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

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

ODR No. 28810-23-24

CLOSED HEARING

Child's Name:
H.V.

Date of Birth:
[redacted]

Parents:
[redacted]

Pro Se

Local Education Agency:
School District of Philadelphia
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Philadelphia, PA 19130

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Hearing Officer:
Brian Jason Ford

Date of Decision:
03/22/2024

Introduction

This special education due process hearing concerns a student with disabilities (the Student). The Student is a "child with disabilities" as defined by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. The Student's parent (the Parent) requested this hearing against the Student's public school district (the District).[1]

The dispute between the Parent and the District centers on what special education program constitutes a free appropriate public education (FAPE) for the Student within the least restrictive environment (LRE).

The Student has been diagnosed with several disabilities that have educational implications, including [redacted]. The Student received Early Intervention (EI) supports before reaching the age of beginners. Then, the Student enrolled in the District for the 2022-23 school year [redacted]. Upon enrollment, the District offered special education servers comparable to those in the EI program while it evaluated the Student. The District's offer included a Life Skills placement. The Parent rejected the District's offer, prompting negotiation. The parties agreed to place the Student in a Learning Support program at the Student's neighborhood elementary school (the NES) while the evaluation was pending.

The District completed its evaluation and produced an evaluation report (the ER). Following the ER, the District proposed an Individualized Education Program (IEP). The IEP included a Life Skills placement for the Student outside of the NES. The Parent again rejected Life Skills and, ultimately, requested this hearing. The Parent alleges that the District has violated the Student's IDEA rights from enrollment through the present and ongoing. The Parent demands compensatory education and continuation of the Student's current placement with increased supports.

As discussed below, I find in part for the Parent and in part for the District.

Procedural History

The Parent initiated this hearing on November 17, 2023, by filing a due process complaint (the Complaint). The Parent amended the Compliant on January 29, 2024 (the Amended Complaint). The Parent was represented, and an attorney drafted the Compliant and the Amended Complaint. The District field responses to both.

[1] Two parents participated in the hearing, but the complaint references one parent.

Shortly before the hearing convened, the Parent discharged her attorney and proceeded *pro se*. To maintain efficiency and fairness, I shifted the burden of production to the District while keeping the burden of persuasion on the Parent. The hearing then proceeded through four sessions between February 15 and March 8, 2024.

Issues Presented

The Amended Complaint presented two issues: First, the Parent alleged that the District violated the Student's right to a FAPE in the 2022-23 and 2023-24 school years because the District provided "improper" special education during that time. The Parent demanded compensatory education as a remedy for that violation. Second, the Parent alleged that the District's proposed Life Skills placement was inappropriate. The Parent demanded continued placement at the NES in a Learning Support program with increased supports.[2]

At the outset of the hearing, the District conceded that the Student's current placement is inappropriate (albeit not for the same reasons that the Parent alleged). That concession removed the question of the current placement's appropriateness. Both parties agree that the Student is not receiving a FAPE, and so the issue shifts to what remedy is owed.

The issues presented for adjudication are:

1. What remedy is owed to remediate the District's violation of the Student's right to a FAPE during the 2022-23 and 2023-24 school year?

2. Is the District's proposed IEP appropriate for the Student?

Regarding the second issue (the appropriateness of the District's proposed IEP), the Parent demands a cascade of relief in the alternative. Primarily, the Parent demands a continuation of the Student's current program with increased supports in the NES. As a first alternative, the Parent demands a continuation of the Student's current program with increased supports outside of the NES. As a second alternative, the Parent demands an order requiring the District to fund an independent educational evaluation (IEE), and an order requiring the District to maintain the Student's current placement without changes until the IEE is complete. In all cases, the Parent objects to a Life Skills placement.

[2] In her written closing statement, the Parent raises a host of issues that were never presented in the due process complaint. Those issues are not properly before me.

Findings of Fact

I reviewed the record in its entirety. I find facts only as necessary to resolve the issues before me. I note that large chunks of testimony were duplicative, despite some effort on the District's part to present a concise case. When testimony from multiple witnesses (sometimes multiple instances from multiple witness) substantiates a fact, and that testimony is peppered thorough whole transcript, and that fact is not in dispute, I cite to the record as a whole using *passim*. the I find as follows:

Pre-Enrollment

1. The Student was born with [redacted] and significant health issues requiring serious medical intervention in infancy. *Passim.*

2. On July 31, 2020, the Student received an initial EI IEP. S-3

3. The Parent and the EI agency updated Student's EI IEP several times. The Student's EI IEP in place immediately before the Student enrolled in the District was drafted on August 10, 2022, 2022. S-3, S-4.

