

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**

ODR No.
24544-20-21

CLOSED HEARING

Child's Name:
M.G.

Date of Birth:
[redacted]

Parents:
[redacted]

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Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
October 6, 2021

Introduction

This special education due process hearing concerns the educational rights of a student with disabilities (the Student).¹ This hearing was requested by the Student's parents (the Parents) against the Student's public school district (the District). The Parents' claims arise primarily under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

The parties agree that the Student is a "child with a disability" and that the District is the Student's Local Educational Agency (LEA) as defined by the IDEA. 20 U.S.C. § 1401.

The IDEA imposes a Child Find obligation on LEAs, requiring LEAs to identify students who may require special education and offer to evaluate those students. The Parents allege a multi-year Child Find violation, starting in the 2015-16 school year. The District eventually identified the Student and provided special education. The Parents allege that this special education falls short of the IDEA's substantive standards. The Parents allege that these violations result in a substantive breach of the Student's right to a free appropriate public education (FAPE). The Parents demand changes to the Student's Individualized Education Program (IEP) and compensatory education as remedies.

The District denies the Parents' allegations and raises the IDEA's statute of limitations as an affirmative defense, seeking to preclude all claims arising before January 27, 2019. The District raised this defense in a motion to limit the scope of the hearing. I determined that the evidence that would enable me to resolve the District's statute of limitations defense is the same evidence that would enable me to resolve the Parents' Child Find claim. Also, precluding claims before January 27, 2019, would not necessarily prohibit either party from introducing evidence before that point in time to establish violations occurring after. I saw no efficiency in bifurcation and took all evidence during a three-session due process hearing.

Having considered the evidence, I now grant the District's motion to limit the scope of the hearing. Consequently, I also dismiss the Parents' Child Find claims as a matter of law. For the remainder, I find that the District complied with its obligation to provide a FAPE to the Student except for a brief window at the start of the 2020-21 school year and I award compensatory education as a remedy.

¹ I omit identifying information as much as possible.

Further, I find that the District's training in its Child Find obligations is deficient and that district-wide training is necessary, but that I cannot order the District to obtain such training. While there was no Child Find violation in this instance, I encourage the District to obtain the necessary training.

The Statute of Limitations

Method for Finding the KOSHK Date

The IDEA's statute of limitations is found at 20 U.S.C. § 1415(f)(3)(C), which states:

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

The date that the Parents knew or should have known about the alleged action is called the KOSHK date. If parents raise a complaint within two years of the KOSHK date, the statute of limitations imposes no bar on recovery. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015).

IDEA case law explains how to determine the KOSHK date. See *E.G. v. Great Valley Sch. Dist.*, No. 16-5456, 2017 U.S. Dist. LEXIS 77920 (E.D. Pa. May 23, 2017). Courts have concluded that the IDEA does not mean exactly what it says. The KOSHK date is not the KOSHK date when the Parents knew or should have known of the action forming the basis of their complaint. It is not the point in time when the Parents knew what the school was doing. Rather, under *E.G. v. Great Valley*, the statute of limitations begins to run when parents know or should know both of the school's actions and of the alleged violations. *Id* at *21-22. Knowledge of the action and knowledge of the violation "can happen on the same day or be spread over months or years." *Id* at 22. Moreover, hearing officers are required to make a fine-grained analysis to determine the KOSHK date for each alleged violation. *Id* at 22-23.

Other cases show how to determine when the Parents knew or should have known of each alleged violation. Courts have applied what has been characterized as the "IDEA's discovery rule" to "focus[] on clear action or inaction by a school district sufficient to alert a reasonable parent that the

child would not be appropriately accommodated.” *Brady P. v. Cent. York Sch. Dist.*, No. 1:16-CV-2395, 2018 U.S. Dist. LEXIS 43230, at *19-20 (M.D. Pa. Mar. 16, 2018) *citing B.B. by & through Catherine B. v. Del. Coll. Preparatory Acad.*, No. 16-806, 2017 U.S. Dist. LEXIS 70245, 2017 WL 1862478, at *3 (D. Del. May 8, 2017); *Solanco Sch. Dist. v. C.H.B.*, No. 5:15-CV-02659, 2016 U.S. Dist. LEXIS 104559, 2016 WL 4204129, at *7 & n.10 (E.D. Pa. Aug. 9, 2016); *Jana K. ex rel. Tim K. v. Annville-Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 600 (M.D. Pa. 2014).

The “reasonable parent” standard highlights the potential delay between a school’s “clear action or inaction” and the parents’ understanding that the “child would not be appropriately accommodated.” *E.G. v. Great Valley* at *22-23. The inquiry calls for consideration of what conclusions about the child’s education a reasonable parent could draw from the information at hand. The standard does not require parents to be educators or legal scholars. The clock does not run from when parents come to understand their legal rights. Instead, the clock runs from when reasonable parents can conclude that their child’s needs are unmet.

The IDEA has a two-year statute of limitations that runs from the date that the Parents knew or should have known about the District’s actions resulting in the violation. A body of case law has developed concerning the method to determine the “knew or should have known” or KOSHK date. There are also two exceptions to the IDEA’s statute of limitations. If either exception applies, the statute of limitations does not apply, regardless of the KOSHK date.

Exceptions to the IDEA’s Statute of Limitations

There are two exceptions to the IDEA’s statute of limitations. Those exceptions are codified at 20 U.S.C. § 1415(f)(3)(D):

The timeline described in subparagraph (C) [that is, 20 U.S.C. § 1415(f)(3)(C), the IDEA’s statute of limitations] shall not apply to a parent if the parent was prevented from requesting the hearing due to— (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or (ii) the local educational agency’s withholding of information from the parent that was required under this subchapter to be provided to the parent.

If either or both exceptions apply, the statute of limitations does not apply. See *D.K. v. Abington Sch. Dist.*, 696 F.3d 233 (3d Cir. Pa. 2012); *P.P. ex rel.*

Michael P. v. West Chester Area School Dist., 585 F.3d 727, 730 (3rd Cir., 2009).

Both exceptions are strictly construed. *Id.* In this case, neither exception is pleaded, but the Parents' argument implies the District misrepresented the Student's progress. Given the IDEA's pleading standards, I will examine that exception as if it were pleaded.

