

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

22795-19-20

Child's Name

P.M.

Date of Birth

Redacted

Parents

Redacted

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Hearing Officer

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Date of Decision

02/18/2020

Introduction

This special education due process hearing concerns the educational rights of P.M. ("student"), a student who resides in the Kiski Area School District ("District").¹ The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")² as a student who requires special education. The parties dispute the evaluation profile of the student and the District's past and present programming.

The student's parents claim that the District failed to evaluate the student appropriately and failed to appropriately program for the student's needs, thereby denying the student a free appropriate public education ("FAPE"). Analogously, the parent asserts these denial-of-FAPE claims under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").³ Parents seek compensatory education as a remedy, as well as directives to the student's individualized education program ("IEP") team.⁴

¹ The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

² It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.162 ("Chapter 14").

³ It is this hearing officer's preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 ("Chapter 15").

⁴ Parents' claim remedy for a period from April 2017 through the student's current programming in the 2019-2020 school year. (Notes of Testimony ["NT"] at 1-32).

The District counters that at all times it met its obligations to the student under IDEIA and Section 504. Accordingly, the District argues that the parent is not entitled to any remedy.

For reasons set forth below, I find in favor of parents.

Issues

1. Did the District appropriately evaluate the student?
2. Did the District provide appropriate programming through the student's program and placement?
3. If the answer to either, or both, of these questions is "no", is the student entitled to compensatory education?

Findings of Fact

All evidence of record was reviewed. The citation to any exhibit or aspect of testimony is to be viewed as the necessary and probative evidence in the mind of the hearing officer.

Prior Evaluation / Education History

1. At parents' request, the District first evaluated the student in December 2012, in the midst of the student's 3rd grade year. (Parents' Exhibit ["P"]-1).
2. In the December 2012 evaluation report ("ER"), the student's full-scale IQ on an assessment of cognitive ability was 104, in the average range. Component index scores on the assessment were also in the average range. (P-1).
3. Achievement testing in the December 2012 ER did not reveal any significant discrepancies between the student's cognitive ability and academic achievement in reading, written expression, or mathematics. (P-1).

4. Teacher input did not indicate any behavioral difficulties, although the student's teacher noted the student's tendency "to rush through tasks and/or exams" and she opined that the student's performance and completion of assignments would improve with a more measured pace of task-approach and task-completion. (P-1).
5. The evaluator observed the student in class and did not observe any behavioral difficulties, although the observer noted that the student was, at times, off-task and inattentive. (P-1).
6. The December 2012 ER concluded that the student did not have a disability and did not require special education. (P-1).
7. In the midst of the 2014-2015 school year, the student's 5th grade year, parents enrolled the student in a private school. In the spring of that school year, the parents requested a re-evaluation of the student in light of psychological diagnoses of attention deficit hyperactivity disorder ("ADHD") and oppositional defiant disorder. (School District Exhibit ["S"]-7; NT at 43-113).
8. The student returned to the District in the 2015-2016 school year, the student's 6th grade year. (S-7; NT at 43-113).
9. In September 2015, the District completed its re-evaluation of the student. (S-7).
10. Parental input in the September 2015 re-evaluation report ("RR") was provided by the student's mother and indicated that the student exhibited oppositional behavior at home, especially when disciplined. The student's mother also reported difficult peer relationships at times. She indicated concerns in certain academic areas, including mathematics, spelling, and language. The student's mother reported that the student "rushes through things often and needs slowed down (sic)". (S-7).

11. An observation of the student reported that the student did not exhibit problematic behaviors toward the teacher or peers but that when classwork became less structured, in small group work, the student "lost focus" and "seemed to have difficulty retaining focus". (S-7).
12. Teacher input in the September 2015 RR indicated academic concerns as a need for studying, poor retention, and poor application of skills. The teacher input also indicated that the student was "quick to anger" and "interaction with students can be inconsistent". The level of support being provided by teachers as "maximum academic; minimal behavioral". Finally, teachers found the student "inconsistent in work effort" and "distracted and has difficulty sustaining attention to the task at hand". (S-7).
13. In the September 2015 RR, the student's full-scale IQ on an assessment of cognitive ability was 71, in the low range and a marked decline from the cognitive assessment in December 2012. Component scores on the assessment were also markedly lower in the September 2015 RR, including scores in the low range for number series and verbal attention (5th and 4th percentiles, respectively) and in the very low range for phonological processing (1st percentile). (S-7).
14. The District evaluator noted that "Several indications of (the student's) ADHD were observed throughout the testing session which significantly impacted (the student's) performance", including impulsivity "work(ing) through tasks too quickly", and a quickness to indicate that the student did not know the answer. The evaluator opined that the cognitive testing results were a "conservative estimate" of the student's cognitive ability. (S-7).

