

This is a redacted version of the original decision. Select details have been removed from the decision to preserve the anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code §16.63 regarding closed hearings.

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

ODR No. 27684-22-23

ODR No. 27704-22-23

CLOSED HEARING

Child's Name:

M.F.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

September 15, 2023

Introduction and Procedural History

This due process hearing concerns the educational rights of a child (the Student). Prior to January 2023, the Student's public school district (the District) found that the Student was both a child with a disability as defined by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and [redacted].

In January 2023, the District reevaluated the Student and drafted a reevaluation report (the 2023 RR). [redacted]

The Student's parents (the Parents) disagreed with the 2023 RR and asked the District to fund an Independent Educational Evaluation (IEE). The District declined and, as required by law, filed a due process complaint to defend its own evaluation. The District's complaint is ODR No. 27684-22-23.

Shortly after the District filed its complaint, the Parents filed their own due process complaint. Through their complaint, the Parents demand a holding that the Student remains eligible for and entitled to special education, and an IEP that includes certain elements discussed below. The Parents also demand compensatory education to remedy a violation of the Student's right to a free, appropriate public education (FAPE) which they alleged occurred during the 2022-23 school year. The Parents argue that compensatory education continues to accrue until such time as the District offers an appropriate IEP.

In the alternative, the Parents claim that the District-proposed Section 504 Plan is inappropriate even if the Student is not entitled to special education. The Parents' complaint also serves as a response to the District's complaint in that they demand a District-funded IEE. The Parents' complaint is ODR No. 27704-22-23.

ODR assigned both complaints to me. I consolidated the cases and heard them on a single record. This decision resolves both matters.

Issues/Burdens

The burden of proof in IDEA due process hearings is set out in full below. For now, I will set forth the issues that the parties presented. While there are some non-substantive differences between the parties' parsing and phrasing of the issues, there is no dispute about what issues are presented for adjudication. See NT 23-24. Those issues are:

1. Was the 2023 RR appropriate? This is the only issue raised in the District's complaint. The District must prove that the 2023 RR was appropriate, or it must fund the Parents' requested IEE.
2. Is the Student a child with a disability in need of special education, as defined by the IDEA? The Parents raised this issue and must prove that the Student meets the IDEA's definition. If the Student meets that definition, the Student is entitled to special education and the District must offer an appropriate IEP to the Student.
3. If the Student is entitled to an IEP, must the IEP include the specific content that the Parents demand in order to be appropriate? The specific content is discussed below. The Parents raised this issue and must prove that the Student requires such content to receive a FAPE under IDEA standards.
4. If the Student is not entitled to an IEP, must the Section 504 Plan include the specific content that the Parents demand to be appropriate? The specific content that the Parents demand for the IEP and the Section 504 Plan is the same. The Parents raised this issue and must prove that the Student requires such content to receive a FAPE under Section 504 standards.
5. Is the Student entitled to compensatory education to remedy a denial of FAPE that started in the 2022-23 school year and is ongoing until the District offers an appropriate IEP or Section 504 Plan? The Parents raised this issue and must prove that the District violated the Student's right to a FAPE and that compensatory education is owed.

Findings of Fact

I reviewed the evidence (document and testimony) in its entirety. I make findings only as necessary to resolve the issues before me. I find as follows:

The 2020-21 School Year

1. During the 2020-21 school year and prior, the family lived outside of Pennsylvania.
2. From a young age, the Student exhibited behavioral difficulties in school. *See, e.g.* NT 32-33.

3. In April 2021, the Student's prior school district completed several evaluations, including a psychological assessment and an occupational therapy evaluation. S-1, S-3, S-4.
4. Around the same time, the Parents obtained an IEE for the Student. The independent evaluator concluded that the Student met diagnostic criteria for Autism, Attention Deficit Hyperactivity Disorder (ADHD), and Mood Disorder. S-3.
5. The Parents shared the IEE with the Student's former school district. That district used the IEE and its own evaluations to conclude that the Student was eligible for special education under the disability categories of Autism and Other Health Impairment (OHI). S-1, S-2, S-4, S-5, S-10.
6. In May 2021, the former school district issued draft IEPs and Behavior Intervention Plans. It is not clear if any of those IEPs were completed, approved, or implemented. S-6, S-7, S-8.

