

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. 27957-22-23

CLOSED HEARING

Child's Name:

J.H.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

Daniel B. Cooper, Esquire
45 E. City Ave., #400
Bala Cynwyd, PA 19004

Local Education Agency:

Hatboro-Horsham School District
229 Meetinghouse Road
Horsham, PA 19044

Counsel for the LEA:

Christina M. Stephanos, Esquire
331 Butler Ave., P.O. Box 5069
New Britain, PA 18901

Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

October 23, 2023

Introduction

This special education due process hearing concerns the rights of a child with disabilities (the Student). The Student's parent requested this hearing against the Student's public school district (the District). The Parent and District were able to resolve disputes about the Student's current program and placement, which is good for the Student. However, the Parent and District continue to disagree about whether the District violated the Student's rights in the past.¹

This matter arises 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 disabilities as defined by the IDEA. Therefore, the Student is entitled to a free, appropriate public education (FAPE) from the District. The Parent alleges that the District violated the Student's right to a FAPE in two ways: by failing to provide appropriate emotional support and by failing to provide appropriate special education in math. The Parent's emotional support claims are directly linked to the Student's work with a Personal Care Assistant (PCA) during the time in question. The Parent demands compensatory education as a remedy.

As discussed below, I find in part for the Parent and in part for the District. I find that that the Parent did not prove that the District violated the Student's IDEA rights concerning emotional support. I find that the Parent proved that the District violated the Student's IDEA rights concerning math.

Issue

A single issue is presented: Did the District violate the Student's right to a FAPE, giving rise to a claim for compensatory education?

Findings of Fact

I reviewed the entire record. I make findings of fact, however, only as necessary to resolve the issues presented for adjudication. I find as follows:

Background

¹ The due process complaint for this matter was originally filed on April 20, 2023. The parties reached a tentative resolution, and the ODR file closed with a contingent dismissal order. That order enabled the Parent to reinstate the hearing should the resolution fail. The resolution failed in part, and the matter was reinstated. By then, ongoing claims were resolved and current programming demands were withdrawn.

1. [redacted] See, e.g. NT 40-41.²
2. On September 16, 2016, an Independent Educational Evaluation (IEE) of the Student was completed. The IEE concluded that the Student was a child with a Traumatic Brain Injury (TBI), but that the Student's academic skills were intact and in the average range. S-1 at 2.
3. The District convened an IEP team to review the IEE. At that time, the Student was receiving services under a Section 504 plan.³ The IEP team concluded that the Student was a child with a disability as defined by the IDEA and should receive an IEP. The plan was for the Student to receive the same accommodations as were provided in the Section 504 plan, but with a Personal Care Assistant (PCA) to ensure that accommodations were provided with consistency. S-1 at 2.⁴
4. The record of this matter includes very little information about the Student's education between September 2016 and January 2020, which is appropriate given the scope of the claims.

The 2019-20 School Year

5. The 2019-20 school year was the Student's [redacted] grade year.
6. On January 6, 2020, the District completed a triannual reevaluation of the Student (the 2020 RR). In that evaluation, a teacher opined that the Student had become dependent on the PCA and expressed concerns about prompt dependency (the Student would rely on the PCA's to restate directions instead of trying to pay attention in class). S-1 at 30.
7. The 2020 RR included new testing of the Student's intellectual ability, academic achievement, and academic and social behaviors. See S-1.
8. Testing completed as part of the 2020 RR found that the Student's Full Scale IQ was in the average range, although the Visual Spatial Index and Working Memory Index scores were both in the low average range. S-1.

² [redacted].

³ Section 504 is Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.* A Section 504 plan provides disability accommodations in school, but not special education.

⁴ The record indicates that the District conducted its own evaluation after receiving the IEE and before offering an IEP. The record does not reveal an exact timeline for these events.

9. Testing completed as part of the 2020 RR found that the Student's academic achievement was average in reading, writing and math. S-1.
10. Behavior rating scales and a Functional Behavioral Assessment (FBA) completed as part of the 2020 RR found that the Student was exhibiting elevated signs inattention, hyperactivity, impulsivity, and executive functioning difficulties. S-1.
11. There is no dispute that the District offered an IEP to the Student sometime after the 2020 RR was developed, and that the Parent accepted the IEP (the 2020 IEP). This finding is supported by the record as a whole. However, the 2020 IEP was not entered into evidence, nor was any documentation showing the District's offer or the Parent's acceptance. *Passim*.
12. I take judicial notice that, on March 13, 2020, Governor Wolf issued an order closing all Pennsylvania schools in response to the COVID-19 pandemic. On April 9, 2020, that order was extended through the end of the 2019-20 school year.