4. The Student's last EI IEP included multiple goals related to basic communication, basic social interactions, and pre-academic goals. Progress reporting indicates that the Student did not master those goals while in the EI program, and some were not started as the Student did not demonstrate prerequisite abilities. *See* S-4.

5. The Student's last EI IEP included Speech Therapy (ST) two times per week, Occupational Therapy (OT) one time per week, and specialized instruction two times per week. S-4.

The 2022-23 School Year

6. There is no dispute that the Student enrolled in the District's [redacted] program for the 2022-23 school year. *Passim*.

7. On September 2, 2022, the District issues a Notice of Recommended Educational Placement (NOREP) to provide school-age services comparable to those in the EI IEP for 90 days pending the results of its own evaluation. S-55.

8. The District's offer of comparable services included a supplemental level of Life Skills support services. S-55.

9. "Supplemental" describes a level of service measured by the amount of time that a child will receive instruction from special education personnel, regardless of the type of special education or where that instruction is delivered. A supplemental level of special education means that a child will receive instruction from special education personnel for more than 20% but less than 80% of the school day. *See, e.g.* S-5 at 37.

10. The District's comparable services NOREP included 360 minutes per month of Life Skills support, 180 minutes per month of OT, a one-to-one (1:1) aide, and transportation. S-55. The NOREP does not specify a number of hours of 1:1 support, but it was understood that the Student would have an aide throughout the day. *Passim.*

11. The NOREP does not specify how much of any service the Student would receive daily. For example, 360 minutes per month of Life Skills is roughly 18 minutes per school day if the time is evenly distributed, but the NOREP would also permit longer blocks of Life Skills support on alternating days. The same is true for OT. Spread evenly, 180 minutes per month is roughly 9 minutes per school day, but it is more likely (and likely more beneficial) to receive a larger OT block on different days. *See* S-55.

12. Also on September 2, 2022, the District issues a Permission to Evaluate (PTE) form, seeking the Parent's request to evaluate the Student. S-56. The Parent provided consent for the evaluation on September 16, 2022. S-50.

13. The Parent did not sign the comparable services NOREP or any other NOREP as the Parent adopted a practice of not signing NOREPs. *See, e.g.* NT at 630. Regardless, there is no dispute that the Parent rejected the comparable services NOREP and asked for a Learning Support program at the NES. *Passim*.

14. On October 3, 2022, the District acquiesced to the Parent's preferences and issued a second comparable services NOREP. This NOREP offered a supplemental level of Learning Support services for 90 minutes per month, ST for 360 minutes per month, OT for 180 minutes a month, transportation, and a 1:1 aide. S-52.

15. The Parent did not sign the second comparable services NOREP, but there is no dispute that the Parent approved the District's proposed

Learning Support program in the NES while the evaluation was pending. *Passim*.

16. On October 16, 2022, the District's psychologist (the Psychologist) attempted to evaluate the Student by administering standardized assessments. That effort was mostly unsuccessful due to the Student's "limited communication and compliance with standardized test administration." These comments do not reflect willful obstinance or purposeful obstruction, but rather relate to the Student's abilities to take standardized tests. S-2.

17. After the failed evaluation attempt, the Psychologist communicated with the Parent. They agreed to try testing again with the Parent in the room. The parties agree to extend the evaluation timeline to carry out that plan. *See* S-2, S-49.

18. On November 15, 2022, the Psychologist attempted to evaluate the Student again, as planned. This time, the Psychologist was able to complete multiple, standardized evaluations. *See* S-2.

19. Also on November 15, 2022, the Parent sent an email to the District requesting an Independent Educational Evaluation (IEE) at the District's expense. On November 22, 2022, the District replied, rejecting the request because it had not completed its own evaluation. S-58.

20. The District completed the evaluation and issued an evaluation report (the ER). Through the ER, the District found the Student's cognitive abilities, academic performance (even at the [redacted] level), adaptive skills, social skills, and communication skills in the lowest ranges that the respective assessments are capable of measuring – indicating a need for massive support in every domain, including but not limited to adaptive skills. These results were consistent with input from teachers, the Psychologist's observations, and the Student's performance within the [redacted] curriculum.[3] S-1.

[3] At some point after the testing started, the Parent developed negative feelings towards the Psychologist. By the time of the hearing, the Parent objected to any future testing by the same psychologist. By all measures, the Psychologist was able to maintain professionalism. Regardless, the Parent does not dispute the procedural compliance or substantive content and findings of the ER. *See Complaint, Amended Complaint*. I, therefore, accept the ER as an accurate representation of the Student's abilities and cognitive profile at the time of testing. I decline to parse the minutia of the ER for the same reason.

21. Regarding eligibility, through the ER, the District found the Student eligible for special education primarily as a child with an Intellectual Disability and secondarily as a child with a Speech or Language Impairment. S-1.