The exception requires the LEA to make "specific" misrepresentations. General statements about the Student's progress cannot support the exception. In this case, the District evaluated the Student on several occasions and determined that the Student was not eligible for special education. Although eligibility relates to the problem forming the basis of the complaint, nothing in the record establishes that these were misrepresentations. Rather, the District accurately reported the results of evaluations. Further, as discussed below, the Parents were always dissatisfied with the District's evaluations, always believing that the Student required special education. Even if the District misrepresented the results of the various evaluations (they did not), the record is silent as to how those misrepresentations prevented the Parents from requesting a hearing. The misrepresentation exception does not apply in this due process hearing for these reasons.

KOSHK Analysis

The Parents allege that the KOSHK date is April 22, 2019. On that date, the Parents and the District met to review an independent educational evaluation (IEE). J-11. That IEE concluded that the Student was not eligible for special education. The Parents argue that they agreed with the IEE's findings but not its conclusions, and that those findings provided sufficient information for them to know about their claims. There is a preponderance of evidence in the record, however, that the Parents knew or had reason to know that the Student's needs were unmet before April 22, 2019.

The IEE discussed at the April 22, 2019, meeting is similar to an evaluation report (ER) dated February 28, 2018. Those evaluations used similar tests and obtained similar results. Both the ER and the IEE concluded that the Student was not eligible for special education. While Student's scores on some sub-tests were lower in 2019 as compared to 2018, the differences are not so striking that they could form the basis of some epiphany about the Student's unmet needs.² Moreover, the record reveals that the Parents were concerned that the Student's needs were unmet as far back as the 2015-16

² The differences between these evaluations are discussed in detail below.

school year when the Student attended the District's kindergarten. During that year, the Parents expressed their concerns about the Student's reading and writing. N.T. 432, 446-450. Those concerns persisted even as the Student received Title 1 reading interventions in kindergarten, 1st grade (the 2016-17 school year), and 2nd grade (the 2017-18 school year). *Id.*, NT 681-682. The Parents were also concerned that the Student may have Dyslexia, given a family history of the same. J-11.

Throughout this time, the Parents argue that they accepted the District's assurances that the Student was making progress and that they should not be concerned. Assuming that these assurances were made and that the Parents believed them is not controlling. The question is not what the Parents believed, but what a reasonable parent knew or should have known. The record of this case reveals that the Parents suspected a specific learning disability (Dyslexia) and were concerned that the Student's educational needs were unmet despite regular education interventions for nearly five school years. A reasonable parent with mounting concerns cannot rely on assurances that everything is fine for such a long period of time.

The record of this case reveals that the Parents effectively had contemporaneous knowledge of the District's actions as they occurred. The record also reveals that the Parents had both general concerns that the Student's needs were unmet and a specific concern that the Student has a learning disability during the entirety of the time in question (perhaps excepting the very beginning of the 2015-16 school year). A reasonable parent under these circumstances cannot wait five years to file a claim. The Parents have not proven that April 22, 2019 is the KOSHK date for their Child Find claim. I **GRANT** the District's motion to limit the scope of the hearing and dismiss demands for relief arising before January 27, 2019.

The Parents' Child Find Claim is Dismissed

Having granted the District's motion to limit the scope of the hearing, I must dismiss the Parents' Child Find claim as a matter of law. In doing so, I note that dismissing this claim has no impact whatsoever on the relief that the Parents demand.

The IDEA's Child Find provision requires states to ensure that "all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located and evaluated." 20 U.S.C. 1412(a)(3). This provision places upon school districts the "continuing obligation . . . to identify and evaluate all students who are reasonably suspected of having a disability

under the statutes." *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009); see also 20 U.S.C. § 1412(a)(3). The evaluation of children who are suspected of having a disability must take place within a reasonable period after the school is on notice of behavior that is likely to reflect a disability. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999). The failure of a school district to timely evaluate a child who it should reasonably suspect of having a disability constitutes a violation of the IDEA, and a denial of FAPE.

By definition, a Child Find violation ends when an LEA evaluates a student who is suspected of having a disability.³ In this case, there is no dispute that the Parents asked the District to evaluate the Student in late December 2017. See J-3, J-4. The District then more formally obtained the Parents' consent and evaluated the Student. *Id.* This resulted in an ER dated February 28, 2018 (the 2018 ER). Therefore, any Child Find violation ended on February 28, 2018, as a matter of law.

The Parents contend that the 2018 ER was flawed and incorrectly found that the Student did not require special education. That claim is addressed below, but this is not a Child Find claim. Rather, when a flawed evaluation erroneously keeps an eligible student from receiving special education, the Student's right to a FAPE has been violated and compensatory education may be owed. Applied to this case, the distinction does little more than change what the alleged violation is called. Even so, the Parents' Child Find claim is dismissed.

Issues Presented

With the period in question limited to January 27, 2019, and onward; and with the Parents' Child Find claim dismissed, the issues presented in this case are:

1. Did the District violate the Student's right to a FAPE, starting on January 27, 2019?
2. If so, what remedy(ies) are owed?

Findings of Fact

I reviewed the record in its entirety. I make findings of fact only as necessary to resolve the issues before me. As noted above, granting the

³ A Child Find violation could also end when an LEA offers to evaluate a student and the student's parents decline the offer. See 20 U.S.C. § 1414(d)(2).

District's motion to limit the scope of the hearing does not preclude evidence about events before January 27, 2019. This evidence provides valuable background and context.

I commend the parties and their attorneys for coordinating with each other and presenting efficient testimony and joint exhibits to the extent they could. Most exhibits are joint exhibits and, moreover, the underlying facts of this case (what happened and when) are not truly in dispute. The parties, of course, view those facts through different lenses and reach different conclusions – but there are no significant, outcome-determinative factual disagreements.

2015-16 School Year – Kindergarten

1. The 2015-16 school year was the Student's kindergarten year.⁴
2. During the 2015-16 school year, the Parents were concerned about the Student's academic progress, particularly regarding the Student DIBELS scores⁵, pronunciation, and handwriting. NT at 432-433, 446-447, 449-450.
3. The District provided Title 1 regular education interventions to the Student during the 2015-16 school year.

2016-17 School Year – 1st Grade

4. The 2016-17 school year was the Student's 1st grade year.
5. During the 2016-17 school year, the Parents noticed the Student reversing letters in handwriting. NT at 433-434, 448.⁶
6. The District continued to provide Title 1 regular education interventions to the Student during the 2016-17 school year.