15. Achievement testing in the September 2015 RR resulted in average or low average scores in letter-word identification, passage comprehension, and calculation. The student scored in the low range (8th percentile) in applied mathematics problem-solving. (S-7).
16. The District evaluator did not perform any assessments of the student's attention, task-approach/task-completion, or executive functioning skills. (S-7; NT at 43-113).
17. The September 2015 RR determined that, based on teacher input and the impact on the instruments for the evaluation, the student's ADHD significantly impacted the student's performance. The September 2015 identified the student as a student with a health impairment as a result of ADHD, and recommended that the student receive specially designed instruction through an IEP. (S-7).
18. Approximately two weeks after the District issued its September 2015 RR, the parents obtained a neuropsychological evaluation from a local psychiatric hospital. (P-2; NT at 115-189).
19. The parents attempted to provide the neuropsychological report to the District, but the District would not review it. (NT at 115-189).
20. The private neuropsychological evaluation included assessments, and detailed findings, for attention, executive functioning, and behavior/adjustment. (P-2).⁵

⁵ For example, the assessment of the student's attention and task-approach/task-completion included data in the following six domains:(1) organizing, prioritizing, and activating, (2) focusing/sustaining/shifting attention, (3) regulating alertness, sustaining effort, and processing speed, (4) managing frustration and modulating emotions, (5) utilizing working memory and accessing recall, and (6) monitoring/self-regulating action. (P-2).

2017-2018 – 8th Grade⁶

21. In September 2017, at the outset of the student's 8th grade year, the District re-evaluated the student. (S-11).
22. The evaluator who authored the September 2017 RR was not the evaluator who authored the September 2015 RR (also the evaluator who testified at the hearing). (NT at 43-113).
23. The evaluator of the September 2017 RR reported the student's cognitive and achievement testing results from the September 2015 RR without including the notations about the unreliability of those results based on the impact on testing of the student's ADHD. (S-11).
24. On the Pennsylvania State System of Assessment for the prior year, the student's 7th grade year, the student scored in the basic range for English/language arts ("marginal academic performance" with "partial command of and ability to apply" knowledge and skills in that area). The student scored in the below basic range for mathematics ("inadequate academic performance" with "minimal command of and ability to apply" knowledge and skills in that area). (S-11).
25. The September 2017 RR indicated that the student had, at that time, an IEP goal in mathematics. (S-11).

⁶ Parents' claim for remedy, and the scope of the denial-of-FAPE evidentiary record, ranged from April 2017 through the current 2019-2020 school year. While some documentary evidence, in the form of progress monitoring, was presented about the student's programming in the spring of 2017, the IEP from that period was not made part of the record nor was testimony elicited about this period. With the progress monitoring being mostly de-contextualized, this hearing officer declines to make the spring of 2017 the basis of any fact-finding. (See P-6 at pages 1-2).

26. Teacher input in the September 2017 RR indicated that the student “sometimes uses the support services of the learning support program” to have tests/quizzes read aloud. The RR also indicated that “math computation and application continues to be an area that (the student) needs to improve”. The teacher input recommended that the student continue to use the learning support setting to have tests/quizzes read aloud. (S-11).
27. The September 2017 RR recommended that the student continue to be identified as a student with a health impairment (ADHD) that requires specially designed instruction to be delivered through an IEP. (S-11).
28. In September 2017, contemporaneously with the RR, the student’s IEP team met for the annual revision of the student’s IEP. (P-3).
29. The September 2017 IEP listed “improve math computation and application skills” as a need of the student. (P-3).
30. The September 2017 IEP contained one goal, in mathematics: “given an instructional level test/quiz, (the student) will solve computation and application problems with at least 75% accuracy on 4 out of 4 grading periods”. (P-3).
31. The September 2017 IEP did not contain any goals for attention, organization, or task-approach/task-completion. (P-3).
32. The program modifications in the September 2017 IEP mostly addressed quizzes and tests (adapted assessments, extended time, directions to be read orally, option for small-group testing environment). The opportunity for review or remediation, and the provision of study guides, were let to the discretion of the regular education teacher. (P-3).
33. There was no specially-designed mathematics instruction as part of the student’s September 2017 IEP. (P-3).