22. Regarding the timeline, testing began in November 2022 and was completed in January 2023. The District gave a copy of the ER to the Parent on February 6, 2023. The parties also met at an IEP team meeting on February 6, 2023. S-1 at 1, S-32 at 35.

23. During the February 6, 2023, IEP team meeting, the District again recommended a supplemental Life Skills placement. *See, e.g.* S-32 at 35.

24. On March 22, 2023, the Parent again rejected the District's proposed Life Skills placement, demanding a continuation of the Learning Support placement within the NES. *See, e.g.* S-32 at 35.

25. On May 31, 2023, the District issued an IEP and a NOREP acquiescing to the Parent's demand. District agreed to continue the Student's Learning Support placement in the NES and revised the IEP accordingly. *See* S-32.

26. The District had actual knowledge that the IEP of May 31, 2023 (S-32) was not reasonably calculated to provide a FAPE at the time it offered that IEP.[4] The District wrote (S-32 at 35):[5]

> Life Skills Support at the Supplemental Level with Speech and Language Supports was offered to the parent on October 6, 2022 on a comparable service NOREP when [Student] transitioned into the School District of Philadelphia from Early Intervention. Parent disagreed with that offer of FAPE. The re-evaluation was completed on February 6, 2023 followed by an IEP offering Life Skills Support at the

[4] In most cases, this holding is a mixed question of fact and law. In this case, even disregarding the District's admission that the Student's current placement is not appropriate, contemporaneous documentation – including the NOREP itself – unambiguously prove that the District offered a placement that it thought was inappropriate for the Student to appease the Parent. I hold that the District offered an IEP that was not reasonably calculated to provide a FAPE to the Student as a finding of fact.

[5] While the evidence in this case speaks for itself, the District's statements on the NOREP both establish the District's actual knowledge and (although not *strictly* relevant) explain the District's decision to offer a placement that it knew was inappropriate. I quote at length from the NOREP for that reason.

> Supplemental Level with speech and occupational therapy. On March 22, 2023, parent denied that offer of FAPE. Parent is asking for Supplemental Learning Support with a 1:1 so that [Student] can learn with [] same aged peers. The team will offer this level of support to allow the time to implement interventions and collect data until the end of the first marking period. At that time, the team will reconvene and review the data collected. At that meeting, it will be determined if this is the appropriate level of support for [Student] based on the current data that is collected. [Student] also qualifies for ESY.

27. The District also listed "Supplemental Life Skills Support" as a considered-but-rejected option on the NOREP. The District wrote that the reason for rejection was (S-32 at 35):

> Parent is requesting this level of service along with a 1:1. The team will offer this level of support to allow the time to implement interventions and collect data until the end of the first marking period. At that time, the team will reconvene and review the data collected. At that meeting, it will be determined if this is the appropriate level of support for Student based on the current data that is collected.

28. The Parent did not sign and return the NOREP, but there is no dispute that the Parent consented to the District's offered Learning Support placement in the NES. *Passim*.

The 2023-24 School Year

29. The Student began the 2023-24 school year in the NES under the May 2023 IEP. That IEP featured a Learning Support placement at the supplemental level. The Student spent 74% of the school day (297 of 399 minutes) in the regular education classroom, receiving 450 minutes per month of Learning Support. The District also provided a 1:1 aide throughout the school day. S-32.

30. The May 2023 IEP also included OT and ST as related services. S-32 at 26. Often, those services were not provided because of District-wide staffing shortages. Other times, services were provided remotely. There is little dispute that the Student has difficulty accessing or benefiting from related services provided remotely. *Passim*.

31. On November 1, 2023, in accordance with the District's plan to reconvene at the end of the first marking period, the District reconvened the Student's IEP team. S-18.

32. By November 1, 2023, despite being accepted and well-loved in the NES, the Student had not made meaningful progress by any measure, be it IEP goals, classroom performance, or anecdotal observations from all educational professionals who worked with the Student. *See, e.g.* S-18.

33. In response to this lack of progress, the District again proposed a Life Skills placement through a new IEP and NOREP. The November 2023 IEP offered 1478 minutes per week of Life Skills, 180 minutes per month of OT, 90 minutes per moth of ST, and a 1:1 aide. S-18.

34. While the NOREP accompanying the November 2023 IEP makes no reference to any school building, both parties understood that the District was proposing a placement outside of the NES in a different elementary school building. The specific school was discussed during the IEP team meeting, and the Parent toured the offered placement. *Passim*.

35. The November 2023 IEP required placement outside of the NES for two primary reasons: First, there is no Life Skills program within the NES at any level, but the other elementary school houses a Life Skills program. Second, District staffs in-person related service providers in the building with a Life Skills program. *Passim*.[6]

36. On November 17, 2023, the Parent requested this hearing by filing a due process complaint. That filing triggered the IDEA's pendency protections, and so the Student remained in the Learning Support placement in the NES under the May 2023 IEP. The related services components of the IEP continued to not be implemented with fidelity.

