

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

PENNSYLVANIA SPECIAL EDUCATION HEARING OFFICER
FINAL DECISION AND ORDER

Closed Hearing

ODR File Number

22487-19-20

Child's Name

P.W.

Date of Birth

Redacted

Parents

Redacted

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Cathy A. Skidmore, Esquire

Date of Decision

03/06/2020

INTRODUCTION AND PROCEDURAL HISTORY

The student, P.W. (Student)¹ is a mid-teenaged student residing in and attending school in the Big Beaver Falls Area School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² In July 2017, Student's Parents filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973³ as well as the federal and state regulations implementing those statutes. The Parents agreed to limit the scope of the claims to July 2017 through July 2019.

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

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

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

The case proceeded to a due process hearing⁴ with the parties presenting evidence in support of their respective positions. The Parents sought to establish that the District failed to provide Student with FAPE throughout the time period in question and requested compensatory education as a remedy as well as specific directives to the District. The District maintained that its special education program, as offered and implemented, was appropriate for Student, and no remedy was warranted.

Following review of the record, and for the reasons set forth below, a majority of the claims of the Parents must be granted and relief ordered.

ISSUES

1. Whether the District provided Student with a free, appropriate public education between July 2017 and July 2019;
2. If the District failed to provide Student with a free, appropriate public education, should Student be awarded compensatory education; and
3. Whether the District should be ordered to reconvene the IEP team to make appropriate revisions to Student's program?

FINDINGS OF FACT

1. Student is mid-teenaged and resides in and attends school in the District. Student is eligible for special education. (N.T. 29-30; S-19.)

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. There are duplicative exhibits in the record that were admitted because various witnesses referred to one version or another, but citation thereto may not be to all. References to the Parents will be in the plural where it appears one was acting on behalf of both.

2. Student was diagnosed at preschool age with Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD), and an expressive language disorder. (N.T. 32.)
3. Student has artistic talent and regularly engages in certain activity as a reflection of that talent and interest. (N.T. *passim*.)
4. Student's most recent Reevaluation Report (RR) prior to District enrollment was completed in February 2016 by another school district. At that time, Student attained a borderline score on assessment of cognitive ability but difficulty with attention, focus, impulse control, and working memory likely affected performance. Academic achievement testing and teacher input reflected poor skills in reading, mathematics, and written expression. Student was determined to be eligible for special education on the bases of an Other Health Impairment and a Speech/Language Impairment. Recommendations were for continuation of services, increased adaptation to academic work, and a behavior plan. (P-1; S-1.)
5. The prior school district developed an Individualized Education Program (IEP) for Student with a Positive Behavior Support Plan (PBSP). Student's IEP provided for daily small group instruction in reading and mathematics, and a number of program modifications/items of specially designed instruction addressed academic and behavioral needs. (P-2; S-2; S-3.)
6. The District uses diagnostic assessments with its students that are used to guide instruction to the class as a whole. Students are permitted limited accommodations, if needed, for purposes of these assessments. Scores for individual students can reflect strengths and weaknesses. (N.T. 170-71, 399-403, 615.)

7. Student had mental health counseling provided in-school by an outside agency throughout the time period in question. (N.T. 89.)

Entry Into District

8. Student first entered the District in seventh grade in the fall of 2016, and an IEP was developed in September. (N.T. 32; S-5.)
9. A District speech/language therapist administered the Test of Language Development Intermediate – Third Edition at the start of the 2016-17 school year. Student’s performance on that instrument indicated a need for speech/language therapy services. (S-6 at 8.)
10. The September 2016 IEP contained annual goals for reading comprehension of grade level materials; grade-level mathematics computation and calculation; and speech/language (addressing vocabulary). Student also had weekly counseling. Student’s program was itinerant speech/language support with all regular education classes. (S-6.)
11. Progress monitoring of the September 2016 IEP goals reflected inconsistent progress toward the reading and mathematics goals that was described as “slight” progress. The need for significant redirection was noted in both subjects. Student reportedly mastered the speech/language goal. (S-8.)

