2019, the 2019 RR was complete but the resulting IEP continued to not explain how the District would teach the Student the skills necessary for emotional and behavioral self-control.

Specially designed instruction (SDI) describes the services that a school will provide to a student to enable the Student to reach IEP goals. The SDI in the October 2019 RR is generic, not derived from the 2019 RR, and gives no clear indication about what the District will do to proactively address the Student's behavioral issues.

The District's classification of the Student as a student with a Speech or Language impairment and not a student with an Emotional Disturbance is irrelevant. Once a student is found to be a child with a disability as defined by the IDEA, the school must create an IEP to address all of the student's special education needs. In this case, the District acknowledged that the Student had behavioral needs that must be addressed through special education by including behavioral goals in the Student's IEP. The October 2019 IEP is deficient because it includes nothing to enable the Student to make progress towards those behavioral goals.

Some of the SDIs in the October 2019 are proactive at a surface level. For example, the IEP calls for giving the Student break time and seating near the teacher. It is unreasonable to conclude that breaks and seating close to the teacher will somehow imbue the Student with skills called for in the PBSP. For example, sitting near the teacher and taking a break will not teach the Student self-calming strategies.

The October 2019 IEP also calls for 30 minutes of group social skills support, once per week. An IEP need not prescribe every moment of a student's school day. In this case, however, inclusion of a group social skills period does not cure the IEP's lack of appropriate SDI. The FBA describes the function of the social skills group in broad terms. This, too, is insufficient. The IEP simply does not say what the District will do, proactively, to curb the Student's behaviors. At the same time, the [redacted] grade teacher endorsed negative behaviors at a lower level on standardized forms and the District was concerned enough about the Student's behavior to draft behavioral goals. This is a substantive denial of FAPE, and compensatory education is owed as a remedy.

Assuming, *arguendo*, that inclusion of group social skills support was sufficient to cure the lack of SDI, I find that the Student never actually received this service between October 21, 2019 (the IEP implementation date) and November 8, 2019 (the Student's last day in the elementary school). The District's failure to implement the IEP would result in the same denial of FAPE and the same compensatory education remedy that flows from the IEP's deficiencies.

After November 8, 2019, the Student was suspended and then not permitted back to school. The Student accrued two days of OSS before November 8, 2019. The District, therefore, could have suspended the Student through November 20, 2019, without running afoul of the IDEA's disciplinary protections – even if the incident on November 8, 2019 was a

function of the Student's disability. I find, based on the Student's cumulative days of suspension during the 2019-20 school year, that the Student is not owed *additional* compensatory education to remedy the exclusion from school from November 8 through 20, 2019. The Student's IEP was still inappropriate for this period of time, and so the compensatory education award accrued during this period of time as well.

In sum, for the period from the start of the 2019-20 school year through November 20, 2019, the Student's needs were behavioral in nature and were pervasive at the start of the 2019-20 school year, even if they were not elevated. This is seen in the [redacted] grade teacher's endorsements on the various behavioral rating scales. It was appropriate for the District to conclude its evaluation before taking action, and the IEP meeting on October 18, 2019 was timely. During that meeting, rather than designing a program to teach the Student the skills necessary to self-regulate behaviors (as called for in the FBA and PBSP), the District offered a reactionary program without needed specially designed instruction. The District then failed to implement the IEP during the short period of time that it was in place prior to the Student's exclusion. All of this is a substantive denial of the Student's right to a FAPE that must be remedied by a compensatory education award.

The Parent presented no evidence as to where the Student would be but for the District's violation, or what is necessary to return the Student to that position. The Parent also presented no preponderant evidence about how many hours of what type of service would have been provided under an appropriate IEP. While I am uncomfortable relying upon an inappropriate IEP as the basis of a compensatory education calculation, the record leaves me with no better option. The Student was supposed to receive 30 minutes per week of social skills instruction and breaks through the day. I award 1.5 hours of compensatory education for each week (five school days,

consecutive or inconsecutive) that school was open from October 18, 2019 through November 20, 2019.

From November 21, 2019, through January 27, the District excluded the Student from school entirely. District personnel who testified to this point were candid. They weighed the potential harm of permitting the Student's return to school against a flagrant IDEA violation and chose the latter. The District's underlying reasoning is irrelevant to the analysis I must perform, but I am compelled to note that the District could have taken a host of actions to mitigate the total loss of educational benefit to the Student during this period of time. The District made no effort to mitigate.

The IDEA and its predecessor statutes exist in large part as a result of congressional findings that children with disabilities were routinely denied access to education in pubic schools. *See, e.g.* 20 U.S.C. § 1400. A primary function of the law is to ensure that children with disabilities are not turned away at the schoolhouse gate. Whatever its reasoning, the District's actions violate the IDEA's central tenant. The District violated the IDEA purposefully, *per se*, by excluding the Student from school and providing no education whatsoever from November 21, 2019, through January 27, 2020. While the District may stand by that decision, viewing it as the lesser of two evils, my task to remedy the violation.

I award one hour of compensatory education for each hour that school was open from November 21, 2019, through and including January 27, 2020.

All compensatory education awarded herein may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's educational and related service needs. Compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be

provided through Student's IEP. Compensatory education may not be used for anything that is primarily recreational in nature. The hours of compensatory education may be used at any time from the present until Student turns age twenty-one (21). Services and goods purchased with compensatory education may not exceed the market rate in the District's geographical area.

The Parent's Section 504 and ADA claims all flow from the same events, and so my IDEA relief provides the total remedy within my jurisdiction. I make no finding as to whether the facts of this case prove Section 504 or ADA claims that are beyond my jurisdiction or substantiate remedies that I cannot award.

An order consistent with the above follows.

ORDER

Now, May 18, 2020, it is hereby **ORDERED** as follows:

1. For the period from the Student's enrollment in the District through October 17, 2019, I find that the District did not violate the Student's right to a FAPE.
2. For the period from October 18, 2019 through November 20, 2019, the District violated the Student's right to a FAPE by providing a partly inappropriate IEP and by not implementing the IEP. The Student is awarded compensatory education for this period in the amount and form described in the accompanying decision.
3. From November 21, 2019 through January 27, 2020, the District excluded the Student from school and provided no education or special education. The Student is awarded compensatory education for this period in the amount and form described in the accompanying decision.

4. The District did not violate the Parent's right to meaningfully participate in the development of the Student's special education program.

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

/s/ Brian Jason Ford
HEARING OFFICER