37. After the Parent requested this hearing, the parties continued to negotiate and communicate with each other. That negotiation lasted longer than the 30 days contemplated by the IDEA, and both parties requested and were granted extensions.

[6] It is worth reiterating that references to *passim* indicate a large amount of testimony from multiple witnesses scattered throughout the record and an absence of a dispute. Testimony about where the District locates its programs, how the District staffs those programs, and the challenges that the District faces with staffing was undisputed and credible.

38. The District reconvened the Student's IEP team on January 17, 2024. S-5.[7] During that meeting, the District revised the November 2023 IEP. Some aspects of that revision may have been part of an effort to compromise with the Parent. But, unlike the May 2023 IEP, the District did not have actual knowledge that any aspect of the January 2024 revisions was inappropriate when offered.

39. Functionally, the January 2024 IEP added Learning Support to the Life Skills program outside of the NES. The result was a blended program of Life Skills and Learning Support. The Student would attend ELA and Math classes in a self-contained Learning Support classroom for 450 minutes per week, spend 1032 minutes per week in Life Skills, receive OT for 30 minutes per week, and receive ST for 30 minutes per week. The January 2024 IEP continued to include a 1:1 aide. S-5.[8]

40. On January 29, 2024, the Parent rejected the January 2024 IEP and amended the Complaint accordingly. *See* "Issues" above.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014);

[7] The January 17, 2024, IEP team meeting can be viewed as part of the parties' effort to resolve this matter through negotiation. Typically, the hearing officer should have no knowledge of the parties' settlement negotiations. However, the January 2024 IEP was entered into the record of this case without objection and constitutes the District's current placement offer, which is the subject of the Parent's amended complaint. The January 2024 IEP also may be the best evidence of the Student's current presentation and needs in school.

[8] Throughout the hearing, the Parent used the term "self-contained" to mean a classroom in which a child spends the entire school day. The District has never offered that sort of program for the Student. In this instance, the term "self-contained" means that all the materials for both ELA and math special education supports are located in the same classroom. The amount of time that the Student would spend in Learning Support, Life Skills, and general education classrooms is specified in the IEP.

A.S. v. Office for Dispute Resolution (Quakertown Community School District), 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

To the extent that credibility is synonymous with truthfulness, I find that all witnesses testified truthfully in accordance with their understanding. While the parties clearly have different views and reach different conclusions, there is no real dispute in this case about what happened and when. To the very small extent that witnesses gave conflicting testimony, that testimony was a honest reflection of the witnesses understanding.

To the extent that credibility is synonymous with the weight that I assign different testimony, not all witnesses were equally credible. The Student's [redacted] grade teacher, the NES's Assistant Principal, and the Student's 1:1 aide were highly credible in this meaning of the word.

The Student's [redacted] grade teacher has an obvious and deep affection for the Student. Her testimony concerning the limits of her program and her own abilities was candid and forthright, as was her testimony concerning the Student's progress.

The Assistant Principal was frank regarding the November 2023 IEP. That IEP, while presented on paper as a temporary means to gather information, was a mechanism by which the District appeased the Parent by offering a program that it knew was inappropriate.

Testimony from the Student's 1:1 aide was remarkable on its own, but it is also worth noting that both parties lavished praise upon the Student's 1:1 aide. By all accounts, the Student's 1:1 aide went above and beyond the requirements of her job to help the Student however possible. This individual did outstanding work in what were surely difficult circumstances. The kudos and compliments from both sides of the aisle were some of the most credible, heart-felt testimony this Hearing Officer has heard over the past 14 years. The 1:1 aide's testimony concerning the Student's abilities, current presentation, and near-total lack of progress is given considerable weight.

Applicable Laws

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief.

Schaffer v. Weast, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the Parent is the party seeking relief and must bear the burden of persuasion.[9]

Free Appropriate Public Education

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

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

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id* at 3015.

Third Circuit consistently interpreted *Rowley* to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew F.* decision in no different.

[9] For practical purposes, I shifted the burden of production to the District. I did not alter the Parent's burden of persuasion.

A school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. *See, Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "*de minimis*" benefit. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than *de minimis*" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id*. Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress even for an academically strong child, depending on the child's circumstances.

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Least Restrictive Environment

The IDEA requires LEAs to "ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." 34 C.F.R. § 300.115(a). That continuum must include "instruction in regular classes, special schools, home instruction, and instruction in hospitals and institutions." 34 C.F.R. § 300.115(b)(1); *see also* 34 C.F.R. § 300.99(a)(1)(i). LEAs must place students with disabilities in the least restrictive environment in which each student can receive FAPE. *See* 34 C.F.R. § 300.114. Generally, restrictiveness

is measured by the extent to which a student with a disability is educated with children who do not have disabilities. *See id*.