2017-18 School Year (Eighth Grade)

12. A new IEP was developed in September 2017 at a meeting of the team. The results of a Wide Range Achievement Test at that time indicated deficits in spelling and mathematics but not reading, although general reading skills were reportedly below grade level expectations. The IEP further noted that Student's "academic skills [were] not progressing at grade level expectancy and [Student] requires specially designed instruction in order to be successful in the general education curriculum" with special education support. (P-4; P-5 at 7, 10; S-9; S-10 at 7, 10.)
13. The September 2017 IEP indicated that Student was eligible for special education as a child with an Other Health Impairment and a Specific Learning Disability in reading comprehension. Teachers reported that Student required frequent redirection and reminders to complete assignments, was often off-task, and reacted negatively when redirected. Identified needs were for reading comprehension, mathematics computation, social skills, post-secondary transition, and focus/attention in the classroom; Student's difficult behavior (failing to follow rules and be respectful and cooperative) was also included. (S-10.)
14. Annual goals in the September 2017 IEP addressed reading comprehension of grade-level materials (with 70% accuracy on 7 of 10 attempts with no indication of Student's baseline performance); solving grade-level mathematics problems (with 75% accuracy with no indication of Student's baseline performance); and speech/language (understanding grade-level grammar and figurative language with 90% accuracy, with no indication of Student's baseline performance). (S-10 at 21-24.)

15. Program modifications/items of specially designed instruction in the September 2017 IEP were for test and assignment accommodations (extended time, chunking of large assignments, and small group testing); adapted tests/assignments; and removal of an item Student used to engage in off-task behavior during classes. Student had weekly speech/language therapy, counseling, and mental health services in a program of itinerant learning and speech/language support with all regular education classes. (S-10.)
16. There was no PBSP at the start of the 2017-18 school year. (N.T. 149-50.)
17. The Parents approved the Notice of Recommended Educational Placement (NOREP) accompanying the September 2017 IEP. (P-7; S-11.)
18. Student was in co-taught classes during eighth grade for academic subjects (reading, English, mathematics, social studies, and science), and had a study hall with the learning support teacher. In the co-taught classes, Student was provided the accommodations and program modifications in the IEP. (N.T. 146, 155-57, 162-63, 206-09, 215, 295, 299-301, 329, 629, 631-33.)
19. A Functional Behavior Assessment (FBA) was conducted in February 2018 by the local Intermediate Unit. The FBA identified work refusal/task avoidance, verbal refusal, and elopement as the target behaviors. The hypothesized function of those behaviors was to avoid peer attention, redirect attention due to possible skill deficits, and seek teacher attention. (N.T. 180, 822-23; P-15; S-16.)
20. The FBA made recommendations for Student with respect to reading, writing, and mathematics support, in addition to general instructional strategies and interventions. (S-16.)

21. A meeting convened to discuss the results of the FBA and develop a new PBSP. (N.T. 187.)
22. The District issued a new RR in February 2018 with the consent of the Parents to reflect the newly completed FBA. (P-9; P-10; S-13; S-14.)
23. Student's IEP was revised in February 2018 by adding information, including the FBA, but did not change any of the goals or program modifications/items of specially designed instruction. (P-17; S-17.)
24. A new PBSP was developed in March 2018 targeting work refusal and verbal task refusal. Student was to use strategies for completing tasks (prompts for assistance by the teacher) and debriefing of difficult situations (social autopsies and comic strip conversations). Teachers were to provide reminders about expectations and consequences, clarification of assignments, and positive reinforcement, in addition to Student's use of strategies. (P-20; S-18.)
25. Student rarely used the PBSP strategies and instead resisted them. (N.T. 188-89, 191, 220-21, 673-77, 826-28; P-23; P-25; S-12 at 17-20; S-33.)
26. Student's eighth grade learning support teacher would redirect Student during co-taught classes, or speak with Student briefly about anything that was concerning to Student at the time, as needed. (N.T. 181-84, 200, 213, 214-15, 217, 228, 230-31, 326-27.)
27. Student's eighth grade learning support teacher and the Parents communicated regularly, and the teacher notified the Parents weekly of any missing assignments at the Parents' request. (N.T. 55, 166, 210-11, 228-29.)
28. The regular and learning support teachers often worked with students in small groups in the content area classes in eighth grade. (N.T. 160-61, 162, 301, 632.)