The 2020-21 School Year

13. The 2020-21 school year was the Student's [redacted] grade year.
14. The Student started the 2020-21 school year remotely, and under the 2020 IEP. *Passim*.
15. On January 28, 2021, the Student's IEP team reconvened and drafted an IEP for the Student (the 2021 IEP).⁵ S-2.
16. The 2021 IEP included a math goal. The Student was to score 80% correct on grade-level math problems on four out of five probes with only one teacher prompt per question. At the time the goal was written, the Student's baseline was 83% (an average of three probes) with an unknown amount of prompting. S-2.
17. The District tracked the Student's progress towards the math goal in the 2021 IEP. By March 2021, the Student scored 80% to 97% over three probes, but with two teacher prompts per question. S-2.

⁵ It is difficult to say if the IEP drafted in January 2021 is best thought of as an annual IEP, a revision to an existing IEP, or something else. Regardless, my focus is on the substance of the IEP, not its form.

18. The 2021 IEP included a goal for the Student to come to class on time with all needed materials or obtain needed materials in class if requested with no more than two additional prompts from the teacher. The mastery condition for this goal was for the Student to exhibit these behaviors in 80% of data collection probes. The baseline was not set in the goal explicitly, but would be established with the first five days of data collection. S-2.
19. The District monitored the Student's progress towards the timeliness/materials goal and, by March 2021, the Student had mastered the goal. S-2.
20. The 2021 IEP included a goal for the Student to use pre-taught self-advocacy responses when faced with frustrating academic or social situations with 80% accuracy across three months. The Student's baseline was 44%. S-2.
21. The District monitored the Student's progress towards the self-advocacy goal but, by March 2021, no data directly related to the goal was reported. Rather, the District reported on its efforts to teach the Student self-advocacy in a virtual environment and in school counseling sessions. S-2.
22. The 2021 IEP included a Positive Behavior Support Plan (PBSP). S-2.
23. The 2021 IEP included program modifications and Specially Designed Instruction (SDI). Some of the modifications and SDI were fairly generic (e.g. preferential seating). Others were specifically tailored to the Student's needs and consistent with IEP team discussions about how to best address those needs through special education. Examples of the latter include explicit methods for chunking larger assignments into smaller parts (often a generic modification, but individualized through an explicit methodology in this case), assignment of a PCA, and direct instruction of pro-social skills. S-2.
24. Regarding the PCA, the 2021 IEP specified that the role of the PCA was to "support organization, focus and attention, increase[] independence, and data collection during instructional periods of the school day." S-2 at 27. In context, the "data collection" related both to IEP goals and the PBSP. The IEP also called for the PCA to receive an hour of training followed by monthly checks to ensure that the PBSP was implemented with fidelity. *Id.*

25. The 2021 IEP also included related services: the PCA, school-based psychological counseling, and consultative occupational and physical therapy. S-2.
26. Through the 2021 IEP, the District concluded that the Student was eligible for Extended School Year (ESY) services and offered one, 30-minute session of psychological counseling per week, with transportation, from June 28 through July 29, 2021. S-2.
27. On February 8, 2021, the District offered the 2021 IEP to the Parent with a Notice of Recommended Educational Placement (NOREP). S-2.⁶
28. April 20, 2021, is the beginning of the period of time for which the Parent demands a remedy.
29. On April 20, 2021, the IEP team reconvened. S-3. During the meeting, the IEP team added a social skills group to the Student's summer ESY program, and added a requirement for the District to warn the Student of any practice drills to the SDI section of the IEP (the Revised 2021 IEP). S-3.
30. The revised IEP also called for a school psychologist to observe the Student six times for 20 minutes per observation, and for the Student's teachers to consult with the school psychologist. S-3.
31. The revised IEP continued the prior IEP goals for counseling and math. S-3.
32. By the end of the 2020-21 school year, the Student had begun to learn and use the pro-social coping skills for which the Student received direct instruction in accordance with the IEP. See S-3 at 4-6. However, progress data was not taken or reported in a way that that can be measured against the 40% baseline written into the goal. *Id.*
33. By the end of the 2020-21 school year, the Student had earned all As and Bs in all classes. S-5.

The 2021-22 School Year

34. The 2021-22 school year was the Student's [redacted] grade year.

⁶ The copy of the NOREP entered into evidence is not signed by the Parent. S-2 at 46. There is no dispute, however, that the 2021 IEP became the Student's operative IEP shortly after it was offered.