In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993), the Third Circuit held that LEAs must determine whether a student can receive a FAPE by adding supplementary aids and services to less restrictive placements. If a student cannot receive a FAPE in a less restrictive placement, the LEA may offer a more restrictive placement. Even then, the LEA must ensure that the student has as much access to non-disabled peers as possible. *Id* at 1215-1218.

More specifically, the court articulated three factors to consider when judging the appropriateness of a restorative placement offer:

"First, the court should look at the steps that the school has taken to try to include the child in a regular classroom." Here, the court or hearing officer should consider what supplementary aids and services were already tried. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1216 (3d Cir. 1993)

"A second factor courts should consider in determining whether a child with disabilities can be included in a regular classroom is the comparison between the educational benefits the child will receive in a regular classroom (with supplementary aids and services) and the benefits the child will receive in the segregated, special education classroom. The court will have to rely heavily in this regard on the testimony of educational experts." The court cautioned, however, that the expectation of a child making grater progress in a segregated classroom is not determinative. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1216-1217 (3d Cir. 1993).

"A third factor the court should consider in determining whether a child with disabilities can be educated satisfactorily in a regular classroom is the possible negative effect the child's inclusion may have on the education of the other children in the regular classroom." The court explained that a child's disruptive behavior may have such a negative impact upon the learning of others that removal is warranted. Moreover, the court reasoned that disruptive behaviors also impact upon the child's own learning. Even so, the court again cautioned that this factor is directly related to the provision of supplementary aids and services. In essence, the court instructs that hearing officers must consider what the LEA did or did not do (or could or could not do) to curb the child's behavior in less restrictive environments. *Oberti v. Bd. of Educ*., 995 F.2d 1204, 1217 (3d Cir. 1993)

There is no tension between the FAPE and LRE mandates. There may be a multitude of potentially appropriate placements for any student. The

IDEA requires LEAs to place students in the least restrictive of all potentially appropriate placements. There is no requirement for an LEA to place a student into an inappropriate placement simply because it is less restrictive. However, LEAs must consider whether a less restrictive but inappropriate placement can be rendered appropriate through the provision of supplementary aids and services.

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remediate substantive denials of FAPE. The first method is the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

The hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). In *Reid*, the court conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. *Reid* is the leading case on this method of calculating compensatory education, and the method has become known as the *Reid* standard or *Reid* method.

The more nuanced *Reid* method was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid* and explaining that compensatory education "should aim to place disabled children in the same position that the child would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the *Reid* method, that analysis poses significant practical problems. Generating evidence of what position the child would be in but for the violation is exceedingly expensive for parents and, measured by time, costs more than children can afford. For those reasons, evidence is almost never presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the *Reid* method recognize the importance of such evidence, and suggest that hour-for-hour is a necessary default when no such evidence is presented:

> "… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education are warranted (meaning one hour of compensatory education for each hour that school was in session). Such awards are fitting if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. *See also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the

problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default. Full-day compensatory education can also be awarded if that standard is met. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Discussion

Compensatory Education – The Parties' Positions

The District and the Parent agree that the Student is not receiving a FAPE and is owed compensatory education. There appears to be a dispute, however, about the amount and type of compensatory education that the District owes to the Student.

There appears to be a dispute because the Parent's demand for compensatory education is sufficient by IDEA pleading standards but vague in every other sense.[10] Through the Complaint and the Amended Complaint, the Parent never asked for a specific amount or form of compensatory education and did not specify if she was seeking an hour-for-hour or make-whole remedy. The Parent's written closing statement sheds no light on this either and confuses compensatory education with more traditional compensatory damages and monetary damages.[11]

The District acknowledges that compensatory education is owed but argues that should be limited to the aspects of the Student's IEP that were not implemented because of staffing shortages. As for the rest, the District's position and argument is that the Parent is to blame for the FAPE violation. That argument takes two forms that apply during different time periods. First, the District argues that the Student's inappropriate program is a function of the Parent's preferences and demands. For the time period just

[10] IDEA complaints are presumptively sufficient unless challenged.
[11] To the extent that the Parent's written closing statement is a request for guidance as to permissible uses of compensatory education hours, I address that concern herein.

after the Student's enrollment, the District makes a fair point under the facts of this case. For the time period when the Student's programming was a function of the District's acquiescence to the Parent's preferences, the District's argument provides very little defense. Second, the District argues that Parent blocked the District from implementing an appropriate program both by withholding consent and by intentionally triggering the IDEA's pendency protections to lock in the Parent's preferred program. I agree that Parent's withholding of consent for an initial school-age special education placement provides a safe harbor for the District. I do not agree that pendency provides a safe harbor, but that is ultimately irrelevant.