29. Student regularly saw the school counselor during eighth grade, sometimes at Student's request, and others at the request of a teacher or the counselor. Sessions were not regularly scheduled and usually lasted less than thirty minutes. (N.T. 656-57, 662-63, 665, 672, 688.)
30. Student was evaluated in the spring of 2018 at the request of the Parents, with an RR completed in April 2018. The District school psychologist did not observe Student in a classroom for this reevaluation. (N.T. 262, 291-92; P-24; S-15; S-19.)
31. Cognitive assessment for the April 2018 RR (the Fourth Edition of the WISC) reflected a borderline Full Scale IQ score. All Composite scores were in the low average range with the exception of Working Memory (extremely low range). Student's resistance to completing the tasks required by that instrument was noted. The District school psychologist did not determine a General Ability Index score despite the poor working memory reflected. (N.T. 246-47; S-19 at 10.)
32. Assessment of academic achievement (select subtests of the Woodcock-Johnson Tests of Achievement – Third Edition) for the April 2018 RR yielded scores that were in the borderline to low average range (Reading), borderline to extremely low range (Math), and borderline to extremely low ranges (Writing), with overall achievement below expectations especially in mathematics. The District school psychologist attributed Student's scores on the mathematics and written expression portions to poor working memory and attention, but did not further assess academic achievement. (N.T. 249-50, 252-56, 259; S-19 at 11.)

33. Student required breaks during the administration of the cognitive and achievement assessments for the April 2018 RR, at times exhibiting resistance to completing tasks presented. The scores were interpreted with caution as to whether they represented Student's true ability and achievement, but overall were not inconsistent with previous testing. (N.T. 245-46, 249-50.)
34. Student and five teachers completed the Behavior Assessment System for Children – Second Edition (BASC-2) rating scales for the April 2018 RR. At least one teacher endorsed clinically significant concerns with depression, somatization, internalizing problems, atypicality; and at-risk scores for anxiety, internalizing problems, attention problems, and withdrawal. However, the ratings of three teachers did not reflect any concerns. Student endorsed clinically significant scores with attitude to school, atypicality, depression, somatization, and internalization, with additional at-risk concerns for locus of control, social stress, attention problems, inattention, hyperactivity, and relations with parents. (S-19 at 12.)
35. Student was determined by the April 2018 RR to be eligible for special education based on a Specific Learning Disability in reading comprehension, a Speech/Language Impairment, and an Other Health Impairment. This RR recommended that Student be provided with specially designed instruction to be successful in the general education curriculum because academic skills were below grade level expectations, particularly in reading comprehension, mathematics computation, mathematics reasoning, and written expression. Other suggestions were for supports for speech/language and behavioral needs. (S-19 at 12-13, 16-17.)

36. Progress monitoring reported on the September 2017 IEP goals over the 2017-18 school year provided example scores on reading comprehension and mathematics computation probes that were not consistent. Student's speech/language therapy progress was similarly inconsistent. (S-12 at 1-16.)
37. Student earned final grades of A and B in all classes at the end of the 2017-18 school year with the exception of physical education for which Student earned a C grade. (S-34 at 1-2.)
38. Student began wraparound services during the summer of 2018 that continued through the time of the due process hearing. (N.T. 60, 81-82.)

2018-19 School Year (Ninth Grade)

39. Student met weekly with the school counselor at the high school during the 2018-19 school year but not necessarily for thirty minutes. Student also met with the school counselor when Student was upset, which occurred frequently with changes in routine, and averaged two or three times each week for the first approximately six weeks. (N.T. 737-41, 743-44, 934.)
40. Student's meetings with the school counselor occurred less and less frequently over the course of the 2018-19 school year, gradually diminishing to very short meetings. (N.T. 744, 750, 763-64, 848.)
41. A meeting convened in mid-October of the 2018-19 school year at which various changes were made to Student's schedule because Student was experiencing difficulty with certain classes. Changes included a new study hall with a learning support teacher and a weekly monitoring checklist. Student's PBSP was also revised to remove the prompts for assistance. (N.T. 64-65, 539, 550-51, 592, 594-95, 597-98, 615, 746-48, 861-62, 876-77, 924; S-32.)