35. The Student transitioned from elementary school to middle school and (a building change) and returned to in-person instruction during the 2021-22 school year. See NT 42, 178.
36. The Student started the 2021-22 school year under the Revised 2021 IEP. S-3.
37. Before the 2021-22 school year started, the Student's teachers, case manager, and the school psychologist for the middle school familiarized themselves with the Student's IEP and understood that the Student may have emotional needs and high levels of anxiety. See, e.g. NT 178-181.⁷
38. During the 2021-22 school year, the Student's case manager and the school psychologist met frequently. The Student's case manager met with the Student's teachers twice per week. During those meetings, no specific or urgent concerns about the Student were raised by any of those District personnel. See NT 202.⁸
39. During the 2021-22 school year, the Student and the Student's case manager (the Case Manager) worked closely with each other, focusing on the Student's executive functioning and math needs. See, e.g. NT 192-195, 207; S-30.
40. In October 2021, the Student's PCA resigned. The District retained a new PCA to work with the Student. Shortly thereafter, the Student expressed a desire to stop working with the new PCA and complete more work independently. See, e.g. NT 181. The Student also told the Case Manager that working with the PCA could be triggering. NT 192, 203-204.
41. A Board Certified Behavior Analyst (BCBA) took data on how the Student worked with the new PCA, observed the Student, and reviewed the FBA. The BCBA saw nothing that would warrant a new FBA. NT 183, 188-189; S-7.

⁷ Testimony that many students returning to school post-pandemic with higher levels of anxiety, regardless of disability, was credible and not contradicted. While I am certain that the overall levels of the student population's psychological/emotional needs were heightened during the pandemic and its aftermath, my inquiry is limited to the Student's rights under the IDEA as an individual, not in relation to the broader peer cohort.

⁸ The District itself is the respondent in this matter. The District has constructive knowledge of

42. The Case Manager used the BCBA's information to develop a plan to titrate the PCA, and to shift the PCA from one-on-one support in every class to a greater reliance on classroom teachers (i.e. the PCA would provide direct support only when a teacher was not available). See, e.g. NT 182-183, 192, 203-204, 207-208.⁹
43. On January 20, 2022, the Student's IEP team reconvened and revised the Students' IEP (the January 2022 IEP). S-7.
44. The January 2022 IEP included a detailed, narrative review of the Student's progress and school performance from the start of the 2021-22 school year. S-7.
45. The IEP team changed the math goal slightly in the January 2022 IEP. C/f S-2 at 30, S-7 at 28. The new math goal called for the Student to exhibit the same skills with fewer prompts.
46. Both parties characterize this goal as a math goal. As a matter of fact-finding, I hold that this is not a math goal. The goal functions to increase the Student's ability to rely on tools and strategies to solve math problems and measures the Student's independence. The goal measures prompt dependency, not math ability. S-2 at 30, S-7 at 28.
47. The goal for the Student to arrive to class with appropriate materials was removed and replaced with a goal for the Student to engage in collaborative goal setting for guidance counseling sessions. C/f S-2 at 21, S-7 at 29.
48. The goal for the Student to comply with teacher demands or directions was removed and not replaced. C/f S-2 at 32, S-7.
49. The goal for the Student to use pre-taught self-advocacy responses when facing frustrating situations remained unchanged. However, the goal in the January 2022 IEP included no baseline and none of the data related to that goal collected previously. C/f S-2 at 33, S-7 at 25.

⁹ It is frustrating that the record of this matter does not readily enable findings that would create a more precise chronology of the PCA personnel change, the Student's conversations with the Case Manager, the BCBA's observations, and the Case Manager's development and implementation of the titration plan. More generally, the documentation of critical events that is typical in special education cases and often used to develop a precise chronology is lacking during this period of time. It is typical in special education for documents like IEPs to be revised and changed over time. When that happens, the chronology of changes should be apparent and easy to understand from the documents themselves. That is not true for documents around this time, although documentation improves later on.

50. The PBSP remained unchanged. *C/f S-2 at 34-35, S-7 at 31-32.*
51. The modifications and SDI, including those relating to the PCA, counseling, and social skills instruction, remained substantively identical. Changes in the modifications and SDI reflected the structure of the middle school, not a deviation from the type or amount of special education that the Student received under the prior IEP. However, some SDI like chunking and planned movement breaks were removed. *C/f S-2 at 36-38, S-7 at 33-35.*
52. The related services changed slightly. Occupational Therapy remained consultative but was reduced from 30 minutes per month to 15 minutes per month. An additional four sessions of group psychological services were added to "determine change of services." All other related services remained the same. *C/f S-2 at 29, S-7 at 31.*
53. The ESY determination remained the same, but the IEP team added social skills instruction to the ESY services. *C/f S-2 at 41, S-7 at 38.*
54. The Student's placement remained an itinerant level of learning support. *C/f S-2 at 42, S-7 at 39.*
55. Nothing in the January 2022 IEP reflects a problem with the Student's use of the PCA, a problem with the Student's relationship with the PCA, the Student's desire to rely on the PCA less, or the titration plan referenced above. *S-7.*
56. On April 27, 2022, the IEP team met again and revised the Student's IEP (the April 2022 IEP). *S-8.¹⁰*
57. At the time of the April 2022 IEP, the Student's teachers had noticed substantial pro-social growth in the Student and progress in group counseling. The IEP team questioned the ongoing need for a PCA and PBSP but acknowledged an ongoing need for occasional prompting. In response, the IEP team modified but did not remove the PBSP and agreed to a new FBA. *S-8.*
58. Academically, at the time of the April 2022 IEP, the Student had mastered the math goal, and so the math goal was revised. *S-8.*

¹⁰ Unlike some prior documents, the April 2022 IEP is a good example of how an IEP that changes over time can be drafted to clearly illustrate what changes were made and when. *See, e.g. S-8 at 30, 31.* Comparing the IEP at S-8 to prior IEPs may be a valuable training exercise for the District.