2017-18 School Year – 2nd Grade

7. The 2017-18 school year was the Student's 2nd grade year.

⁴ Findings of facts presented without citation are facts that are **both** not in dispute and supported by the record as a whole. This is different than a *passim* citation, which is used to indicate that the fact was in dispute, but the finding is supported in numerous places in the record and is supported by the record as a whole.

⁵ DIBELS is a series of short, grade-appropriate literacy assessments.

⁶ Credible testimony establishes that the Parents became concerned about Dyslexia at this time. There is no preponderant evidence in the record that the Parents shared concerns specifically about Dyslexia with the District at this time.

8. During the 2017-18 school year, the Parents continued to have the same concerns that they had in the prior school years. *Passim*.⁷
9. In addition to their concerns from prior school years, the Parents were also concerned that the District did not offer Title 1 interventions to students beyond 2nd grade. This prompted the Parents to request a special education evaluation from the District on December 11, 2017. J-2, NT at 177, 681-682.
10. The Parents requested an evaluation in writing. The Parents were specifically concerned about reading (both comprehension and phonics) and that they observed the Student reading letters incorrectly and writing letters backwards. J-11.
11. On December 20, 2017, in response to the Parents' request for an evaluation, the District sought the Parents' consent to evaluate the Student by issuing an evaluation consent form. J-3.
12. The Parents signed the consent form, providing consent, on December 29, 2017. J-3 at 4. The District received the signed consent form before January 10, 2017. See J-3 at 1.
13. The District issued a second consent form on January 26, 2018. The difference between the first and second consent forms is the addition of an Occupational Therapy (OT) assessment on the second form. J-4.
14. The Parents signed the second consent form, providing consent, on January 31, 2018. J-4 at 3. The District received the signed consent form in February 2018. See J-5 at 1.
15. The District evaluated the Student and drafted the 2018 ER. The 2018 ER is dated February 28, 2018. J-6. The report was presented to the Parents during a meeting the same day. J-5.
16. The 2018 ER included parental input, an observation of the Student while the Student took assessments for the evaluation, teacher observations, standardized normative assessments of

⁷ Given the passage of time, it is somewhat difficult from the Parents' testimony to pinpoint exactly what concerns were present during any of the Student's first school years. However, there is a preponderance of evidence that the Parents were concerned and expressed that concern consistently throughout kindergarten, 1st, and 2nd grade.

intellectual ability (WISC-V) and academic achievement (WIAT-III), and a review of educational records. J-6.

17. The evaluator noted that the Student reversed letters (e.g. /d/ and /b/) and reversed the sounds of those letters as well. J-6.
18. Despite these reversals, the Student's academic progress was strong as measured by the Student's classroom grades. The Student's academic achievement was average in all six composite domains of the WIAT-III.⁸ All 11 of the Student's sub-test scores on the WIAT-III were also in the average range except for "Math Fluency – Subtraction." J-6.
19. The Student's academic achievement was in line with the Student's intellectual ability, as measured by the WISC-V. The Student scored in the average range in all five composite scores, yielding a Full-Scale IQ (FSIQ) of 103 with a confidence interval of 97 to 109 – close to the dead center of the Average range. J-6.
20. The 2018 ER also included an OT evaluation that used standardized, normative OT assessments. Those assessments measured the Student's visual-motor abilities (WRAVMA), visual-perceptual skills (TVPS), and a sentence copying test. Despite some errors in copying letters, the Student scored in the average range based on the Student's age and grade, and so the evaluator did not recommend OT. J-6.
21. Based on the results of the 2018 ER, the District concluded that the Student did not have a disability and was not eligible for special education. J-6.
22. After presenting the 2018 ER, the District issued a Notice of Recommended Educational Placement (NOREP) on March 6, 2018 (the 2018 NOREP). In Pennsylvania, the NOREP is the most common type of IDEA Prior Written Notice and is also a form by which parents may provide or withhold consent for LEA recommendations. The 2018 NOREP proposes no changes, confirming the ineligibility determination and decision that the Student should remain in regular education. J-7.
23. The Parents signed the 2018 NOREP, approving the recommendation. J-7.

⁸ On both the WISC-V and the WIAT-III, average denotes a score within one standard deviation of the median score of the normative sample.

24. On May 7, 2018, the Student took a Terra Nova 3 assessment, which is a criterion-based assessment of academic skills. All students in the District took that assessment at that time. The Student scored in the average range in all academic domains except for spelling. Spelling was significantly impaired. J-8.

2018-19 School Year – 3rd Grade

25. The 2018-19 school year was the Student’s 3rd grade year.
26. The Parents retained a private tutor, who worked with the Student on reading and writing. On September 14, 2018, the Parents signed a form permitting the District to communicate with the tutor. J-9.
27. The private tutor and the District coordinated with each other so that the private tutor used the same instructional materials that the Student used in school. NT at 455-456, 679.
28. The Parents obtained a private, independent educational evaluation for the Student. On February 4, 2019, the Parents signed a form permitting the private evaluator and the District to communicate with each other. J-10.
29. The private evaluator evaluated the Student on March 8 and 15, 2019 and drafted an Independent Educational Evaluation report, dated March 26, 2019 (the 2019 IEE). J-11.
30. The 2019 IEE included a diagnostic intake evaluation, a mental status evaluation, a structured developmental history, and standardized, normative assessments of the Student’s visual-motor integration (Beery VMI), intellectual ability (WISC-V), and academic achievement (WIAT-III). The 2019 IEE also included a broad-range behavior rating scale that collects input from the Parents, teacher, and the Student (BASC-3), and a behavior rating scale that targets ADHD symptoms that collects input from the Parents and teacher (Connors 3). J-11.
31. The 2019 IEE notes that the WISC-V and WIAT-III were repeats of assessments completed by the District about 13 months earlier. The 2019 IEE reproduces the composite scores from prior testing for a comparison to the new testing. J-11.