42. Student experienced difficulty with peers in ninth grade. When Student expressed not wanting to have lunch in the cafeteria, Student was able to have lunch in another location. Eventually Student resumed having lunch in the cafeteria. (N.T. 60-61, 68, 128-29, 550, 616-19, 742, 837-38, 40, 879.)
43. Student exhibited anxiety at times in ninth grade and would ask to meet with the guidance counselor or another adult. Some anxiety was related to the PBSP supports that Student was resistant to use, in part because doing so was noticeable to peers. By the end of the school year, however, Student's anxiety had diminished. (N.T. 349-54, 368, 381-83, 387, 542-46, 570, 593-94, 703, 705-06, 713, 834-35, 922, 924.)
44. Student had co-taught classes in ninth grade for English/Language Arts, Algebra, U.S. History, and science, as well as a support study hall. (N.T. 338-40, 346-47, 528, 540, 551-52, 574, 596-97, 697-98.)
45. Student was considered to be successful with grade level novels in the English/Language Arts class in ninth grade. Accommodations and adaptations were provided such as reducing the number of questions Student needed to answer. (N.T. 342-45, 346-48, 395-96, 399, 533, 562.)
46. At the start of the 2018-19 school year, Student exhibited significant anxiety in the Algebra class, lacking attention and focus. Student required more one-on-one support by the special education teacher in ninth grade Algebra class compared to the English/Language Arts class. (N.T. 569, 578-79, 700-01, 703-06.)
47. Student required support for organization in ninth grade. (N.T. 570.)

48. An IEP meeting convened in February 2019. The Parents agreed that the meeting could occur without her because they had recently had a meeting in October, and would need to meet again to discuss the IEE. (N.T. 108, 602-03; S-31.)
49. The IEP and PBSP developed in February 2019 were substantively identical to those in February and March 2018 pending completion of the IEE. (S-22; S-23; S-25.)
50. The speech/language pathologist used the comic strip conversations in ninth grade with Student and another student. However, by November 2018, Student began to refuse to attend the sessions, often becoming upset when asked to do so. Student also was resistant to push-in sessions. (N.T. 784-85, 788-90, 792-93, 808; S-38.)
51. The Parents were contacted about the missed speech/language sessions when they first began to occur, but not routinely after that. (N.T. 846; S-38.)

Independent Educational Evaluation

52. An IEE was completed in March 2019 at public expense at the request of the Parents. The Parents and private psychologist discussed the timing of the IEE, and they agreed that an observation would be conducted prior to testing. The actual testing occurred in December and January. (N.T. 59, 69, 99, 104, 418, 432; S-26.)
53. The private evaluator conducted an observation of Student at school. (N.T. 420-22, 480-82; P-27 at 10; S-26 at 10.)
54. Teacher input into the IEE reflected academic difficulty attributed to off-task behavior and task avoidance; distractibility and lack of focus and attention; and organizational skill deficits. (S-26.)

55. The private evaluator decided during the process of the IEE to explore autism because Student exhibited difficulties with social interactions and emotional regulation, as well as Student's continual focus on a particular interest. (N.T. 435-37, 439, 480, 514.)
56. Student exhibited noncompliance with assessment administration for the IEE even with frequent breaks. (P-27 at 10-11; S-26 at 10-11.)
57. Cognitive assessment for the IEE (Differential Ability Scales – Second Edition) yielded a low average score using both the General Conceptual Ability and Special Nonverbal Composite score. Relative weaknesses were revealed in various areas. (P-27 at 12-16; S-26 at 12-16.)
58. Assessment of Student's memory and learning for the IEE reflected variability with overall low average to average range scores. Working memory was a relative weakness. (P-27 at 17-18; S-26 at 17-18.)
59. The Kaufman Test of Educational Achievement – Third Edition for the IEE revealed that Student was below expectations in Basic Reading Skills, Reading Comprehension, Mathematical Calculations and Mathematical Reasoning, and Written Expression. (P-27 at 24-26; S-26 at 24-26.)
60. Student's executive functioning was assessed for the IEE with several instruments. Results reflected very impaired executive functioning skills with both teacher raters and both of the Parents reporting lower than expected ability. (N.T. 445-46; P-27 at 32-35; S-26 at 18-22.)