34. The student did not have any pullout instruction and spent 89% of the school day in regular education. (P-3).
35. In November 2017, the student's progress was reported at 85% accuracy on instructional-level tests/quizzes with an overall first quarter math grade of 80%. (P-6, P-7).
36. In January 2018, the student's progress was reported at 80% accuracy on instructional-level tests/quizzes with an overall second quarter math grade of 74%. (P-6, P-7).
37. In March 2018, the student's IEP was "reopened...to talk about (the student's) struggles in math". It is unclear in the IEP, or from testimony, what—if any—changes to the student's programming resulted from the March 2018 IEP meeting. (P-3).
38. In April 2018, the student's progress was reported at 83% accuracy. Although not reported as part of the student's progress monitoring at that time, the student's third quarter math grade was 79%. (P-6, P-7).
39. In June 2018, the student's progress was reported at 82% accuracy. Although not reported as part of the student's progress monitoring at that time, the student's fourth quarter math grade was 79%. The progress monitoring indicated "(the student) met (the) goal". (P-6, P-7).
40. The student's final mathematics grade in 8th grade was 78%. (P-7).

2018-2019 – 9th Grade

41. In September 2018, the student moved to the District high school for 9th grade.

42. Rather than a daily class schedule, the high school schedule runs on an A/B block schedule (i.e., a student has certain classes on "A" day, and other classes on "B" day), with each A/B day alternating one after the other. The class periods are longer ("blocks"), approximately twice as long as a 45-minute class-period schedule. (NT at 308-407).
43. The high school includes a regular education intervention called lunch-and-learn for all students. During lunch-and-learn a student may voluntarily utilize time for review of material. Alternatively, a teacher may request or require a student to attend lunch-and-learn for review of material. (NT at 193-302).
44. The student began studies in a (redacted) program at a county-based career and technical center ("CTC"). (NT at 115-189).
45. The student spent "A" day in the District and "B" day at the CTC. (S-14; NT at 115-189, 232-407).
46. In September 2018, the student's IEP team met for its annual review of the student's IEP. (S-14).
47. On the Pennsylvania State System of Assessment for the prior year, the student's 8th grade year, the student scored in the basic range for reading and in the below-basic range for mathematics and science. On the Keystone Exams for 8th grade, the student scored in the basic range for Algebra I. (P-7).
48. The student's mathematics teacher did not provide input for the IEP. (S-14).
49. The September 2018 IEP identified that the student continued to have needs in math computation and application skills. (S-14).
50. The September 2018 IEP did not contain a mathematics goal. (S-14).

51. In the student's mathematics class—Algebra I—the student was allowed to re-take tests. This was a practice for any student in the class, including regular education students. (NT at 232-302).
52. The September 2018 IEP contained a task-completion goal: "Given an assignment in ... general education classes, (the student) will start the assignment with no more than 2 prompts, continue working until the task is completed, and turn in the assignment with no less than 80% accuracy for 4 out of 4 grading terms." (S-14).
53. The program modifications in the September 2018 IEP mostly addressed quizzes and tests and assignments (adapted assessments, extended time, directions and the assessments to be read orally and checked throughout assessments, option for small-group testing environment). The IEP provided that the student be given an opportunity for review, along with every high school student, during lunch-and-learn. (S-14).
54. There was no specially-designed mathematics instruction or instruction for attention/task-approach/task-completion as part of the student's September 2018 IEP. (S-14).
55. The student did not have any pullout instruction and spent 93% of the school day in regular education. The student's special education teacher, however, could not explain when or where the student received any regular special education services as part of this calculation. (S-14; NT at 232-302).
56. In October 2018, progress monitoring for the September 2018 IEP indicated: "(The student) is turning in work with 84% accuracy." (S-14).
57. In November 2018, the student appeared on four consecutive "weekly failure reports" for failing grades in one or more subjects. (P-12).