As in all cases, the District's liability is best understood by examining the Student's program through distinct time periods.

Compensatory Education – Enrollment through February 6, 2023

When the Student transferred from EI to school-age programming, the District examined and analyzed all available information and reached a reasonable conclusion: a Life Skills placement would constitute comparable services for the Student while an evaluation was pending. The Parent rejected that placement, and the parties reached a compromise. The District agreed to place the Student in the Parent's preferred program. From a pragmatic point of view, the District's decision to avoid immediate acrimony while getting to know the Student and the Parent makes sense. From a legal point of view, there is no bright line test to determine what services are "comparable services" as required by the IDEA. It is possible that multiple programs could constitute comparable services. This is especially true for children who, like the Student at that time, have never attended school-aged programming and have significant needs.

The Parent makes no claim or argument that the Student's initial placement in the District fell short of the District's obligation to provide comparable services. Testimony from District personnel and documents drafted at that time clearly reveal that the Student's initial placement – supplementary Learning Support with related services at the NES – was not the District's first choice. That evidence does not, however, prove that the Student's initial placement fell short of the District's comparable services mandate. In the absence of evidence or argument to the contrary, I find that the Student's initial placement in the District constitutes services comparable to those in the EI program.

Having found that the Student's initial placement qualifies as comparable services, I further hold that, through the completion of the ER, the District satisfied its IDEA obligations to the Student. Said simply, the District did

what it was supposed to do. It offered an evaluation and provided comparable services while the evaluation was pending. The Student is not owed compensatory education for this time period.

Compensatory Education – February 6 through May 31, 2023

The District completed its evaluation and provided a copy to the Parent on February 6, 2023.[12] At this point, the District's obligation shifted from an obligation to provide comparable services to an obligation to provide an appropriate IEP. The District satisfied that obligation. Every bit of evidence in the record of this case, including the Parent's testimony, proves that the services that the Student received as comparable services from enrollment through the ER was insufficient to meet the Student's needs. In response, the District proposed a necessary increase and realignment of the Student's program. That proposal was in complete alignment not only with the ER, but with the advice and good counsel of highly trained, experienced educators who care greatly for the Student.

The record does not reveal in detail what happened between February 6 and May 31, 2023. The record as a whole leads me to conclude that this was a period of negotiation between the parties. The District pushed for the program that it thought was appropriate, and the Parent resisted that push. During those 114 days, the Student remained in the comparable services placement, not receiving a FAPE. However, the IDEA shields the District during this time. The IDEA requires LEAs to obtain parental consent before providing initial services and distinguishes between initial services for school age children and comparable services provided as EI children age into school programming. *See* 20 U.S.C. § 1414. The District could not act without the parental consent that it was working to obtain.

From February 6 through May 31, 2023, the District acted in accordance with its IDEA obligations. It used an ER and all available information to draft an initial IEP that was reasonably calculated to provide a FAPE at the time it was offered. It then worked to obtain parental consent to implement the IEP. This process took a concerning amount of time but, under the unique facts of this case, there is no evidence of unreasonable delay. Moreover, the IDEA prohibited the District from implementing the proposed initial IEP without the Parent's consent. The IDEA also shielded the District when the Parent refused to provide consent. While the Student did not receive a FAPE during these 114 days, I am precluded from awarding relief for this time period.

[12] The 143 days it took the District to complete the ER is eyebrow-raising. Yet, as with the substantive content of the ER, the Parent raises no claims about the ER's procedural compliance.

Compensatory Education – May 31 through November 1, 2023

On May 31, 2023, the District gave up its fight to obtain the Parent's consent for an appropriate IEP and, instead, offered an IEP that it knew was inappropriate.

There is a certain logic to the District's actions. District personnel cared about the Student, knew that the Student was not making progress, and knew that a change was necessary. District personnel also knew that the Parent would not approve the program that the Student required – a Life Skills program. So, the District placated the Parent in the hope of putting itself in a better position to reason with the Parent in the future. The District created an expectation that the parties would revisit the IEP at the end of the first marking period of the 2023-24 school year for this reason as well.

Unfortunately, by focusing on its growing dispute with the Parent, the District took its eyes off the Student. While the parents have IDEA rights, the IDEA's primary guarantee – a FAPE – belongs to children with disabilities. Absent any of the IDEA's safe harbors, when an effort to get to "yes" results in a violation of a child's educational rights, the child is owed a remedy. Unlike the IDEA's parental consent requirements, providing an inappropriate IEP as a form of acquiescence to parental demands is not a cognizable defense or mitigating factor when the Student's right to a FAPE is violated. The District's intention to put the May 2023 IEP in place for a limited time and then reassess does not mitigate the deprivation of educational benefits to the Student while that IEP was operational.[13]

From May 31, 2023, through the end of the 2022-23 school year, and then again from the start of the 2023-24 school year through November 1, 2023, the Student received special education pursuant to an IEP that was inappropriate at the time it was offered. The Student is entitled to compensatory education during this time period. The District is not entitled to a reduction in that award for the amount of time it would take to rectify the problem because the District had actual knowledge that the IEP was inappropriate at the time of the offer. The Student, therefore, is entitled to compensatory education for the entirety of this period.