61. Social/emotional/behavioral functioning was assessed for the IEE using the Third Edition of the BASC. One or both teachers endorsed clinically significant concerns with aggression, conduct problems, depression, attention problems, Atypicality, Social Skills, study skills, and adaptive skills; at-risk elevations were additionally for hyperactivity, anxiety, learning problems, withdrawal, leadership, and functional communication by one or both. One or both of the Parents indicated clinically significant concerns with hyperactivity, aggression, attention problems, leadership, and activities of daily living; and at-risk concerns with conduct problems, anxiety, depression, atypicality, social skills, and functional communication. (P-27 at 26-28; S-26 at 26-28.)
62. Assessment of social perception, social skills, and autism characteristics for the IEE reflected some social skill functioning deficits and symptoms of mild to moderate autism. (P-27 at 29-31; S-26 at 29-31.)
63. Assessment of receptive and expressive language skills for the IEE yielded results that were well below that of same-aged peers. (P-27 at 23-24; S-26 at 23-24.)
64. The private evaluator concluded that Student met criteria for the following IDEA classifications: Autism; Other Health Impairment (ADHD); and Specific Learning Disability in reading comprehension, written expression, mathematics computation, and mathematics problem solving. A number of recommendations were provided in the IEE, including small class instruction. (P-27 at 32-35; S-26 at 32-35.)

IEP Development 2019

65. A meeting convened in April 2019 to discuss the IEE attended by the private psychologist. (N.T. 71-72, 404, 495-96, 577, 606-07; P-30.)

66. An April 2019 IEP incorporated previous assessment information including from the IEE. Identified needs were for reading comprehension, mathematics computation and problem solving, written expression, pragmatic language, and behavior support. (P-31; S-27.)
67. Annual goals in the April 2019 IEP provided for reading comprehension with 70% accuracy on selected assignments on an unspecified level of materials; solving mathematics problems on selected assignments with 70% accuracy on an unspecified level of materials; use of correct grammar and sentence structure on selected assignments with 70% accuracy on an unspecified level of materials; and speech/language (understanding point of view, reasoning, and figure of speech with 80% accuracy). There are no baselines for the goals. (S-27 at 32-35.)
68. Program modifications/items of specially designed instruction in the April 2019 IEP were for manipulatives and visual supports (such as a graphic organizer); checks for understanding with repetition and rephrasing; modified tests and assignments with accommodations (extended time, small group testing, chunking of larger assignments); copies of notes; prompts to complete tasks; daily check-in; review of schedule for changes; social skills and coping skills; positive reinforcement; breaks throughout the day; and preferential seating. (S-27 at 36-37.)
69. Student's program in the April 2019 IEP was one of learning support and speech/language support at a supplemental level. Speech/language services of up to thirty minutes per week were provided as a related service, but counseling was not. Student would be in all regular education classes except for speech/language and any needed counseling. (S-27 at 40-42.)

70. A new PBSP in the April 2019 IEP identified reading comprehension, math computation and problem solving, written expression, and pragmatic language as skill deficits. Annual goals were for Student to request a break prior to non-preferred tasks in core classes on four of five assignments; and to increase independent work. There was no indication of Student's then-current performance in the IEP. (P-32; S-27.)
71. Antecedent strategies in the PBSP included classwork at an instructional level where Student could complete tasks independently; individual assistance when Student had difficulty with tasks; planned ignoring or extended wait time; modeling of behavior; a menu of reinforcers; positive reinforcement; and availability of choices, in addition to the program modifications/items of specially designed instruction. Student would use coping skills and debrief on social skills. (P-29 at 9-12; S-27 at 53-56.)
72. After the April 2019 IEP meeting, Student resumed participating in speech/language therapy sessions. (N.T. 793-94, 802-03.)
73. The IEP team did not conclude the meeting on the April date after several hours. The team did not reconvene because the Parents did not agree to hold another meeting and instead cancelled it. (N.T. 77, 117, 584, 608-09.)
74. Progress monitoring on annual goals for the 2018-19 school year reflected overall inconsistent performance. (P-28; S-12 at 23-32.)
75. Student earned final grades of A and B in most classes at the end of the 2018-19 school year with the exception of Algebra and History for which Student earned C grades. (S-34 at 3-4.)

76. An evaluation by a different private psychologist in the summer of 2019 reflected a continued need for behavioral health services. It also referenced prior behavioral health service evaluations and treatment, reports of which were never provided to the District in part due to the family's concerns for privacy. (N.T. 53, 87-88, 120-21, 123-24; P-34; S-30.)