32. On the WISC-V, the Student's scores produced composite measures that are consistent with the 2018 ER. J-6, J-11. More specifically:
- a. The Student's Verbal Comprehension composite score increased from the Average range, crossing into the High Average range by one point, with a confidence interval that straddles the Average and High Average ranges. J-6, J-11.
 - b. The Student's Fluid Reasoning composite score decreased from the Average range, crossing into to the Low Average range by two points, with a confidence interval that straddles the Average and Low Average ranges. J-6, J-11.
 - c. The Student's Processing Speed composite score decreased from the Average range, crossing into the Low Average range by seven points. This is the most significant decrease compared to prior testing, but the change is small in absolute terms. The confidence interval straddled the Average and Low Average ranges. J-6, J-11.
 - d. All other composite scores, including the Student's FSIQ, remained in the Average range. J-6, J-11.
33. On the WIAT-III, the Student's scores produced composite measures that are consistent with the 2018 ER. All composite scores on both administrations of the test were in the Average range. There was some WIAT-III sub-test variability between the 2018 ER and the 2019 IEE (some sub-tests improved to the Above Average or Superior range while others decreased to the Below Average or Low range) but these fluctuations were not significant enough to alter any composite score. J-6, J-11.
34. The 2019 IEE included a statistical discrepancy analysis to determine whether the Student's academic performance was commensurate with the Student's intellectual ability. The evaluator determined that the scores were commensurate, and therefore ruled out a specific learning disability. J-11.
35. The Visual-Motor integration assessment found impaired motor coordination, but other measures fell in the average range. The evaluator noted that "this weakness does not seem to be impairing [the Student's] overall visual-motor integration abilities." J-11 at 15.

36. Neither the BASC-3 nor the Connors 3 resulted in scores indicating ADHD. However, both the Parents' and teacher's scores reflected concerns about the Student's learning difficulties. The Parents noticed "more negative emotions at home, and the teacher notic[ed] issues with anxiety and social relationships as seen in the school setting." J-11 at 25.
37. The evaluator ultimately concluded that the Student's scores on the behavior rating scales did not indicate a disability. The evaluator explained this, along with the rule-out specific learning disability, as follows (J-11 at 25):
- Overall, the results of the current testing do not suggest a diagnosis of a specific learning disorder. To be diagnosed with a specific learning disorder, according to the DSM-5, an individual's scores on standardized assessments must be significantly below those expected and cause impairment in academic functioning. A review of [the Student's] educational history and standardized scores do not indicate a learning disorder diagnosis, as [the Student's] achievement is commensurate with [the Student's] cognitive functioning. In other words, [the Student's] IQ, as measured by the WISC-V, and academic abilities, as measured by the WIAT-III, both consistently fall within the average range of functioning. The only academic area which indicated a significant discrepancy was [the Student's] early reading skills. These skills were measured at the below average level and likely contribute to [the Student's] reading and writing difficulties. However, this weakness does not seem to be significantly impairing [the Student's] abilities given [the Student's] overall reading and written expression scores. In addition to the specific learning disorder rule-out, no other social/emotional/behavioral concerns were indicated.
38. DSM-5 diagnostic criteria and IDEA eligibility are not the same, but the evaluator's conclusion that the Student is not entitled to special education based on the lack of impact of any of the Student's weaknesses upon the Student's education is consistent with the analysis required by the IDEA. *See, e.g.* 20 U.S.C. §§ 1401, 1414, 1415.

39. Although the evaluator concluded that the Student did not have a disability, the evaluator included several educational recommendations in the 2019 IEE. J-11.
40. The Parents sent a copy of the 2019 IEE to the District on April 8, 2019. J-11.
41. The Parents and the District met to discuss the 2019 IEE on April 10, 2019. J-12.
42. During the meeting, the Parents expressed concerns about the changes in test scores between the 2018 ER and the 2019 IEE. District personnel highlighted the low statistical significance of those variations and reported the Student's progress in the DIBLES. The Parents also noted that the Student received 90 minutes of tutoring every weekend, and that they intended to continue that tutoring during the summer of 2019. J-12.
43. During the meeting, the Parents also stated that the Student sees an eye doctor and wore an eye patch in the past. The Parents requested a new OT evaluation based on the 2019 IEE and concerns about vision problems. J-12.
44. On April 11, 2019, in response to the Parents' request for an OT evaluation and their concerns about testing variations, the District advised the Parents of their rights under Section 504 and sought the Parents' consent for a Section 504 evaluation. The Parents provided consent on April 22, 2019. J-13, J-14.⁹
45. In May 2019, the District completed another OT evaluation using one test that was administered as part of the 2018 ER (WRAVMA) and a formalized, clinical observation system (COMPS). The OT evaluator determined that the Student's scores were age appropriate and found that the Student was not eligible for school-based OT. J-15.
46. The Student sat for the 3rd Grade PSSA in the spring of 2019. The Student scored in the "Proficient" range in both English Language Arts and Mathematics – albeit at the bottom of the proficient range in both. J-16.

⁹ J-14 includes a letter from the Student's mother stating her concerns about the Student's anxiety, motor coordination and test score variability. The Parents requested some of the accommodations recommended in the 2019 IEE.

The 2019-20 School Year – 4th Grade

47. In 4th grade, the District assigned the Student to receive regular education reading interventions from a certified reading specialist for 20 minutes per day.
48. The reading specialist provided interventions in accordance with an “Intervention Plan” dated October 15, 2019. J-19. This Intervention Plan is neither an IEP nor a Section 504 Service Agreement. J-18
49. The Intervention Plan contained two goals to be implemented over a five-week period: a reading fluency goal and a reading comprehension goal. Both goals were to be measured by AIMS Web Plus, a computer program. Both goals were measurable and objective, but neither were baselined in the document itself. Baseline data appears in the District’s data collection reports. J-18, J-19.
50. The District collected data on the Student’s progress towards the Intervention Plan’s goals. This data shows that the Student was consistently performing above at or above the Intervention Plan’s targets from November 14, 2019, through February 20, 2020. J-19.¹⁰
51. Just after the District implemented the Intervention Plan, on October 18, 2019, the Parents requested an independent Auditory Language Processing Evaluation by a private evaluator of their choice. J-20. The District approved that request on October 21, 2019. J-21. That evaluation was completed in March 2020 and the results were written into an IEE in July 2020 (see below). J-35.
52. The Parents took the Student for an eye evaluation on October 22, 2019. The evaluation found that the Student had severe myopia (nearsightedness) with binocular vision problem. At the Parents’ direction, the eye doctor included comments about the need for an IEP in the report of the eye evaluation (e.g. “Mom educated that I am recommended an IEP immediately”). J-22.
53. On October 24, the Parents sent a copy of the eye evaluation to the District and requested another meeting. J-22. The Parents sent the same request again on November 8, 2019. J-23. The District convened a meeting on November 19, 2019. J-24. During the meeting, the Parents and District agreed to yet another OT evaluation to determine Section 504 eligibility. J-24, J-25.