59. The District issued a Permission to Reevaluate form (PTRE) for the FBA on April 27, 2022. The Parent approved the PTRE on May 7, 2022. S-8.
60. On May 9, 2022, the District and Parent agreed to add accommodations to the SDI and modifications section of the April 2022 IEP. See S-8 at 31-34. Some of those changes brought back accommodations that were previously provided, like chunking larger assignments and planned movement breaks.¹¹ *Id.* Other changes added new modifications like double time for tests. *Id.* A third group of revisions clarified and fine-tuned the services that the Student was receiving, like direct instruction in pro-social skills. See, e.g. S-8 at 32. A fourth group of revisions specified how the District would send information to the Parent. See, e.g. S-8 at 34.
61. Near the end of the 2021-22 school year, a personnel change resulted in a new PCA being assigned to the Student. *Passim.*
62. On June 9, 2022, the IEP team reconvened. Both parties were represented by attorneys at this meeting. During this meeting the District reported that the Student had made progress towards IEP goals and “had a tremendous year in terms of social growth.” S-8 at 6. Nevertheless, the District offered to fund an IEE and requested the Parent’s permission to communicate with outside providers. *Id.*
63. The Student’s final grades in all classes for the 2021-22 school year were all As and Bs. S-10.
64. The Student made substantial progress towards all IEP goals during the 2021-22 school year. See, e.g. S-8.

Summer 2022

65. On August 8, 2022, the District completed its reevaluation report (the 2022 RR). S-12.
66. The 2022 RR included updated parental information, a review of prior evaluations and teacher input to IEPs drafted during the 2021-22

¹¹ The record does not reveal whether edits to add back in prior accommodations signal that the accommodations were discontinued and then started again, or whether the edits made the IEP reflect what had always been happening. The record as a whole suggests something in between. Regardless, in this case, the distinction is not outcome determinative, given the issues presented and the particular modifications and SDI in question.

school year, teacher observations and recommendations generated for the 2022 RR itself, and a new FBA. S-12.

67. The FBA, which was conducted by a doctoral-level BCBA (BCBA-D), included interviews with teachers and two, detailed observations of the Student. S-12.
68. Through the FBA, the BCBA-D concluded that the Student was not exhibiting behaviors that were impeding the Student's learning or the learning of others. Rather, the BCBA observed that the Student would sometimes protest non-preferred demands and would sometimes rush through work. The protests were minor (a sigh or an unhappy facial expression), and the Student would ultimately comply. Rushed work could yield mistakes, but the Student complied with teacher prompting to self-correct. S-12.
69. While the BCBA-D concluded that a PBSP and a PCA were likely unnecessary for the Student, the BCBA-D did not recommend elimination of either. Rather, the BCBA-D acknowledged that additional data was needed to develop a plan to titrate both services (the BCBA-D partially attributed the lack of data to several Student absences at the end of the 2021-22 school year). S-12.
70. The BCBA-D recommended data collection during the first trimester of the 2022-23 school year to develop a titration plan unless the Student's behaviors worsened. S-12.
71. The Student participated in ESY during the summer of 2022, but some counseling services were not provided. The District offered to provide make up missed counseling time at the start of the 2022-23 school year. S-13. The Parent initially rejected that offer both as vague and out of concern that the make-up sessions would cut into class time. *Id.* Ultimately, the parties came to an agreement and make-up sessions were provided. NT 221.

The 2022-23 School Year

72. The 2022-23 school year was the Student's [redacted] grade year.
73. The Student's case manager changed at the start of the 2022-23 school year. See NT 137.
74. The Student started the 2022-23 school year under the April 2022 IEP, as revised.