2019-20 School Year (Tenth Grade)

77. Student engaged in an action of self-harm at the start of the tenth grade school year. Student's therapist addressed the actions with the Parents and Student, as did the District, and they all agreed the behavior was attention-seeking rather than an intention to harm self. (N.T. 83-84, 130, 758-59, 848, 850-51, 853-54.)

78. Student had direct instruction in English and mathematics in learning support in the 2019-20 school year. (N.T. 88, 920; S-27 at 42.)

79. Student participated in a weekly social skills group during the 2019-20 school year. (N.T. 753-54, 772.)

80. Student had a study hall with the same special education teacher as in the prior school year in tenth grade with the same support. (N.T. 880, 891-92.)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. It should be recognized that the burden of persuasion lies with the party seeking relief, here the Parents. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

Nevertheless, application of this principle determines which party prevails

only in those rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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). This hearing officer found each of the witnesses who testified to be credible, and the testimony was overall not inconsistent where there was overlap. The recall of some of the witnesses was, understandably, not crystal clear in all respects, but the documentary evidence provided essential details for an understanding of the facts. Importantly, the findings and testimony of the private evaluator were particularly persuasive. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties’ closing statements.

General IDEA Principles: Substantive FAPE

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Many years ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with the procedural obligations in the Act.

The Third Circuit has long held that the FAPE standard requires development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009) (citations omitted). Fairly recently, the U.S. Supreme Court observed that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). “A focus on the particular child is at the core of the IDEA.” *Id.*, ___ U.S. at ___, 137 S. Ct. at 999, 197 L.Ed.2d at 349-50 (2017) (citing *Rowley* at 206-09) (other citations omitted).

Thus, individualization is the central consideration for purposes of the IDEA. In other words, the crucial and primary focus of a child’s IEP is to respond appropriately to the identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child’s parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands services are reasonable and appropriate in light of a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Endrew F.*, *supra*; *Ridley*, *supra*; *see also Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). It is also necessary to recognize that a proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *see also Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993) (same). However, issues surrounding implementation of an existing program involve ongoing monitoring of the student’s individual

responsiveness to the IEP, including progress toward IEP goals, in order to make appropriate revisions as may be necessary. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320, 324. Importantly, the duty to ensure a student's right to FAPE lies with the LEA, not the Parents. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996) (explaining that, "a child's entitlement to special education should not depend upon the vigilance of the parents[.]").

Least Restrictive Environment

A critical and rather paramount premise in the IDEA is the obligation that eligible students be educated in the "least restrictive environment" (LRE) that also satisfies that meaningful educational benefit standards:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.S. § 1412(a)(5)(A); see *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993). In order to ensure compliance with LRE obligations, LEAs must have available a "continuum of alternative placements" to meet the service needs of children with disabilities. 34 C.F.R. § 300.115(a); see also 22 Pa. Code § 14.145. And, the "continuum" of placements in the law enumerates settings that grow progressively more restrictive, beginning with regular education

classes, moving first toward special classes and then toward special schools and beyond. 34 C.F.R. § 300.115; see also 22 Pa. Code § 171.16(c) (specifying an order of priority for educational placements from the regular classroom in a public school when a private school is recommended).

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family including parents have “a significant role in the IEP process.” *Schaffer, supra*, at 53. Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). Procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E).

General Section 504 Principles

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

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995); see also *Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Thus, in this case, the coextensive Section 504 claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

The Parents' Claims

The Parents assert that the District has denied Student FAPE by failing to program appropriately for academic, social, emotional, and behavioral needs. The record as a whole largely supports their contentions.

Student entered the District with significant academic weaknesses across content areas in addition to speech/language, social skill, behavioral, and executive functioning deficits that impacted performance. Student also left a prior district where Student was receiving small group instruction in reading and mathematics on a daily basis.

Student's program in the District, however, for the relevant two year time period provided only for co-taught classrooms in content area classes. The IEPs for the 2017-18 and 2018-19 school year reflected a number of means of adapting and modifying the regular education curriculum expectations, but no specially designed instruction designed to help Student acquire skills in the areas in which Student was deficient despite an explicit need for same recognized in the fall of 2017. There was no PBSP. Instead, Student was in regular education classes for virtually the entire school day and exhibiting extreme difficulty accessing the curriculum and achieving success. Rather than providing needed special education services and support, Student was redirected and expectations were reduced in order to avoid behavioral and emotional reactions.