Neither party presented evidence to enable a "make-whole" or *Reid* analysis. The record establishes, however, that the Student received a trivial educational benefit, at best, across every domain that the District assessed

[13] Nothing herein should be read to suggest that families and schools cannot cooperate with each other to implement trial programs. Such trials require exacting documentation and often come hand in hand with a waiver to avoid cases just like this.

or informally observed. It is worth reiterating to the parties that the word "trivial" is a term of art that has nothing to do with the care or attention that the District's educators gave to the Student. By all accounts, everyone who worked with the Student in school welcomed the Student with open arms and created an environment in which the Student's same-age peers did the same. Rather, my task is to determine if the Student's program comported with the IDEA's mandate. I find that it did not, and that the resulting educational harm to the Student was pernicious.

I award full days of compensatory education to the Student for each day that school was in session between May 31, 2023, and the last day of the 2022-23 school year. I award full days of compensatory education from the first day of the 2023-24 school year through November 1, 2023.

Compensatory Education – November 1, 2023, through January 17, 2024

The period from November 1, 2023, through January 17, 2024, breaks down into smaller periods, but the analysis for the entire period is the same: the Student is not entitled to compensatory education for this time period.

On November 1, 2023, the District carried out its plan to reconvene the IEP team after the first marking period of the 2023-24 school year. Unsurprisingly, the District found itself in the position that it thought it would be in. The Student had made very small gains in discrete areas but had not made meaningful progress in any educational domain (those domains encompass much more than academics, but include academics as well). The District shared this information with the Parent, and again offered placement in a Life Skills program.

I find that the IEP that the District presented on November 1, 2023, was reasonably calculated to provide a FAPE at the time it was offered. All evidence in this case establishes that the Student was able to make small gains – trivial or *de minimis* gains to use the IDEA's language – under the May 2023 IEP. At the same time, the record overwhelmingly establishes that the Student's has significant academic, pragmatic, and adaptive skills needs that were unaddressed in the District's Learning Support program. That is no surprise, as the District's Learning Support program is not designed to address those needs. The District's Life Skills program is designed to address those needs and, fortunately, that is what the District offered.

The November 2023 IEP also comports with the LRE mandate and passes the *Oberti* test. The starting point of the LRE analysis is a consideration of what special education and related services the Student requires to receive a

FAPE. Once that analysis is complete, the inquiry turns to the least restrictive placement in which the Student can receive those services. Discussed above, the Student requires a Life Skills program in order to receive a FAPE because the District's Life Skills program targets the Student's deficits and needs. It is the Parent's burden, therefore, to prove that the District could implement its Life Skills program in a less restrictive environment than what is proposed in the November 2023 IEP. There is no evidence in the record in support of that burden.[14]

The Student is not owed compensatory education from November 1 through 17, 2023, because the District offered an appropriate IEP. The Student needs the Life Skills program that the District offered, and the District offered that program in the least restrictive environment in which it can be delivered. That offer terminates the District's compensatory education liability.

On November 17, 2023, the Parent filed the initial due process complaint in this matter. That filing triggered the IDEA's pendency rules. The parties agree that the District's Learning Support program in the NES is the Student's pendent placement. The parties also agree that the Student is not receive a FAPE in the pendent placement.

The District is correct that the IDEA prohibits the District from unilaterally changing the Student's placement during the pendency of these proceedings (the District may change the Student's placement with the Parent's consent). Pendency, however, does not alter the compensatory education analysis. The District's liability for compensatory education ended when it offered an appropriate IEP for the Student. Instead of accepting that IEP, the Parent requested a hearing, locking the Student into an inappropriate placement.[15]

While the Parent's filing does not alter the District's liability, and while compensatory education is not owed for this time period, the District still must concern itself with the consequences of the FAPE violation during this time. The District's obligation is to provide appropriate programming relative to the Student's abilities and needs. Those needs will only become more significant as the Student spends more time outside of an appropriate

[14] The Parent does not agree that the Student requires a Life Skills placement. Discussed above, the record of this case is to the contrary. The Parent makes no argument in the alternative that the District could implement its Life Skills program in some less restrictive way or within the NES. The District has no obligation to recreate all of its programs in all of its buildings. In this case, the District chose the budling closest to the NES that contains both a Life Skills program and in which necessary related service providers are staffed.
[15] There is evidence in the record that the Parent requested this hearing with the intent to trigger pendency, prolonging the Student's time in the NES. I decline to make a finding of fact in this regard.

program. While the District protected itself from liability by offering an appropriate program, the District is cautioned that its FAPE obligation is ongoing. Nothing herein diminishes that obligation going forward.