¹⁰ A single reading fluency probe on January 30, 2020, fell below the target. J-19.

54. The District sought the Parents' consent for the OT evaluation on November 20, 2019, and the Parents provided consent on December 3, 2019. J-25.
55. The District completed the OT evaluation in January 2020 using the Berry, 6th edition and the TVPS, 2nd edition, which are standardized assessments. These found the Student functioning in the Average to Above Average range in multiple domains, including handwriting. The evaluator again determined that the Student was not eligible for school-based OT. J-26.
56. The District and Parents met on February 21, 2020, to review the latest OT evaluation. The District determined that the Student was not eligible for Section 504 accommodations. *See, e.g.* J-29. However, at the same meeting, the Parents also requested an evaluation for IDEA eligibility and presented paperwork enabling the District and a new private evaluator to communicate with each other.¹¹ J-28, J-29.
57. On February 27, 2020, the District sought the Parents' consent to conduct a new IDEA eligibility evaluation. On May 7, 2020, the Parents signed the document, providing consent. The District received the document back from the Parents on March 10, 2020.
58. An independent auditory evaluator tested the student on March 6 and 7, 2020. J-35. The results of this evaluation was not written into a report and shared with the District until later (see below).
59. I take judicial notice that on March 13, 2020, Governor Wolf issued an order requiring all Pennsylvania schools closed for in-person instruction as part of the Commonwealth's COVID-19 mitigation effort.
60. The District evaluated the Student despite the school closure and issued an ER on April 29, 2020 (the April 2020 ER). J-31.
61. The April 2020 ER did not include new assessments or a classroom observation by the evaluator because of the school closure. The District acknowledged this was a problem and planned to correct the problem. The April 2020 ER stated that the District would issue a

¹¹ By the time of this hearing, the new private evaluator (the third, not counting the eye doctor), had seen the Student and had made an oral preliminary report to the Parents. The Parents related what the new private evaluator said to them. This evidence is hearsay, which was admissible under the rules of the hearing, but cannot be used to form the basis of this decision.

permission to evaluate form as soon as school restarted to complete new assessments and observations. See J-31 at 3, 6.¹²

62. Instead of new testing, the April 2020 ER relied upon new input from the Parents and teachers, and a comprehensive review of all prior testing, the Student's educational records up to the point that school closed, and new behavior rating scales. J-31.
63. Using the available information, the District again concluded that the Student was not eligible for special education. J-31.
64. On April 29, 2020, the same day as the April 2020 ER, the District issued a NOREP stating that it was refusing to change the Student's identification. As in the April 2020 ER, the District explicitly noted that all available information indicated that the Student did not qualify for special education, but that new assessments and observations would be necessary whenever school resumed. J-32.
65. The Parents did not sign the April 29, 2020, NOREP. J-32.

The 2020-21 School Year – 5th Grade

66. True to its word, the District sought the Parents' consent to evaluate the Student on July 1, 2020, by issuing a consent form. The Parents signed the form, providing consent, on July 8, 2020, and the District acknowledged receipt on July 10, 2020.
67. The evaluation consent form came with a special invitation to the District so that the Student could be assessed. J-34.
68. On July 20, 2020, the Auditory Processing IEE was written into a report (the 2020 IEE). The evaluator sent a copy of the report the District on that day. The District received the 2020 IEE on July 28, 2020. J-35.
69. The 2020 IEE included several specialized audiological tests. From the results of those tests, the evaluator found that the Student has an Auditory Processing Disorder and an Expressive Language Disorder. J-35.

¹² Of course, in April 2020, it was impossible for either party to anticipate how long school would be closed or the circumstances under which school would reopen.

70. All testing for the 2020 IEE was completed by one evaluator, and the 2020 IEE itself was written by that same person. That evaluator did not testify at the hearing. The District did not object to the 2020 IEE's admission and took no position as to the Auditory Processing Disorder and Expressive Language Disorder diagnoses.
71. The 2020 IEE indicated that the Student's Auditory Processing Disorder and Expressive Language Disorder manifest as symptoms that are consistent with Dyslexia. *See, e.g., J-35 at 13.* A careful reading of the 2020 IEE reveals that the evaluator did not actually diagnose Dyslexia.¹³
72. The 2020 IEE included numerous educational recommendations. J-35.
73. On July 22, 2020 the Parents sent copies of eye doctor reports from January 14, 2020, and July 8, 2020 to the District. J-36. The Parents' cover letter describes the eye doctor's reports as a recommendation for an IEP. That is a mischaracterization of the reports. Rather, both reports say that the Student's symptoms are stable and infrequent. The January 14, 2020 report says that the Parents reported that they were working with the 2020 IEE evaluator *for the purpose of obtaining an IEP from the District.* J-36 at 2. The July 8, 2020 report says that the *Parents believe* that an IEP is "imperative." Neither report includes a recommendation for any sort of educational programming *from the eye doctor.* J-36.
74. The District completed testing and issued an evaluation report on August 25, 2020 (the August 2020 ER). J-38.
75. The August 2020 ER did not include a classroom observation because the evaluation was completed in the summer, during a school closure. The 2020 ER did, however, include an observation of the Student during testing. J-38 at 6, 7.
76. The August 2020 ER included a review of all prior records and evaluations, including the April 2020 ER and the 2020 IEE. J-38.
77. The August 2020 ER included a new administration of the WISC-V (the third in total). Again, the composite scores were statistically consistent with prior testing, indicating that an average intellectual ability. More specifically:

¹³ The 2020 IEE does imply a Dyslexia diagnosis, and the District took issue with that implication.

- a. The Verbal Comprehension composite decreased from the High Average to the Average range, with a confidence interval entirely in the Average range. J-11, J-38.¹⁴
 - b. The Visual Spatial composite decreased from the Average range to the Low Average range, with a confidence interval that includes both Average and Low Average ranges. J-11, J-38.
 - c. The Fluid Reasoning composite increased from the Average range to the High Average range, with a confidence interval that includes both the High Average and Very High ranges. J-11, J-38.
 - d. The Working Memory composite did not change at all, remaining in the Average range. J-11, J-38.
 - e. The Processing Speed composite decreased from the Low Average range to the Very Low range, but with a wide-reaching confidence interval spanning the Very Low, Low Average, and Average ranges. J-11, J-38.
 - f. The Student's FSIQ remained nearly identical, in the Average range with a confidence interval entirely in the average range. J-11, J-38.
78. The Student's academic achievement, as measured by WIAT-III composite scores, decreased. The statistical significance of the decrease on a composite score by composite score basis is quite small. However, every change was in a negative direction, creating a pattern suggesting more than minor test-to-test fluctuations – particularly given the high level of consistency between the prior two WIAT-III administrations. More specifically:
- a. The Student's Total Reading score decreased from the Average range to the Below Average range, with a confidence interval spanning the Average and Below Average ranges. J-11, J-38.¹⁵
 - b. The Student's Basic Reading score remained in the Average range with a statically insignificant one-point increase in the standard score. J-11, J-38.