It should be noted, however, that the emphasis at the hearing on the classroom diagnostic assessments do not conclusively point to a need for special education programming, since their purpose is to guide instruction for the classroom. Although those discrete scores can be a source of data for identifying strengths and weaknesses, it is not prudent to place heavy reliance on reported grade equivalency scores; those numbers are derived scores that, while useful at times, must be interpreted with caution. Grade

equivalency scores simply do not mean that a student is performing at the grade level specified.⁵

Nevertheless, the record as a whole convincingly establishes that Student had significant education-related weaknesses throughout the relevant time period that required much more than adaptations and modifications to grade level expectations.

3) Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction –

i) To address the unique needs of the child that result from the child's disability; and

ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

It was, of course, appropriate for the District to consider educating Student in the least restrictive environment. But not all students are able to succeed in such a setting. The co-taught classes did provide access to a special education teacher for Student as well as the whole class and was a source of necessary redirection, but without specific provisions in Student's IEP for what special education services would be provided, it is unknown how much support Student actually had. Adaptations to the content, methodology, or delivery of instruction to address disability-related needs so

⁵ See, e.g., Salvia, J., Ysseldyke, J., & Bolt, S., *Assessment in Special and Inclusive Education* (11th ed. 2010) at 40-41; Sattler, J. M., *Assessment of Children: Cognitive Applications* (5th ed. 2008) at 104-106. Similarly, however, Student's report card grades do not suggest that Student lacked disability-related needs in light of the entire record.

that Student could access the general education curriculum was wholly lacking.

The IEP in the fall of 2017 reflected Student's needs related to reading comprehension and mathematics computation, yet Student was expected to meet IEP goals for mastering grade-level content. The goals were not based on Student's performance at the time the document was written and, indeed, one cannot glean from the inconsistent progress monitoring data whether Student actually made progress in those areas or not. Without specially designed instruction so that Student could acquire necessary academic skills, it is clear that Student could not make the progress that the goals envisioned.

In the spring of 2018, both an FBA and a District RR made suggestions for increasing support including the District school psychologist's recommendation for specially designed instruction. The IEP that followed and carried into the 2018-19 school year failed to appropriately respond to those recommendations and instead maintained the same programming, as did the February 2019 IEP. Behaviorally, the interventions designed to address Student's deficits were largely unsuccessful and unused. It was not until the IEE was completed in March 2019 that the District began to understand Student's needs and propose a more intensive level of special education to address Student's significant skill deficits.

The April 2019 IEP similarly has flaws that render it inappropriate. This IEP continued the use of annual goals that lacked indications of Student's baseline performance at the time it was drafted, unspecified levels, and an unusual approach to progress monitoring based on "selected" assignments.

With respect to emotional needs and anxiety, however, Student was receiving both school-based mental health counseling and support of the school counselor as needed, in addition to private therapeutic services. The

support of the school counselor was clearly beneficial and Student needed and relied less and less on that related service as time went on with decreased anxiety. Moreover, the District's lack of access to reports of mental health professionals is troubling; while it is certainly understandable to have privacy concerns, there is no reason to suspect that the District professionals' privy to such reports would not safeguard Student's confidential information. The parties should bear in mind that the District's inability to access relevant information about Student may impede a collaborative IEP process. *See, e.g., Oconee County School District, 2015 U.S. Dist. LEXIS 85226, 2015 WL 4041297 (M.D. Ga. 2015).*

In summary, the record is more than preponderant that the District denied Student FAPE during the 2017-18 and 2018-19 school years. Although the Parents also seek such a finding for the 2019-20 school year, the scope of the claims was expressly limited to the time period of July 2017 through July 2019. (N.T. 16, 26-27; HO-1.) Thus, those contentions need not be addressed further.

Remedies

As a remedy for the FAPE denial found above, the Parents seek compensatory education, an appropriate form of relief where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C., supra*, 81 F.3d at 397. This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has also endorsed an alternate approach, sometimes described as a "make whole" remedy, where the award of compensatory education is crafted "to restore the child to the

educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); see also *Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014) (accepting the *Reid* Court’s more equitable, discretionary, and individually tailored calculation of this remedy). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

There was no evidence presented in this case that would guide or support a “make whole” compensatory education award. The standard method of providing an award equal to the amount of the deprivation shall therefore be utilized.