The 2021-22 School Year

7. There is no dispute that the Parents moved to Pennsylvania and enrolled the Student in the District for the 2021-22 school year. From this time forward, the District was and is the Student's Local Educational Agency (LEA) as defined by the IDEA.
8. There is insufficient evidence to establish with specificity what services the Student received from the District upon enrollment.
9. On August 27, 2021, the Student [harmed] another student [redacted]. The District logged the incident, but the record does not indicate what discipline, if any, was imposed. S-17.
10. On November 5, 2021, the District issued an Evaluation Report (ER). Through the ER, the District found that the Student was eligible for special education services under the disability categories of Autism and Other Health Impairment (OHI). S-10.
11. On December 3, 2021, the Student's IEP team met. The District issued a draft IEP for the Student. S-11. The draft IEP included two goals. The first goal called for the Student to return to and remain on task for a minimum of ten minutes after a frustrating situation with no more than one prompt. The second goal, which was an Occupational

Therapy goal, called for the Student to learn and then independently use self-regulation strategies to communicate and state needs. S-11.

12. The draft IEP contained Specially Designed Instruction (SDI), including direct social skills instruction in a small group, access to a counselor, help breaking down large assignments, and various tools to promote positive reinforcement, self-regulation, and organization. S-11.
13. The draft IEP also provided Occupational Therapy for 16, 30-minute sessions per IEP year. S-11.
14. The draft IEP placed the Student in Learning Support at the Itinerant level, meaning that the Student would receive special education in a learning support setting for less than 20% of the school day. S-11.
15. On January 26, 2022, the District completed a Functional Behavioral Assessment of the Student (the FBA). At that time, the FBA evaluator noted that the IEP was still in draft form. S-12.
16. Through the FBA, the District reported that the Student was not displaying problematic behaviors in school. This stood in contrast to the Student's behaviors earlier in the 2021-22 school year, and the evaluator noted the difference. The evaluator also noted that the Student appeared to benefit from the various teaching and behavior management methods used for the entire class. S-12.
17. The FBA evaluator directly observed the Student was able to maintain self-control during frustrating situations with peers, indicating that the Student was applying the behavioral techniques that the Student's teachers had been teaching. S-12.
18. On February 16, 2022, the Student's IEP team met again. The District revised the Student's IEP. The goal of returning to task after a frustrating event was replaced with a goal for the Student to use a coping strategy within three or less prompts when faced with a frustrating event. The goal to utilize strategies to appropriately communicate emotions was changed to a goal where the Student would identify and demonstrate the use of five different self-regulation strategies. Direct social skills instruction remained in place, and SDIs were added for check-ins during writing assignments and prompts to use coping strategies. S-14.

19. The Parents approve the IEP as revised in February 2022. S-14 at 38.¹ IEP revisions. See, e.g. NT 55.
20. On February 22, 2021, the Parents obtained a private evaluation of the Student (the 2021 Private Evaluation). See S-23 at 2-3. The 2021 Private Evaluation is described below.
21. On March 16, 2022, the Student and another student were [involved in an altercation]. [redacted]. The District logged the incident, but it is not clear what discipline, if any, was imposed. S-17.
22. On April 4, 2022, a substitute teacher reported that the Student was disruptive in class. The Student wrote an apology note to the substitute at the District's direction. S-17.
23. [redacted]
24. On May 12, 2022, the Student wrote a mild but inappropriate word on a digital worksheet while a substitute was in class. The record does not indicate what discipline, if any, was imposed. S-17.
25. On May 23, 2022, the Student's IEP team met again. [redacted]
26. By the end of the 2021-22 school year, the Student had mastered all but one IEP goal and had made substantial progress towards the one unmastered goal. S-15.
27. At the Student's grade level, report cards are coded with numbers 1 through 4 in core academic areas. Exceeding expectations is represented as a 4 and meeting expectations is represented as a 3. By the end of the school year, the Student scored 3s and 4s in every domain assessed except for "represents and interprets data" and two writing sub-domains. In those areas, the Student scored a 2, meaning that the Student was "approaching" standards while capable of grade-level work. For the grade into which the lower writing sub-domains were a factor, the Student's overall score was a 3. S-16.
28. In "encore" subjects (Art, Music, Health, PE, and Library), the Student could score an M for meeting expectations or an A for approaching expectations. The Student scored Ms in all domains assessed. S-16.

¹ See credibility determinations, below.

29. The Student's teachers also rated the Student's "Characteristics of a Successful Learner" and "Student Effort" as part of the report card. In these areas, the Student could be rated as either "proficient" or "needs improvement." By the end of the school year, the Student was rated as proficient in all 18 domains assessed except for "cooperates with others" and "follows directions the first time." S-16.