75. As contemplated in the 2022 RR, the District collected behavioral data at the start of the 2022-23 school year. That data showed the Student occasionally relied upon minimal prompting to engage in group work and did not require prompting in math or to engage in pro-social skills. Consequently, as recommended in the 2022 RR, the BCBA-D developed a plan to titrate the PBA. In general, the plan called for the PCA to decrease prompting while collecting data about the Student's ability to remain on task. Prompting would decrease on a class-by-class basis until the PCA was no longer needed. See S-14 at 22-25.
76. On September 22, 2022, the IEP team reconvened (again with attorneys) to review the newly collected behavioral data and titration plan. See S-14, NT 88. During that meeting, the Parent did not object to the proposed plan, but would not agree to make any changes. Rather, the Parent refused to discuss the new information and preferred to hold everything as is until the pending IEE was complete. See, e.g. S-14 at 26.
77. On November 18, 2022, a Certified School Psychologist in private practice completed the IEE. The IEE included a review of school records, interviews with private providers who were working with the Student outside of school, interviews with teachers, an interview with the Student, an in-school observation, a standardized, normative test of intellectual ability (WISC-V), a standardized, normative test of academic achievement (KTEA-3, sections of the WIAT-4, and a mathematics test), a behavior rating scale (BASC-3), an executive functioning assessments (CEFI), ADHD rating scales (Conners 3), an anxiety rating scale (MASC-2), and a social responsiveness scale (SRS). S-16.
78. The BASC-3 and CEFI rating scales were completed by the Student's case managers and the Parent. The Student also completed a BASC-3 self-assessment. The Conners 3, MASC-2, and SRS included information from the Student's mother only. S-16.
79. The independent evaluator diagnosed the Student with Adjustment Disorder with Mixed Anxiety and Depression, and Specific Learning Disability with Impairment in Mathematics. The evaluator concluded that the Student did not meet diagnostic criteria for PTSD or ADHD. S-16.¹²

¹² The IEE notes diagnoses of TBI and vision processing disorder by history but does not indicate those were current diagnoses at the time of the IEE. Specifically regarding TBI, the

80. At the time of the IEE, the Student was receiving private therapy and private equine therapy weekly. S-16.
81. At the time of the IEE, the Student had experienced significant trauma.¹³ S-16.
82. Intelligence testing conducted as part of the IEE found that the Student's FSIQ and GAI were both in the average range. S-16.
83. Academic achievement testing conducted as part of the IEE found that the Student's academic achievement in reading and written language, but that the Student's math scores were below average. Assuming that the WISC-4 and KTEA-3 can be compared with each other, the Student's reading and written language achievement was within expectations relative to FSIQ, but the Student's math abilities were below expectations.¹⁴ The FAM revealed that the Student's math difficulties were most significant in terms of fluency (that is, the Student's ability to do math quickly as opposed to the Student's ability to understand math concepts). S-16
84. Two teachers, the Student's [redacted] grade case manager and the Student's [redacted] grade case manager, completed the BASC-3. Generally, the Student's [redacted] grade teacher gave the Student more significant ratings than the Student's [redacted] grade teacher.¹⁵ For externalizing problems, the [redacted] grade teacher rated the Student in the clinically significant range while the [redacted] grade teacher related the Student in the average range. Both teachers rated the Student in the clinically significant range for internalizing problems. For school problems, the [redacted] grade teacher rated the Student in the at risk range while the [redacted] grade teacher related

IEE contains mixed messages about whether that diagnosis is still appropriate and recommends additional medical testing. *See, e.g.* S-16 at 51.

¹³ The traumatic events in the Student's life were known to the District as they occurred. The IEE provides a good summary of those events. Disclosing the details of those events would make the Student easily identifiable, even with the Student's name redacted in this decision. For that reason, and since the events are well-known to the parties, I decline to list them explicitly.

¹⁴ The WISC is typically compared to the WIAT, not the KTEA. Some WIAT sub-tests were administered, but those were used to measure listening comprehension and oral expression, not academic achievement. There is no preponderant evidence in the record of this case to say how the WISC and KTEA can or should (or should not) be compared. However, there is no dispute that math is an area of need for the Student.

¹⁵ The decrease in problems in [redacted] grade compared to [redacted] grade is consistent with the District's own reporting.

the Student in the average range. Those composite scores contribute to an overall behavioral symptoms index. That index score was in the clinically significant range for the [redacted] grade teacher and in the at risk range for the [redacted] grade teacher. S-16.

85. The Parent's ratings on the BASC-3 were less significant than either teachers' ratings overall, and more consistent with the [redacted] grade teacher's ratings (average for externalizing problems, at risk for internalizing problems, and average for the behavioral symptoms index). S-16.
86. On the CEFI, the [redacted] grade teacher rated the Student mostly in the low-average range with some scores in the average range. The [redacted] grade teacher rated the Student as average across the board, with one score in the superior range. The Parent rated the Student mostly in the low-average range with some scores in the average range and some in the below average range. S-16.
87. The Conners 3 parent ratings were mostly in the average range, but reflected parental concerns about attention, executive functioning, and peer relationships. S-16.
88. The IEE included several recommendations to the IEP team. Those recommendations included special education to address gaps in foundational math skills, instruction in self-monitoring skills for attention, development of peer relationships through participation in activities and social skill groups, and titration of the PCA and PBSP. S-16 at 53.
89. Other recommendations were consistent with SDI and modifications in the Student's IEP. S-16 at 54.
90. On November 3, 2022, the District sought the Parent's consent to reevaluate the Student in order to gain more information about topics addressed in the IEE and to use the IEE programmatically. S-15. The Parent did not respond, and so the District reissued the consent form on December 2, 2022. S-17.
91. While the Parent did not return either of the District's consent forms, the Parent did request another IEP team meeting. That meeting convened on December 16, 2022. Again, both parties participated with attorneys. S-18.