Compensatory Education – January 17, 2024, and Onward

On January 17, 2024, the District revised its offer to include Learning Support. The record indicates that the purpose of this revision may have been to make the Parent more comfortable with and accepting of the Life Skills program by converting that to a blended program. I find that adding Learning Support to the November 2023 IEP does not make that IEP any less appropriate. The January 2024 IEP is appropriate for the Student for all the same reasons that the November 2023 IEP was appropriate for the Student.

On January 29, 2024, the Parent amended the due process complaint. That amendment has no impact upon the pendency, FAPE, or compensatory education analysis above. The Student is not owed compensatory education during this period. The caution stated above, however, bears repeating: Regardless of lability and remedies, both parties agree that the Student is not receiving a FAPE in the pendent placement. One can reasonably expect the Student's needs to grow in the absence of a FAPE. The District's ongoing obligation is to program for those needs.

Restrictions and Limitations on Compensatory Education

The Parent may decide how the compensatory education is used. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related service needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation.

Compensatory education shall be used 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 IEP.

Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until the end of the school year in which the Student turns age twenty-one (21). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent.

The cost of providing the awarded hours of compensatory services shall be limited to the average market rate for private providers of those services in the county where the District is located.

Placement and Other Remedies

The ongoing violation of the Student's right to a FAPE must end. Above, I find that the IEP of November 2023, as revised in January 2024, is appropriate for the Student. The District must implement that IEP.

The Parent has not substantiated that the District's proposed IEP is inappropriate (in fact, I find the opposite). Therefore, the Parent is not entitled to the various placements demanded as remedies.

The Parent also demands an IEE at public expense as part of a placement remedy, and not under the more typical standards of 34 C.F.R. § 300.502. Careful reading of the Complaint and Amended Complaint reveals that the Parent is not disputing the District's evaluation but rather seeking to hold the Student in place for however long it takes to complete an IEE. This form of relief is not authorized in the IDEA and is contrary to the IDEA's purposes because it would protract the ongoing violation. While an IEE cannot be used to keep the Student from an appropriate placement, an IEE is consistent with the use of compensatory education described above. Should the Parent choose to use compensatory education to obtain an IEE, all of the IDEA's qualifications for evaluators shall apply.

Summary and Legal Conclusions

The Student enrolled in the District at the start of the 2022-23 school year. The Student had previously received EI services. At the start of the 2022-23 school year, the District offered Life Skills in the NES as a form of comparable services while an evaluation was pending. The Parent rejected Life Skills. The parties then compromised, and the District offered a Learning Support placement as comparable services. I find no violation from the Student's enrollment through the completion of the ER.

Once the ER was complete, the District was obligated to offer an appropriate IEP. At this point, the District knew that the Student needed a Life Skills program, and that is what it offered. The Parent again rejected Life Skills. The Parent's refusal to provide consent for the District's initial placement offer shielded the District, even as it perpetuated the Student's time in an inappropriate placement.

Eventually, the District acquiesced to the Parent by offering an inappropriate Learning Support placement. By giving into the Parent's demand, the District both extended the FAPE violation and lost its safe harbor. At this point, the District was implementing the IEP that it offered, and is responsible for the inappropriate placement. That placement resulted in significant and wide-spread educational harms to the Student, warranting a full-day compensatory education award from May 31 through November 1, 2023.

On November 1, 2023, the District offered an appropriate Life Skills placement for the Student. That offer terminated the District's liability. The parties actions after November 1, 2023, are significant. They include the due process compliant initiating this hearing and triggering pendency, revisions to the District's proposed IEP, and amendments to the complaint. None of those actions change the analysis. The District is not liable for compensatory education after November 1, 2023, because it offered an appropriate IEP, even though the Student remains in an inappropriate program.

ORDER

Now, March 22, 2024, it is hereby ORDERED as follows:

1. The Student is awarded one hour of compensatory education for each day that the District was in session from May 31, 2023, until the last day of the 2022-23 school year.

2. The Student is awarded one hour of compensatory education for each hour that the District was in session from the first day of the 2023-24 school year through November 1, 2023.

3. The Parent may direct the use of compensatory education in accordance with the terms and conditions in the accompanying decision.

4. The District shall implement the November 2023, as revised in January 2024, as soon as is practicable.

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

/s/ Brian Jason Ford
HEARING OFFICER