¹⁴ The clearest breakdown of WISC-V standard deviations and associated ranges is found at J-6, page 6.

¹⁵ The clearest breakdown of WIAT-III standard deviations and associated ranges is found at J-6, page 9.

- c. The Student's Reading Comprehension and Fluency score decreased from the Average range to the Below Average range, with a confidence interval spanning the Average and Below Average ranges. J-11, J-38.
 - d. The Student's Mathematics score remained in the Average range, but the Student's Math Fluency score decreased from the Average range to the Below Average range with a confidence interval spanning the Average and Below Average ranges. J-11, J-38.
 - e. The Student's Written Expression score decreased from the Average range to the Below Average range, with a confidence interval spanning the Average and Below Average ranges. J-11, J-38.
79. The August 2020 ER also included a neuropsychological test, a memory test, and an executive functioning test. These revealed problems with memory and executive functioning. This is consistent with processing speed measures in the WISC-V. J-38.
80. The August 2020 ER included a speech and language assessment that assessed the Student's articulation and pragmatic language skills. These found that the Student was in the average range for the Student's age. J-38.
81. The August 2020 ER includes a detailed discussion of the Student's strengths and needs, focusing on the Students expected versus actual performance. The August 2020 ER does not include a statistical discrepancy analysis, but the District found that the Student's oral reading fluency was not commensurate with the Student's cognitive ability. J-38 at 35.
82. In the August 2020 ER, in the same part noting the Student's lower than expected oral reading fluency, the District quoted from the 2020 IEE that the Student's symptoms are consistent with the hallmarks of Dyslexia. J-38 at 35.
83. These findings resulted in the District's determination that the Student qualified for special education as a child with a Specific Learning Disability (SLD) and should receive an IEP. J-38.

84. The Parents completed a form stating that they agreed with the August 2020 ER except for the speech and language evaluation. J-38 at 41.
85. The Student's IEP team met on August 26, 2020, to draft an IEP. J-39. Although the District did not finalize an IEP during that meeting, the District issued a NOREP proposing that the Student should receive special education through an IEP. The Parents approved the NOREP, stating that they agreed an IEP was necessary, but that they had not received an IEP for review. J-40.
86. The District and Parents met again to finalize the IEP on September 22, 2020. J-41, J-42.
87. The IEP dated September 22, 2020 (the 2020 IEP) includes a comprehensive review of prior records and evaluations. J-41.
88. The 2020 IEP included an objective, measurable, baselined reading fluency goal. J-41 at 24.
89. The 2020 IEP included two objective, measurable, baselined, reading decoding goals. J-41 at 27, 29. One of those goals assessed the Student using a "Beginning Decoding Survey" and the other using an "Advanced Decoding Survey." *Id.*
90. The 2020 IEP included an objective, measurable, baselined reading comprehension goal. J-41 at 26.
91. The 2020 IEP included program modifications and specially designed instruction (SDI). These are presented in a logical format in which the SDIs are grouped by area of need. In this way, the District demonstrated that the SDIs are not generic, but specifically target areas of need identified through evaluations. The District included SDIs to target or accommodate the Student's processing speed and working memory deficits, auditory processing deficits, executive functioning deficits. J-41.
92. Through the 2020 IEP, the District provided one hour per day of intensive reading instruction that focused on decoding. This was calculated to be an itinerant level of learning support. J-41.
93. The District issued the 2020 IEP with a NOREP dated October 12, 2020. The Parents approved the NOREP, permitting the District to implement the IEP. However, the Parents also wrote that they believed

the IDEA was insufficient. They wrote that the Student needed a specific reading program: Wilson Reading. J-43.

94. At the time that the Parents returned the NOREP approving implementation of the 2020 IEP, no evaluation (including the 2020 IEE) had recommended Wilson Reading. Rather, the 2020 IEE said: "Because [the Student] has a dyslexic profile, programs of reading that are appropriate for dyslexics, such as Wilson, should be explored for use with [the Student.]" J-16 at 23.
95. On November 23, 2020, the IEP team reconvened by video conference. At this point, the Parents were represented by an attorney and brought their attorney to the IEP team meeting. The District was, therefore, also represented by an attorney during the meeting. No changes were made to the IEP at that time. J-45.
96. The Parents and the District agreed that the District should fund an independent speech and language evaluation for the Student (the 2020 S/L Evaluation). The exact date of the parties' agreement is unclear, but testing occurred on October 24, 2020, and the report was issued on December 14, 2020. J-46. Although there is some ambiguity in the record, I find that the Parents sent the District a copy of the Private S/L Evaluation on or around December 14, 2020.
97. The 2020 S/L Evaluation used a several S/L assessments and input from Parents and teachers. The 2020 S/L Evaluation concluded that the Student has a disability in phonology that contributes to the Student's difficulty reading, spelling, and pronouncing words at an age-appropriate level. J-46.
98. The 2020 S/L Evaluation recommended a disability classification of S/L Impairment in addition to SLD and direct S/L interventions from a pathologist to improve phonological skills. J-46.
99. The District accepted the results of the 2020 S/L Evaluation, reconvened the IEP team, and revised the Student's IEP. See J-41. Specifically, the IEP team updated the reading comprehension goal based on the Student's progress (J-41 at 26) and added two S/L Therapy goals. One of those goals focused on articulation and the other focused on phonemic awareness. Both of those goals were objective and measurable but, in the absence of data from prior services, neither were baselined. J-41

100. The 2020 IEP was also revised to include one 30-minute session of individual Speech and Language Pathology/Therapy per week. J-41.
101. On January 5, 2021, the District issued the revised 2020 IEP with a NOREP.¹⁶ J-48.
102. The Parents signed the NOREP approving implementation of the revisions, but also wrote: "However, we do not believe this IEP meets all of [the Student's] educational needs and that further revisions are needed." J-48. Unlike the prior NOREP, the Parents did not say anything specific about how the revised 2020 IEP was insufficient. *Id.*
103. Sometime after the December 2020/January 2021 IEP revisions went into effect, the parties had several communications about the Student's access to the school counselor. The Parents permitted the Student to see the counselor only if certain conditions were met. I find that access to the school counselor is a regular education intervention that is not related any actual, proposed, or demanded special education service.
104. On January 27, 2021, the Parents requested this due process hearing.
105. By the end of the 2020-21 school year the Student had made consistent progress towards IEP goals (although the Student fell short of mastery) and concluded the school year with proficient or advanced scores in all subjects. J-53, J-55.