58. In January 2019, progress monitoring for the September 2018 IEP indicated: "(The student) is turning in work with 80% accuracy." (S-14).
59. In January 2019, the student was disciplined for (redacted). In March 2019. (S-19).
60. In February 2019, the student appeared on three consecutive weekly failure reports for failing grades in one or more subjects. (P-12).
61. In March 2019, the student was disciplined twice—(redacted). (S-19).
62. In March 2019, progress monitoring for the September 2018 IEP indicated: "(The student) is turning in work with 94% accuracy." (S-14).
63. In March 2019, the student appeared on two consecutive weekly failure reports for failing grades in one or more subjects. (P-12).
64. None of the IEP progress monitoring indicated any measure, as provided in the goal, of prompting to start an assignment. Neither the goal nor the progress monitoring indicated the class, or classes, where the task-approach/task-completion were probed, or how many assignments were utilized for this measurement. The accuracy figure does not indicate the number of assignments, or the classes, where accuracy on assignments were gauged. (S-14).
65. In April 2019, the student appeared on a weekly failure report for failing grades in one or more subjects. (P-12).
66. In April 2019, the parent communicated with the District, requesting an IEP meeting for a discussion of parent's view that the student had been denied FAPE, and the component complaints of parents in that regard. (S-14; NT at 115-189).

67. The parents requested an independent educational evaluation (“IEE”) at public expense. The District did not file a special education due process complaint to defend its September 2017 evaluation process/RR, instead telling parents that the District must first be allowed to re-evaluate the student. (S-14; NT at 115-189).
68. The parents, the student’s special education teacher, and one of the District’s co-administrators for special education met to discuss parent’s concerns. (S-14).
69. In early May 2019, as a result of the April 2019 IEP team meeting, the District issued a RR. (P-15; S-17).
70. The evaluator who authored the May 2019 RR was not the evaluator who authored the September 2015 RR, which contained the District’s latest cognitive and achievement testing (also the evaluator who testified at the hearing). (NT at 43-113).
71. The evaluator of the May 2019 RR reported the student’s cognitive and achievement testing results from the September 2015 RR and, unlike the September 2017 RR, included the notations about the unreliability of the September 2015 results based on the impact on testing of the student’s ADHD. (P-15; S-17).
72. The May 2019 RR did not contain any updated cognitive or achievement assessments. (P-15; S-17).
73. Teacher input in the May 2019 RR included the following:
 - The student’s English teacher indicated that “only sometimes does (the student) adequately prepare for tests”.

- The student's Algebra I teacher indicated that "(the student) rarely comes to class prepared or has necessary homework assignments completed", that "it is evident by test scores that (the student) does not adequately prepare for tests, that the student "only sometimes" pays attention during instruction, and that "(the student) has trouble paying attention and staying on task".
 - The student's history teacher indicated that the student "only sometimes" is adequately prepared for class. (P-15; S-17).
74. The May 2019 RR did not contain any assessments for needs in attention, organization, or task-approach/task-completion. (P-15; S-17).
75. In late May 2019, the student's IEP team met to revise the student's IEP. (S-19).
76. The May 2019 indicated that in April, the student's math computation skills were measured using a curriculum-based measure ("CBM"). At the Algebra 8-1 level (one of multiple testing levels for 8th grade algebra), the student could compute and solve mathematic problems with 56% accuracy. At the 7-9 level (one of multiple testing levels for 7th grade mathematics), the student could compute and solve problems with 94% accuracy. (S-19; *see also* each party's closing statement⁷).

⁷ The hearing officer had asked each party to provide information about the CBM system employed by the District, with a view especially to the meaning of the curricular levels reflected in the 8-1 and 7-9 designations.

77. At the hearing, the District special education teachers could not explain, or inaccurately understood, the grade-level CBM assessment results. (NT at 232-407).
78. The May 2019 IEP repeated the task-completion goal, although it adjusted the numeric measures in the goal: "Given an assignment in ... general education classes, (the student) will start the assignment with no more than 2 prompts, continue working until the task is completed, and turn in the assignment with no less than 85% accuracy for 3 out of 4 grading terms." (S-19).
79. A mathematics goal was added to the May 2019 IEP: "Given a collection (16 questions) of Algebra I math computation and problem solving problems at the 8-1 level, (the student) will compute and solve the problems with at least 65% accuracy by the end of the 2019-2020 school year." The mathematics goal was written for demonstrated achievement on the District's CBM program. (S-19).
80. The program modifications in the May 2019 IEP again mostly addressed quizzes and tests and assignments (adapted assessments, extended time, directions and the assessments to be read orally and checked throughout assessments, option for small-group testing environment). The May 2019 IEP required that the student engage in the regular education lunch-and-learn session. (S-19).
81. There was no specially-designed mathematics instruction or instruction for attention/task-approach/task-completion as part of the student's May 2019 IEP. (S-19).
82. The student did not have any pullout instruction and spent 93% of the school day in regular education. (S-19).