The 2022-23 School Year

30. Early in the 2022-23 school year, the Parents grew frustrated with teachers because of inconsistent use of an agenda or planner book. The Student had benefited from consistent use of an agenda book the year before. *See, e.g.* P-1.
31. On October 7, 2022, a private behavioral health provider who had been working with the Student wrote a letter at the Parents' request. The letter urges District staff to be "fully compliant" with the Student's "accommodation plan" by providing "supports for organizational skills" in school. S-18.
32. Organizational tools and supports were part of the Student's IEP in October 2022, particularly for writing. But nothing in the Student's IEP required use of an agenda book, implementation of a specific planner, or teacher assistance for using the same. S-14.
33. On October 21, 2022, the Student's IEP team reconvened with attorneys for both parties present. During this meeting, the parties agreed that the District should reevaluate the Student to address the Parent's concerns about organization, self-regulation, and social skills – even though District personnel did not share these concerns. The parties also agreed to add SDIs to the IEP including a daily check-in for self-regulation, homework time limitations, and staff review of the Student's planner. S-19.
34. Around the same time as the October 2022 IEP team meeting, the parties also agreed to implement the Student's IEP, as revised, while the District's reevaluation was pending. Documentation of the agreement to reevaluate and implement the revised IEP while the reevaluation was pending came in November 2022, but there is no dispute about what services were agreed to or that the reevaluation should proceed. *See* S-20, S-21.
35. On January 13, 2023, the District completed the reevaluation and drafted a reevaluation report (the 2023 RR). S-23. For context, this is

the reevaluation that the Parents allege is inappropriate and that the District is defending.

36. The 2023 RR included a comprehensive review of existing information about the Student, including a reprinting of the 2021 Private Evaluation. The 2021 Private Evaluation included standardized, normative intelligence and achievement tests. Those tests showed that the Student is very intelligent and has strong academic skills, especially in math. S-23 at 2-3.
37. The review of existing information in the 2023 RR also included parental input, a history of the Student's medical diagnoses, prior testing and curriculum-based assessments from the District, prior progress reports, prior report cards, and the prior FBA. S-23 at 1-7.
38. The 2023 RR included narrative input from the Student's current teachers. S-23 at 7.
39. The 2023 RR did not include new intelligence or academic achievement testing. The Student's high IQ and strong academic skills were well-established and were not a concern of either party at that time. S-23.
40. The 2023 RR included new assessments of the Student's behavior, executive functioning, and social-emotional skills. To assess the Student's behavior, the District used the Behavior Assessment System for Children, 3rd Edition (BASC-3), which is a standardized, normative, broad-ranged behavior rating scale. To assess the Student's executive functioning, the District used the Behavior Rating Inventory of Executive Functioning, 2nd Edition (BRIEF-2), which is a standardized, normative behavior rating scale that targets executive functioning skills. To assess social-emotional skills, the District used the Social Skills Improvement System Social-Emotional Learning Edition (SSIS SEL) which assesses skills related to school-based social and emotional regulation. See S-23 at 7.
41. The new assessments were scored by a District-employed Certified School Psychologist (the CSP). The CSP also observed the Student, conducted an informal interview with the Student, and reported her observations. S-23 at 8.
42. For the BASC-3, two teachers and one of the Parents rated the Student. Generally, the teachers' ratings were like each other and different from the Parent's ratings. Despite these differences, none of

the ratings triggered the BASC-3's validity warnings (meaning all scores were statistically acceptable) S-23 at 8-12.

43. The BASC-3 generates four clinical index scores: Externalizing Problems, Internalizing Problems, School Problems, and an overarching Behavior Symptom Index. Both teachers' ratings placed the Student in the average range in all four indices. The Parent rating form does not generate a School Problems index score, but the Parent's ratings placed the Student in the "At Risk" range for Internalizing Problems and in the "Clinically Significant" range for Externalizing Problems and the Behavior Symptom Index.² See S-23 at 8.
44. The four clinical index scores on the BASC-3 are comprised of multiple sub-test scores. The Parent's ratings placed the Student in the "At Risk" or "Clinically Significant" ranges in nearly all those domains. Both teachers' ratings placed the Student in the "At Risk" range for Aggression, but in the average range in all other domains. See S-23 at 8.
45. The BASC-3 also generates an Adaptive Skills index score that considers factors like social skills, adaptability, and activities of daily living. While there was variability between all three raters, both teacher's ratings placed the Student in the average range in the Adaptive Skills Index. The Parent's ratings placed the Student in the "Clinically Significant" range in that index. See S-23 at 8.
46. The BASC-3 also generates content scales for specific behaviors like bullying. The Parent's ratings placed the Student in the "Clinically Significant" range for nearly all of these behaviors. The teachers' ratings were somewhat different from each other. One teacher placed the Student in the "At Risk" range for anger control and emotional self-control. Both teachers placed the Student in the "At Risk" range for negative emotionality. All of the teachers' other ratings were in the average range for this content scale. See S-23 at 9.
47. The CSP drafted a comprehensive analysis of the BASC-3 ratings and summarized the scores. S-23 at 9-12. In doing so, the CSP recognized that the scores were valid and consistent with reports that the Student's behaviors were very different at home and in school. The CSP wrote, "[Student] appears to demonstrate consistent difficulty