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 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.*

¹⁶ The NOREP is somewhat confusing because it says that the District's action is reviewing the 2020 S/L Evaluation. In context, and based on other comments in the same document, it is clear that the NOREP relates to the IEP revisions and that the Parents understood this.

Council Rock School District, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

In this case, the Parents' credibility is somewhat tarnished by their persistent mischaracterizations of the medical reports and IEEs that they rely upon, and because much of their testimony constitutes permissible but unusable hearsay. To be clear, I do not believe that the Parents were attempting to deceive me. They were speaking their truth as they see it. But I cannot rely on hearsay to resolve this matter.

All other witnesses testified credibly.

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 case, the Parents are the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." *Mary Courtney T. v. School District of Philadelphia*,

575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

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

In *Rowley*, the Court found that 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 is 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.

Evaluation Criteria

The IDEA establishes requirements for evaluations. Substantively, those are the same for initial evaluations and reevaluations. 20 U.S.C. § 1414.

In substance, evaluations must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the child is a child with a disability and, if so, what must be provided through the child’s IEP in order for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation must “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child” and must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”. 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the District is obligated to ensure that:

assessments and other evaluation materials... (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments.

20 U.S.C. § 1414(b)(3)(A).

Finally, evaluations must assess “all areas of suspected disability”. 20 U.S.C. § 1414(b)(3)(B).

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. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the

resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default. 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.

Discussion and Conclusions of Law

January 27, 2019, Through March 26, 2019

Above, I conclude that the period under consideration starts on January 27, 2019. At that time, the Student was a regular education student because the 2018 ER found that the Student was not a child with a disability in need of special education.

While the Parents argue that the 2018 ER reached an incorrect conclusion, the record reveals no procedural flaw with the 2018 ER. The ER complies with all IDEA procedural requirements set forth above. Moreover, there is no evidence in the record that the District should have second guessed the results of the 2018 ER. Despite some struggles, the Student was educationally successful with regular education interventions. The 2018 ER was consistent with every account of the Student's educational presentation at that time.

Similarly, even if the results of the 2018 ER could be interpreted to suggest that the Student had a disability at that time, there is no evidence that the Student required special education. To be eligible for special education, a student must both have a disability and require special education to derive a meaningful benefit from the school's education. In this case, even if the Student had a disability, all evidence suggests that the Student was appropriately accommodated with regular education interventions. In fact, it was the anticipated end of Title 1 services (a regular education support) – not a change in the Student's needs – that prompted the Parents to seek additional supports.

For the period from January 27, 2019, through March 26, 2019, I find no violation of the Student's right to a FAPE. The Student was properly classified as a regular education student during this time.

March 26, 2019, Through the End of the 2018-19 School Year

On March 26, 2019, the parties received the 2019 IEE. The 2019 IEE only confirmed the accuracy of the 2018 ER. Here, the Parents miss the forest for the trees by perseverating on test-to-test fluctuations that have little to no statistical significance. The independent evaluator recognized the consistency in testing results and reached the same conclusion that the District had already reached: the Student had difficulties in particular areas but was not a child with a disability and did not require special education.

For the period from March 26, 2019, through the end of the 2018-19 school year, I find no violation of the Student's right to a FAPE. The Student was properly classified as a regular education student during this time.

The Start of the 2019-20 School Year Through February 27, 2020

The timing of the 2019 IEE is important to the analysis of the 2019-20 school year (4th grade). The parties received the 2019 IEE at the end of the 2018-19 school year (3rd grade). It was entirely proper for the independent evaluator to include educational recommendations in the 2019 IEE. Both parties agreed that the Student would benefit from supports in certain academic domains, and reading fluency was a particular concern. After a year without Title 1 supports, the Student was not showing a need for special education but was showing that academic supports were beneficial. The District responded to this information by significantly increasing the Student's regular education supports at the start of the 2019-20 school year. The record shows that the Student's participation in the District's intensive regular education reading program with the Intervention Plan was successful.

I commend the District for drafting and implementing an IEP-like plan, with objective, measurable goals, and then tracking and reporting progress against that plan, despite no legal obligation to do so. I am also persuaded that the regular education reading interventions provided during the 2019-20 school year were not special education by another name. Rather, these are regular education interventions, like Title 1, but with Student specific progress monitoring.

Between the start of the 2019-20 school year and February 27, 2020, I find no violation of the Student's right to a FAPE. The Student was properly classified as a regular education student during this time. The reports from the eye doctor do not change this analysis, and the 2020 OT evaluation confirms this analysis.

February 27, 2020, Through April 29, 2020

On February 27, 2020, the District responded to the Parents renewed request for an IDEA evaluation by seeking their consent to evaluate. 15 days later, the Governor ordered all Pennsylvania schools to close. The District closed long before the evaluation was due under the IDEA's timeline. It is not clear if the period in which the District was closed pursuant to the Governor's order counts against the evaluation timeline. See 22 Pa. Code § 14.123(b). Regardless, the District completed the April 2020 ER on April 29, 2020 – 62 days after it sought parental consent.

Between February 27, 2020, and April 29, 2020, I find no violation of the Student's right to a FAPE. The Student was properly classified as a regular education student during this time.

April 29, 2020, Through the End of the 2019-20 School Year

The District has always acknowledged flaws in the April 2020 ER. Those flaws, a lack of new testing and observations, are entirely attributable to Pennsylvania's COVID-19 mitigation efforts. More importantly, the District's actions ensured that the flaws in the April 2020 ER would not result in substantive harm. The District promised to complete the missing parts of the April 2020 ER. That promise is embedded in the April 2020 ER itself. The District then kept its promise by inviting the Student in for evaluations during the summer of 2020. This enabled the District to complete the evaluation and issue the August 2020 ER before the 2020-21 school year started.