83. In May 2019, progress monitoring for the September 2018 IEP indicated: "(The student) is turning in work with 81% accuracy." (S-14).
84. In May 2019, the student appeared on a weekly failure report for failing grades in one or more subjects. (P-12).
85. The student's participation in sports and the student's attendance at the CTC (redacted) program were both put in jeopardy by failing grades. (NT at 115-230, 449-504).

2019-2020 – 10th Grade

86. The student needed to repeat Algebra I in 10th grade. (NT at 115-189, 308-407).
87. In September 2019, the parents filed the special education due process complaint which led to these proceedings.
88. In November 2019, the District re-evaluated the student. (S-21).
89. The November 2019 RR was conducted by the evaluator who had conducted the September 2015 re-evaluation, the last time the District had conducted cognitive and achievement testing. The evaluator included his results in the November 2019 RR, including his caution that those testing results were significantly impacted by the student's ADHD. (S-21).
90. The November 2019 RR contained Keystone Exams scores for 9th grade. The student scored in the basic range for Algebra and biology. (S-21).
91. As of mid-November 2019, the student's current classroom grades indicated that the student had failed most tests in academic classes (Algebra I – 16/30, 49/73, 0/88; English – 29/45; Technology – 36/50; Contemporary America – 21/50, 26/50). (S-21).

92. The November 2019 RR indicated that, in October 2019, progress monitoring for the task-approach/task-completion goal in the May 2019 IEP indicated: "(The student) is turning in work with 89% accuracy." (S-21).
93. The November 2019 RR indicated that, in October 2019, progress monitoring for the mathematics goal in the May 2019 IEP indicated that the student had 44% accuracy on the Algebra I CBM, a decline from the 56% accuracy in April 2019. (S-19, S-21).
94. The student's teacher in Contemporary America provided detailed input for the November 2019 RR. The teacher indicated that the student's reading and writing skills were a concern, that the student required maximum academic support, and that the student showed inconsistent work effort and had difficulty sustaining attention to the task-at-hand. (S-21).
95. The teacher also rated the student's classroom behaviors as poor in the following areas: asks for help, homework completion, study skills, and preparedness for/performance on tests. (S-21).
96. The student's teacher in English provided detailed input for the November 2019 RR. The teacher indicated that the student's writing and analytical skills were a concern and that the student required moderate academic support. The teacher recommended that the student utilize the regular education lunch-and-learn session. The teacher did not rate the student's classroom behaviors as poor in any area. (S-21).
97. The student's mathematics teacher did not provide any input in the November 2019 RR. (S-21).
98. The November 2019 RR contained updated cognitive and achievement testing. (S-21).

99. The evaluator did not note any manifestation of the student's ADHD as part of the testing sessions and did not offer any qualification on the resulting scores from those assessments. (S-21).
100. In the November 2019 RR, the student's full-scale IQ on an assessment of cognitive ability was 79, in the low range. Component index scores on the assessment were in the average or low average range, except for number series which was in the low range (7th percentile). (S-21).
101. The November 2019 RR contained achievement testing, with all measures in reading, writing, and mathematics falling in the low average range except for writing samples, which fell in the average range, and the mathematics cluster and calculation, which fell in the low range (each at the 4th percentile). (S-21).
102. The November 2019 RR included an assessment of mathematic abilities. The student scored in the average range in mathematics for everyday life, in the below average range for word problems, and in the poor range for mathematics symbols and concepts and computation (2nd and 5th percentiles, respectively). The student's overall mathematics ability index was in the poor range (7th percentile). (S-21).
103. The evaluator opined that these scored were commensurate with the student's cognitive ability and consistent with the student's scores on achievement testing. (S-21).