92. During the IEP team meeting, the Parent (via counsel) opposed the PCA titration plan, asked about whether the Student's math programming would change in response to the IEE, expressed concerns about the accuracy of the most recent FBA, expressed concerns about the Student's in-school counseling services,¹⁶ and asked questions about the consent forms. S-18 at 29.
93. Although the exact date is not reflected in the records, the Parent ultimately consented to the District's proposed reevaluation. The District completed a reevaluation report on January 6, 2023 (the 2023 RR). S-19.
94. The 2023 RR included a comprehensive review of all prior testing, including the most recent IEE, and the Student's academic history. S-19 at 1-25.
95. The 2023 RR included a behavior rating scale (the BRIEF) completed by the Parent and three subject-area teachers. The teacher's ratings, like the [redacted] grade teacher's ratings in the IEE, found the Student in the average range across the board. The Parent's ratings found the Student in the clinically significant range in nearly all domains. S-19.
96. The 2023 RR included several other rating scales as well, targeting executive functioning, peer relationships, anxiety, and other domains. As with the BRIEF, parent and teacher ratings show completely different views of the Student. The evaluator attributed the differences both to the raters' perceptions of the Student and the Student's behaviors in different settings. S-19.
97. The 2023 RR also included a new FBA, which itself included multiple observations of the Student over multiple days in multiple classes. In all of those observations, the Student showed no maladaptive behaviors or behaviors that interfered with the Student's learning or that of others. Similarly, the Student required only one minor prompt in one class to attend to task. S-19.

¹⁶ Specifically regarding in-school counseling, the Parent did not want the school counselor to discuss the subject of [redacted] with the Student. Nothing in the record establishes that was a subject of school counseling, or that the Student was [redacted], or that the Student exhibited any form of [redacted]. The Parent testified that the Student threatened self-harm upon learning that the PCA worked with another student when not working with the Student. Ignoring the hearsay, that single sentence in the record of this case is not preponderant evidence and relates to the Student's efforts to keep a preferred PCA in place. See *infra*.

98. The 2023 RR concluded that the Student qualified for special education under three disability categories: Other Health Impairment (OHI) was the primary category, Emotional Disturbance (ED) was the secondary category, and Specific Learning Disability (SLD) was the tertiary category. S-19.
99. Regarding OHI, the evaluator found that the Student's heightened anxiety resulted in attention and executive functioning needs to a level that required special education. This finding gives particular credence to the IEE (including the adjustment disorder diagnosis) and the Parent's responses to rating scales in the 2023 RR, and discounts the Student's abilities as observed during the FBA. S-19.
100. Regarding ED, the evaluator concluded that – despite considerable improvement – the Student's long history of needing direct instruction in social skills and help forming and maintaining peer relationships, combined with recommendations in the IEE and the 2023 RR itself to continue those services, warranted the designation. S-19.
101. Regarding SLD, the evaluator concluded that the Student's need for special education in Math warranted the designation. S-19.
102. On January 19, 2023, the IEP team reconvened. S-20.
103. During the IEP team meeting, the Parent disagreed with the ED qualification in the 2023 RR, ascribing the Student's behaviors to TBI or OHI. That disagreement, and a disagreement about the PCA's attendance at the IEP team meeting, filled the duration of the IEP team meeting. NT 73, 222-223.
104. Roughly an hour before the meeting convened, the Parent demanded that the PCA attend the meeting. The District did not have time to comply. However, after the meeting, the District solicited the PCA's input and issued an addendum to the 2022 RR with that input. S-22.
105. A draft IEP that the District prepared for the meeting indicates that the Student had begun to see the PCA as a friend, was aware of the proposed titration plan (which called for the Student's active participation), and occasionally exhibited behaviors to ensure that the PCA would not be removed. S-20.