Between April 29, 2020, and the end of the 2019-20 school year, I find no violation of the Student's right to a FAPE. The Student was properly classified as a regular education student during this time.

The Start of the 2020-21 School Year through October 12, 2020

In the summer of 2020, the District completed the August 2020 ER. By this time, the parties also had the 2020 IEE. The District accepted the 2020 IEE and referenced it in the August 2020 ER. I find no procedural defect in the August 2020 ER, including the District's S/L evaluation.

Substantively, the District found a specific learning disability by scrutinizing statistically significant discrepancies between discrete academic areas and the Student's overall cognitive ability. The August 2020 ER could just as easily have been read to support continued placement in regular education. In fact, the Student's eligibility was based on a low academic achievement

score obtained under unusual circumstances after a prolonged school closure. The District's use of that measure in a discrepancy analysis shows the District interpreting data in a way that maximally enhanced the Student's rights and protections.

After concluding and reporting the 2020 ER, the District also convened the Student's IEP team before the start of the 2020-21 school year. It is unfortunate that the IEP team did not complete its work until October 12, 2020. For eligible students, the District is obligated to have an IEP in place by the first day of school. Bluntly, under the circumstances, I am not sure what else the District could have done. The IDEA, however, is inflexible in this regard.

Having found the Student eligible for special education in August 2020, the District was obligated to have an IEP in place by the start of the 2020-21 school year. Because the District did not offer an IEP until October 12, 2020, the Student was denied the benefits of special education from the start of the school year until that date. Below, I find that the 2020 IEP was appropriate at the time it was offered, and that IEP offers one hour per day of special education in Reading. I therefore award the Student one hour of compensatory education for each day that the Student attended school, either in person or remotely, from the start of the 2020-21 school year through October 12, 2020.

The Parents may direct the use of this compensatory education to any educational service or product designed to improve the Student's reading at a rate not to exceed the market rate for specialized reading services in the District's geographical area. Any hours of special education that are not used by the Student's graduation or the end of the school year in which the Student turns 21 years old are forfeited.

October 12, 2020, Through December 14, 2020

On October 12, 2020, the District offered an IEP that was reasonably calculated to provide a FAPE at the time it was issued. I see no procedural flaw in the original 2020 IEP. That IEP was also substantively appropriate because it targeted the Student's identified needs through objective, measurable goals; SDI that are linked to those goals; and modifications that specifically and explicitly target the Student's areas of need.

The District's choice of reading program was also appropriate. There is strong evidence (although little presented in this case) that Orton-Gillingham-based reading intervention programs, like Wilson Reading, are effective for children with Dyslexia. This does not mean that Wilson Reading

is a panacea or appropriate for every child with Dyslexia. Ignoring the District's broad discretion in choosing methodologies and curricula, and further ignoring the fact that the Student was not diagnosed with Dyslexia at any point through the close of the evidentiary record in this case, the Student's reading difficulty primarily manifested as an oral reading fluency deficit. I see no FAPE violation in the District's choice of a curriculum that targets reading fluency.

In October 2020, the most current information about the Student's speech and language needs indicated that the Student did not require school-based speech and language interventions. The District's S/L evaluation complied with the IDEA's procedural requirements. There is no evidence that the District incorrectly reported the results of that evaluation or misinterpreted those results. The fact that a subsequent, independent S/L evaluation ran different tests and reached a different conclusion does not change the information that was available to the District in October 2020.

From October 12, 2020, through December 14, 2020, I find no violation of the Student's right to a FAPE. During this time, the Student was educated pursuant to an IEP that was reasonably calculated to provide a FAPE at the time it was offered.

December 14, 2020, Through the End of the 2020-21 School Year

On December 14, 2020, the parties received the independent 2020 S/L Evaluation. That evaluation was based on different testing than the District's own S/L evaluation and contradicted the District's conclusions about the Student's need for school-based speech and language support. I am far too familiar with schools digging in their heels in similar circumstances; refusing to accept new information from outside sources that contradicts their own findings. The opposite happened in this case. The District promptly reconvened the IEP team, discussed the outside evaluation, and added S/L goals and interventions to the Student's IEP. By January 27, 2021, the District issued a revised IEP with those changes. This amount of time from the District's receipt of the 2020 S/L Evaluation to its offer of the revised IEP is appropriate under the circumstances of this case. Moreover, the revised 2020 IEP was reasonably calculated to offer a FAPE at the time it was issued.

From December 14, 2020, through the end of the 2020-21 school year, I find no violation of the Student's right to a FAPE. During this time, the

Student was educated pursuant to an IEP that was reasonably calculated to provide a FAPE at the time it was offered.¹⁷

The evidentiary hearing concluded on August 17, 2021, with another independent evaluation pending. I imagine that the parties have the results of that evaluation by now. I make no finding as to the appropriateness of the Student's IEP during the 2021-22 school year.

Child Find Training

There was no Child Find violation in this case. However, portions of testimony from District personnel reveals a lack of knowledge and training about the IDEA's Child Find obligations. *See, e.g.* NT 92, 235. It is insufficient for schools to train special education administrators and teachers about Child Find. In practice, Child Find is an IDEA obligation that falls primarily to general or regular education teachers. Those teachers are the District's eyes and ears for purposes of "finding" children who may have a disability.

I note that the Parents do not demand district-wide training as a remedy in their complaint. I also note that my authority to resolve systemic or district-wide problems is suspect to say the very least. For both reasons, I cannot order the District to obtain the necessary training. Even so, I very strongly encourage the District to obtain Child Find training, especially for regular education teachers.

ORDER

Now, October 6, 2021, it is hereby **ORDERED** that:

1. The District's Motion to Limit the Scope of this hearing is **GRANTED**, and
2. All the Parents' claims and demands are **DENIED** and **DISMISSED** except that I award the Student one (1) hour of compensatory education for each day that the Student attended school, either in person or remotely, from the start of the 2020-21 school year through October 12, 2020.

¹⁷ A student's actual progress is often a red herring in evaluating the appropriateness of an IEP at the time it was offered. In this case, the Student's actual progress does not change the analysis in any way.

3. The Parents may direct the use of the awarded compensatory education in any way consistent with the accompanying decision.

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

/s/ Brian Jason Ford
HEARING OFFICER