104. The November 2019 RR contained a comprehensive behavior rating scale completed by three teachers. One teacher rated the student as “very elevated” for academic difficulties and perfectionist/compulsive behaviors. The same teacher rated the student as “elevated” in language, mathematics, major depressive episode, and obsessive-compulsive disorder. A second teacher rated the student as “elevated” in academic difficulties and language. A third teacher rated the student as average in all areas. (S-21).
105. The November 2019 RR contained an assessment of executive functioning, that is the ability to process, sort, organize, and access information. Three teachers completed the rating scales. All three teachers’ scores rated the student as potentially clinically significant (one teacher), or clinically significant (two teachers), in working memory. Two teachers rated the student as potentially clinically significant in the cognitive regulation index. All three raters scored the student as mildly elevated in multiple areas. (S-21).⁸
106. The November 2019 RR continued to recommend that the student qualify for special education as a student with the health impairment ADHD. (S-21).
107. Opening statements of the parties were delivered on December 5, 2020. (NT at 1-42).

⁸ The evaluator did not include any means for a reader to interpret the scores on the executive functioning assessment (T-scores) as those scores would allow a reader to interpret the student’s relative strengths and needs in executive functioning. That interpretation is provided out of the expertise of the hearing officer. (S-21).

108. On December 10, 2020, the student's IEP team met to consider the results of the November 2019 RR and to revise the student's IEP. (P-16).
109. The student's mother testified credibly that the school psychologist who evaluated the student offered at the IEP meeting that certain programming changes could be made part of the IEP only if the parents withdrew their due process complaint. (NT at 43-189).
110. The December 2019 IEP included the results of the November 2019 RR. (P-16).
111. The December 2019 IEP contained largely the same background and present levels information, although where data was available it was updated through mid-December 2019. (S-21).
112. The December 2019 IEP contained four goals. (S-21).
113. The general task-approach/task-completion goal from the September 2018 and May 2019 IEPs was removed, replaced by a general assignment completion goal: "Given an assignment in ... general education, (the student) will turn in the assignment with no less than 85% accuracy for 3 out of 4 grading terms". (S-21).
114. A task-approach/task-completion goal was added specifically for mathematics: "Given an assignment in ... general education classes, (the student) will show evidence of planning and organizing (assignment checks, task list, collected homework) the assignment with 90% accuracy for 3 out of 4 grading terms for mathematics." (S-21).
115. The December 2019 IEP contained two mathematics goals. (S-21).

116. A mathematics computation goal indicates: "Given Algebra I math problems, (the student) will solve computation problems on an Algebra I probe with at least 65% accuracy by the end of 2019-2020." (S-21).
117. The mathematics problem-solving goal indicates: "Given a collection of Algebra I problem solving problems, (the student) will solve the problems with at least 65% accuracy by the end of the 2019-2020 school year." (S-21).
118. The modifications in the December 2019 IEP continued to focus on directions and testing modifications but now included adapted assessments in mathematics and reading comprehension. (S-21).
119. The student did not have any pullout instruction and spent 92.8% of the school day in regular education. (S-21).
120. The first evidentiary session in the hearing was held on December 16, 2019. This hearing officer requested a copy of the notice of recommended educational placement to see whether or not parents had accepted the December 2019 IEP as the student's program/placement. On December 18, 2019, the parents explicitly rejected the program. (S-22).
121. The hearing concluded with an evidentiary session on January 7, 2020.

Witness Credibility

Between the testimony of the student's mother and the District-based witnesses, the testimony of the student's mother was accorded more weight. Based on the affect the witnesses during testimony, and the substance of the testimony itself, the testimony of the District school psychologist and the high school principal was accorded very little weight.

Discussion

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. (Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982)). 'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis* or minimal education progress. (Endrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S., 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); K.D. v. Downingtown Area School District, F.3d (3d Cir. at No. 17-3605, September 18, 2018)).

Each of the areas of parents' claims, along with the legal framework that governs those claims, is considered in the subsections below.

Evaluations / Re-Evaluations

The District denied the student a FAPE due to inappropriate evaluations. In December 2012, the student's cognitive and achievement profile was entirely consistent and within the average range. By September 2015, the student's cognitive and achievement profile had markedly deteriorated. Most concerning of all, however, was that manifestations of the student's ADHD explicitly interfered with the reliability of those results. Yet no measures were taken to seek other scores or assessments, and even with the noted limitations, the District based education programming in academics on admittedly problematic data. Additionally, even though there were consistent indications that the student's task-approach/task-completion skills, and executive functioning generally, were seriously impacting the student's academic work, there was no assessment of the student's

attention/behavioral/executive functioning skills in any RR, until November 2019, assessments which confirmed what the parents and teachers had been seeing all along. This is a prejudicial flaw in the student's entire evaluation history at the District and undermines their educational decision-making thereafter.