106. The draft IEP also increased the amount and type of social skills instruction and counseling support that the Student would receive in school while implementing the PCA titration plan. S-20.
107. The Parent rejected the draft IEP in its entirety (including the additional services and the titration plan). The District continued to implement the Student's last-approved IEP. S-20.
108. On February 2, 2023, the District invited the Parent to another IEP team meeting. S-23.
109. On February 23, 2023, the Parent sent a letter from a doctor to the District indicating that the Student had sustained a concussion.¹⁷ The letter included a concussion protocol, which the District implemented. The District was unable to implement substantial portions of the Student's IEP with the concussion protocol in place. The Student was excused from school through February 25, 2023, and then attended a shortened school day and was occasionally absent. That, in turn, made it difficult for the District to continue progress monitoring. Occupational and physical therapy also stopped. *See, e.g.* S-20, S-25, S-27.
110. On February 28, 2023, the Parent returned the February 2, 2023, IEP team meeting invitation. S-23.
111. On March 3, 2023, the IEP team reconvened. During that meeting, the Parent expressed concerns that the ED qualification would hinder the Student's ability to attend college. S-23.
112. The District prepared a draft IEP for the March 3 meeting. That draft included reports of the Student's progress. Data collected supported the discontinuation of occupational and physical therapy, and the removal of PBSP. The District continued to recommend titration of the PCA while increasing other supports. The draft also included increased math supports and replacement math instruction. Other changes addressed the Student's transition to high school and an assistive technology assessment as soon as permitted by the concussion protocol. S-23.

¹⁷ The record is nearly devoid of information about what happened to the Student at this time. My impression is that no information beyond the fact of the concussion itself was provided to the District.

113. Goals in the draft IEP addressed needs identified in the IEE and 2023 RR, including written expression, math problem solving, task perseverance (particularly important for PCA titration, use of prosocial coping skills, and development of problem solving skills. S-23.
114. The Parent asked to visit the math and social skills classrooms before approving the IEP. The District granted the request, but the Parent did not schedule the visit. Similarly, the District offered a tour of the high school to the Parent and Student but received no response from the Parent. *See, e.g.* NT 226.
115. The Student's concussion protocol, which called for a shortened school day and no physical activity, was extended several times through June 2023. S-25, S-36.
116. The District requested, on multiple occasions, to speak with the Student's doctor to get a better understanding of the Student's concussion and the concussion protocol. The Parent did not provide consent. *See, e.g.* S-36.
117. On April 20, 2023, the Parent, via counsel, filed the due process complaint initiating this matter.
118. Eventually, the Parent signed a Notice of Recommended Educational Placement approving the draft IEP that began development in March 2023. No disputes about the Student's current programming are presented.

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. 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).

I find that all witnesses testified credibly in that all witnesses candidly shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. To the extent that witnesses recall events differently or draw different conclusions from the same information, genuine differences in recollection or opinion explain the difference.

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 [WHAT] 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 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 *Andrew 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 *Andrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a “merely more than *de minimis*” standard, holding instead that the “IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be “appropriately ambitious in light of [the child’s] circumstances.” *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be “appropriately ambitious” for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress. Rather, I must consider the totality of a child’s circumstances to determine whether the LEA offered the child a FAPE.

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 concluded 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* remains the leading case on this method of calculating compensatory education.

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 embraced the *Reid* method in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid* to explain 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 *Reid* or "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., 39 F. Supp. 3d 584, 608 (M.D. Pa. 2014).

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.*, 39 F. Supp. 3d 584, 609 (M.D. Pa. 2014). 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 establishing the position that the student would be in but for the denial, or evidence establishing the amount

and type of compensatory education needed for remediation, the hour-for-hour approach is a necessary default. Alternatively, full-day compensatory education can also be an appropriate remedy if the full-day standard is met. In all cases, however, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Discussion

The Parent alleges that the District violated the Student's right to a FAPE in two ways: First, the Parent argues that the District failed to provide appropriate special education to address the Student's emotional functioning. Second, the Parent argues that the District failed to provide appropriate special education to address the Student's math needs.

Emotional Functioning

While both arguments are presented, the Parent's focus has been on the Student's emotional needs. The Parent argues that the PCA masked the true depth of the Student's emotional needs and, functionally, the District relied on the PCA to provide an ad hoc but inappropriate form of emotional support for the Student. There is virtually nothing in the record of this hearing to support that argument.

The argument is so broad that it is difficult to parse. Which PCA, under which IEP, at what time? Two PCAs worked with the Student during the time in question, and the work that those PCAs did with the Student changed over time as well. The Student had significantly different relationships with the PCAs, too. The first PCA worked with the Student until the last part of the 2021-22 school year. The Student did not have a close relationship with that PCA, and requested titration. The second PCA took over at the end of the 2021-22 school year. The Student saw that PCA as a friend, and actively worked to keep the PCA in place.¹⁸

In support of the claim that the PCA masked the Student's emotional needs, the Parent points to the absence of an evaluation of the Student's emotional needs, and the Student's over-reliance on the PCA. Assuming that both of those arguments are true, neither supports the Parent's claim that the PCA masked the Student's emotional needs.

¹⁸ The District argues that the second PCA was popular, and so the Student received a social benefit from working with the second PCA. There is good reason to accept that argument, but I make no specific finding in this regard.