As discussed above, this hearing officer concludes that the District denied Student FAPE with respect to academic and behavioral programming during the 2017-18 and 2018-19 school years. The District does contend that because the IEE was not completed until March 2019, any delays in its programming proposals should be attributed to the Parents and private evaluator. Nonetheless, the record is replete with references to Student’s educational needs that it should have recognized went unaddressed well before the completion of the IEE, indeed as early as September 2017. Moreover, its own school psychologist could have conducted additional assessment of Student’s cognitive ability and academic skills after concluding that Student’s performance was negatively impacted by Student’s resistance to completing tasks and lack of focus in order to gain a true understanding of Student. That it did not do so cannot be ascribed to any action or inaction by the Parents or the private evaluator.

It is difficult if not impossible to quantify the appropriate award of compensatory education since Student's academic and related non-academic skills impacted Student throughout the day. Nevertheless, one cannot conclude that Student did not benefit at all, particularly given the obvious success with Student's receipt of the support of the school counselor and other adults in the District for emotional needs. This hearing officer equitably estimates that Student should be awarded hours of compensatory education equal to one half of the entire school day for the entire 2017-18 and 2018-19 school years, for a total of 990 hours.⁶ No deduction will be made for a reasonable rectification period because Student's needs were well known to it by the start of the 2017-18 school year; and, any days of Student's absence will provide a remedy for missed speech/language sessions.

The award of compensatory education is subject to the following conditions and limitations. Student's Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's educational and related services needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress. Compensatory services may occur after school hours,

⁶ See 22 Pa. Code § 11.3(a) (providing for 990 hours of instruction in a school year at the secondary level). Even if the second spring 2019 IEP meeting had convened in May, it is unlikely that changes would have been implemented prior to the end of the 2018-19 school year.

on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age twenty one (21). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

Finally, the Parents request an order for the District to develop a new IEP to address all of Student's educational needs. The record does not provide any certainty as to what Student's program is for the 2019-20 school year since the Parents did not approve the April 2019 IEP. This hearing officer understands that the parties did reach some agreement on programming while this proceeding was pending. Still, Student is now overdue for a new IEP, so the team will be directed to reconvene and develop a new IEP that, at a minimum, includes instruction in a small class setting for reading, written expression, and mathematics with specially designed instruction to address each of the deficits identified by the private evaluator; measurable annual goals in reading comprehension, written expression, mathematics computation, and mathematics problem solving that contain all elements in the form document itself;⁷ a PBSP; and counseling, social skills, and speech/language services as well as an adult with whom Student will meet daily to provide executive functioning and related support. This hearing officer has confidence that the team as a whole

⁷ The Pennsylvania Training and Technical Assistance Network has a form [Annotated IEP](https://www.pattan.net/Forms/INDIVIDUALIZED-EDUCATION-PROGRAM-IEP-ANNOTATED?NodeId=567594) available for guidance on its website (<https://www.pattan.net/Forms/INDIVIDUALIZED-EDUCATION-PROGRAM-IEP-ANNOTATED?NodeId=567594>, last visited March 4, 2020).

will be able to develop an appropriate program consistent with these directives and the IEE.

ORDER

AND NOW, this 6th day of March, 2020, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District denied Student FAPE for entirety of the 2017-18 and 2018-19 schools years.
2. Student is awarded 990 hours of compensatory education to remedy the denial of FAPE. All of the conditions and limitations on that award set forth in the above Discussion are expressly made a part hereof as if set forth at length.
3. The District shall convene a meeting of Student's IEP team to include the Parents within ten calendar days to develop a new IEP that includes, at a minimum:
 - a. instruction in a small class, learning support setting for reading, written expression, and mathematics with specially designed instruction to address each of the deficits identified by the private evaluator;
 - b. measurable annual goals in reading comprehension, written expression, mathematics computation, and mathematics problem solving at specified levels of expectation;
 - c. a PBSP;
 - d. counseling, social skills, and speech/language services; and
 - e. identification of an adult with whom Student will meet daily to provide executive functioning and related support.

4. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

Cathy A. Skidmore

Cathy A. Skidmore, M.Ed., J.D.
HEARING OFFICER
ODR File No. 22487-19-20