This flawed understanding of the student's cognitive and achievement profile even to this day. In the November 2019 RR, the evaluator obtained an IQ score that was nearly identical to the September 2015 IQ score, both scores exhibiting a two-standard-deviation decline from the December 2012 IQ score. Such an erosion in assessment of basic cognition is remarkable and must be explained, which it was: The student's task-approach/task-completion deficits related to ADHD rendered those scores to be interpreted with caution. Yet in November 2019, nearly identical scores were accepted as wholly reliable. The District cannot have it both ways—either the caution in interpreting the September 2015 scores was unwarranted, or the November 2019 scores, even without manifestations of ADHD during administration of the assessments, should also cause some degree of interpretive concern. In sum, the evaluation history of the student at the District is unreliable, and an IEE at public expense, ordered under the authority of a hearing officer, must be undertaken.⁹

⁹ Here, the hearing officer notes, too, that the District evaluator, by November/December 2019 was (redacted) to the parents at the December 2019 IEP meeting. While bias in the evaluator is not made an explicit finding, the attitude of the evaluator toward the parents and their due process claims cannot discount the possibility that it may have impacted the evaluator's evaluation process or conclusions.

Procedural Denial-of-FAPE

A procedural error can only be the basis of remedy where the procedural error results in a denial of FAPE. (34 C.F.R. §300.513(a)(2)). Here, the District committed two procedural errors that amount to a denial of FAPE.

First, the District refused to receive and to review the neuropsychological report obtained by parents in September 2015, shortly after the District had issued its RR earlier that month. This denied the parents meaningful participation in the deliberations of the student's multi-disciplinary/IEP team process, and deprived every member of the IEP team an opportunity to understand in a different way the strengths and needs of the student.

Second, in the November 2019 RR, the presentation of the results of the executive functioning assessment does not allow a non-expert reader of the report, not only parents but fellow educators who are not school psychologists as well, to understand those results. And, again, those results are critical to providing an evaluative understanding to what parents and teachers had been observing and reporting for years. It is a fatal flaw in the November 2019 RR and amounts to a denial of FAPE in reporting those results.

Inappropriate IEPs

The student's IEPs have been inappropriate for the entire period encompassed by this evidentiary record, for the 2017-2018, 2018-2019, and current 2019-2020 school years.

First, the goals in the IEPs are consistently unmeasurable. The goals geared to task-approach/task-completion are written in terms of "accuracy" on underlying assignments. So the goals in those areas do not measure

whether the student is progressing in skills to approach and complete tasks; instead, those goals measure the grade received on assignments. Likewise, early on the goals geared to mathematics are largely assignment-driven. In the December 2019 IEP, the mathematics goals improve but are still inappropriate as those goals are written for scoring at 65% - that is not an adequate regular education score and represents only a small increase over the course of an entire school year (from a score of 56%). In short, even the “least inappropriate” mathematics goal is simply not ambitious enough.¹⁰

Second, the IEPs are entirely post-hoc and reactive. There is not specially designed instruction in either task-approach/task-completion or in mathematics. The student has been given no targeted *instruction* in these areas. How do I gain skills in task-approach/task-completion? How do I better understand the mathematics I am being taught? The IEP does not provide the gateway to the answers to these questions because the modifications—again, there is no specially designed instruction made part of these IEPs—are purely reactive: The student will be given accommodations for testing and quizzing and assignments as those things are taken/prepared or after they have been taken/submitted. The student is not gaining skills to shrink the gap in these areas created by the student’s disabilities—the entire goal of specially designed *instruction*.