It is true that there was a gap in the Student's evaluations. That gap is largely attributable to the COVID-19 pandemic, but the pandemic did not alter the Student's rights. Even so, that gap neither establishes an over-reliance on the PCA, or that the PCA masked the Student's emotional needs. Rather, the record establishes that the District was always keenly aware of the Student's emotional needs and consistently offered programming in support of those need through social skills groups, direct instruction in pro-social skills, and the like.

Similarly, the District concluded that the Student was overly reliant on the PCA in 2020, the District took active measures to decrease the PCA's prompting while putting additional supports in place.

Moreover, the Parent's argument about the PCA masking the Student's emotional needs is also hard to understand in light of the District's prolonged and consistent effort to titrate the PCA while increasing the Student's emotional support services. The Parent actively worked against this effort. The Parent rejected increased emotional support services, took umbrage at an ED designation that was derived almost entirely from the Parent's input into independent evaluations, and blocked the District's efforts to decrease the amount of time that the Student would spend with the PCA as different milestones were met.

In sum, the Parent argues that the District failed to evaluate the Student's emotional needs during a time when all evidence shows that the District's efforts to address the Student's emotional needs were successful. At the same time, the Parent argues that the Student's over-reliance on the PCA evidences a FAPE violation during a period when A) the Parent was actively thwarting the District's effort to increase other services while titrating the PCA and B) the Student's reliance on the PCA was at an all-time low.

Math

The Parent has a stronger argument regarding math. The District recognized the Student had special education needs in math during the entirety of the time in question. The District's efforts to address those needs were ambiguous at best.

It is true that the Student made progress towards IEP goals but as explained above, what the District called math goals were not truly math goals. The District was measuring the Student's ability to attend to math, not the Student's ability to do math. Also, while the Student earned good grades in Math, the Student obtained those grades with significant accommodations. That pattern continued for years until, standardized, normative assessments

of the Student's math achievement showed a deviation between the Student's intellectual ability and the Student's acquired math skills. Those same assessments showed gaps in the Student's math abilities and, based on those assessments, the District proposed significant changes to the Student's math program. For the first time, the District proposed replacement math instruction in a special education setting.

The difficulty in this case both in terms of finding a violation and crafting a remedy is that there is very little evidence about the Student's math needs during the time in question. The testing that provided detailed information about the Student's math needs came late. However, the record shows that the Student had math needs that required special education for the entire time in question but did not have a math goal (despite labels in an IEP) for the entire time in question. The record does not support a specific finding of what sort of math instruction the Student should have had all along, but there is preponderant evidence that the Student's math needs were unmet.

Further, unlike the Student's emotional needs, there is preponderant evidence that the PCA – along with other accommodations – masked the Student's math needs. In fact, the Student's IEP goal for math was to decrease PCA prompt dependency. By focusing on the Student's need for a PCA, the District failed to keep tabs on the Student's math needs and progress.

While the Student's IEPs changed over time, nothing in those IEPs changed the Student's math instruction or special education interventions related to math until March 3, 2023. At that point, the District drafted an IEP offering replacement math instruction. Again, this does not prove that the Student needed replacement math instruction all along. Rather, this is one more point illustrating how the Student's math needs were not address. In this case, that failure is a substantive violation of the Student's right to a FAPE for which compensatory education is owed. Further, in the record of this case, the replacement math instruction is the only evidence that can be used to calculate a compensatory education award using the hour-for-hour method. I use the hour-for-hour method as a default because no evidence was presented regarding a make-whole remedy.

I award the Student one hour of compensatory education for each day that the Student attended school between April 20, 2021, and March 3, 2023, including half days that the Student attended while working under the concussion protocol.¹⁹ The Parent may direct the use of this compensatory

¹⁹ The record does not support a violation during summer ESY. The concussion protocol did not prohibit math instruction.

education for any appropriate developmental, remedial, or enriching educational service, product, or device that furthers the Student's educational needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. The cost of services and products obtained with this award may not exceed the market rate for those or similar services and products within the District. Any compensatory education that is not used by the end of the school year in which the Student turns 21 years old is forfeited.

An appropriate order follows.

ORDER

Now, October 23, 2023, it is hereby **ORDERED** as follows:

1. The District violated the Student's IDEA right to a FAPE by failing to provide appropriate special education in math from April 20, 2021, through March 3, 2023.
2. The Student is awarded one hour of compensatory education for each day that the Student attended school from April 20, 2021, through March 3, 2023, including days that the Student participated in half-day instruction during implementation of a concussion protocol.
3. The Parent may direct the use of all compensatory education awarded herein in accordance with limitations the accompanying Decision.
4. Any compensatory education that is not used by the end of the school year in which the Student turns 21 years old is forfeited.
5. All other claims are **DENIED**.

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

/s/ Brian Jason Ford
HEARING OFFICER