Third, this lack of instruction is driven by the fact that the student receives instruction entirely in co-taught regular education classrooms without the opportunity to receive targeted instruction in task-

¹⁰ And by December 2019, the focus on mathematics in the student’s IEP is, rightly, heavy. Yet the District steadfastly declines to recognize what appears to be a significant learning disability in computation and in mathematics problem-solving. To repeat, however, it is not possible to accurately gauge this question given the flawed evaluation history/results generated by the District.

approach/task-completion or mathematics. Indeed, the high school principal testified that the District has no pullout resource room services available (except in “extremely rare” circumstances, NT at 449-504), and the only choices available to students with IEPs is inclusion in a co-taught classroom or a life-skills classroom for students who need instruction and services due to significant developmental or cognitive needs. This clearly violates the mandate for a continuum of special education services and placements. In this matter, the student’s program will be modified by the order below to provide pullout services for the student’s needs.

In sum, the student’s IEP have been, and continue to be, inappropriate and, both as designed and implemented, amount to a denial of FAPE.

Compensatory Education

Where a school district has denied FAPE to a student under the terms of IDEIA, compensatory education is an equitable remedy that is available to a student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)).

In this case, the District has denied the student FAPE on multiple levels—in its evaluation history with the student, in the design and implementation of the student’s IEP, and in prejudicial procedural flaws related to the re-evaluation reports.

Granted, the student made academic progress. Indeed, the student is to be lauded for performing as well as is exhibited on this record—and many teacher comments and aspects of input reflect this. But there are longstanding and significant deficits in the student’s special education program—some of them compounding over time—which require remedy.

Therefore, as a matter of equitable consideration, the student is awarded 300 hours of compensatory education for the District’s failures in

the evaluation and programming for the student over the 2017-2018, 2018-2019, and current 2019-2020 school years (through the date of this order).

As for the nature of the compensatory education award, the parents may decide in their sole discretion how the hours should be spent so long as those hours take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the student's future IEPs, or identified educational needs. These hours must be in addition to any then-current IEP and may not be used to supplant an IEP. These hours may be employed after school, on weekends and/or during the summer months, at a time and place convenient for, and through providers who are convenient to, the student and the family.

ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Kiski Area School District has denied the student a free appropriate public education.

The student is awarded 300 hours of compensatory education reflecting this denial-of-FAPE through the date of this order.

Additionally, within 10 school days of the date of this order, the student's IEP team shall meet to design specially-designed instruction to address, as part of a systematic instructional program geared to addressing the student's specific deficits, the student's needs in task-approach/task-completion/executive-functioning and mathematics.

At that IEP meeting, the IEP shall be revised to provide this instruction in a pullout resource room environment for 40 minutes on each instructional day at the school district. The IEP shall be revised to provide 20 minutes for review, consultation, and services with a special education teacher at the career and technical center on each instructional day at the center. Furthermore, the student's special education case manager at the school

district shall consult weekly, in writing, with the special education teacher at the career and technical center to gauge the student's performance and needs, if any, at the center.

Finally, under the authority granted to a hearing officer by 34 C.F.R. §300.502(d)/22 PA Code §14.102(a)(2)(xxix), the school district shall fund a comprehensive psycho-educational evaluation under the terms that follow.

The school district shall fund, at public expense and as set forth below, a comprehensive psycho-educational evaluation to be performed by an independent evaluator of the parents' choosing.

The record review, input, assessments, testing, consultation, scope, details, proposed observations, findings, recommendations, and any other content in the independent evaluation report, shall be determined solely by the independent evaluator, although that evaluator shall be informed that an assessment of the student's potential needs related to possible specific learning disabilities and task-approach/task-completion/executive-functioning shall be part of the evaluation process.

After the independent evaluator has issued the independent evaluation report, the student's multi-disciplinary team ("MDT") shall meet to consider the findings of the independent evaluation report ("independent evaluation MDT meeting"). At the independent evaluation MDT meeting, the school district shall invite and include the independent evaluator as a participant in the independent evaluation MDT meeting, making scheduling accommodations for the participation of the evaluator, in person or by telephone, as necessary. The school district shall bear any cost or rate for the participation of the independent evaluator at the independent evaluation MDT meeting.

The terms of this order regarding the involvement of the independent evaluator shall cease after their attendance at the independent evaluation

MDT meeting, although nothing in the order should be read to limit or interfere with the continued involvement of the independent evaluator, as both parties may mutually agree, or as one party may make singular arrangements therefor.

Finally, nothing in this order should be read to interfere with or limit the ability of the parties to agree otherwise, so long as such agreement is in writing and specifically references this order.

Any claim not specifically addressed in this decision and order is denied and dismissed.

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

February 18, 2020