² On the BASC-3, "Clinically Significant" indicates a strong likelihood of a problem while "At Risk" indicates that a problem may be present.

with being flexible, keeping [] temper, and recovering quickly from setbacks; however, these behaviors tend to be much more intense at home than they do in school." S-23 at 12.

48. Regarding executive functioning, the CSP wrote a brief explanation of what executive functioning is, and then went on to report and analyze the BRIEF-2. S-23 at 12-14.
49. As with the BASC-3, the BRIEF-2 included ratings by two teachers and one of the Student's parents. The CSP accepted all three ratings as valid. Even more so than the BASC-3, both teacher's ratings were similar to each other and different from the Parent's ratings. See S-23 at 13.
50. On the BRIEF-2, both teachers ratings placed the Student within normal limits in every index score except for the Emotional Regulation Index. There, one teacher's ratings placed the Student in the "Mildly Elevated" range and the other teacher's ratings placed the Student in the "Potentially Clinically Elevated" range. However, both teachers' ratings generated a Global Executive Composite Score within normal limits. See S-23 at 13.
51. In sharp contrast, on the BRIEF-2, the Parent's ratings placed the Student in the "Clinically Elevated" range (the most significant rating) in all sub-test and index scores except for the "Task-Monitor" sub-test ("Potentially Clinically Elevated") and the "Initiate" sub-test (within normal limits). The Parent's ratings generated a Global Executive Composite Score in the "Clinically Elevated" range. See S-23 at 13.
52. The CSP drafted a comprehensive analysis of the BRIEF-2 ratings and summarized the scores. S-23 at 12-14. In doing so, the CSP again recognized that the scores were valid and consistent with reports that the Student's executive functioning skills were very different at home and in school. The CSP wrote, "Overall, [Student's] executive functioning skills appear to vary significantly from one setting to another. At school, [Student] appears to demonstrate much better executive functioning skills than [Student] does outside of school." S-23 at 14.
53. Despite the very significant differences between home and school executive functioning behaviors, the CSP recognized that the Student had some difficulty controlling emotions and adjusting to changes in routine in school. S-23 at 14.

54. Regarding Social-Emotional Learning Skills, the CSP explained what social-emotional learning skills are and what the SSIS SEL measures. S-23 at 14-17.
55. As with the BASC-3 and BRIEF-2, two teachers and one of the Parents completed the SSIS SEL. As with the BASC-3 and BRIEF-2, both teacher's ratings were like each other (despite some variability between the two) and unlike the Parent's rating. See S-23 at 16.
56. Both teacher's ratings produced a SEL Composite and Core Skills scores in the average range, with all sub-tests used to generate those scores also in the average range. In contrast, the Parent's ratings produced a SEL Composite and Core Skills scores in the below average range (meaning that the Student has less social-emotional regulation abilities than an average peer), with all sub-tests used to generate those scores also in the below average range except for "Responsible Decision Making," which was in the average range. See S-23 at 16.
57. The SSIS SEL also includes a student self-assessment. The Student self-rated using that assessment. The Student's self-rated SEL Composite was in the average range while the Student's self-rated Core Skills were in the Below average range. S-23 at 16.
58. The CSP drafted a comprehensive analysis of the SSIS SEL ratings and summarized the scores. S-23 at 16-17. In doing so, the CSP yet again recognized that the scores were valid and consistent with reports that the Student's skills and behaviors were very different at home and in school.
59. The 2023 RR also include an Occupational Therapy (OT) Evaluation conducted by a Registered, Licensed Occupational Therapist (the OTR/L). S-23 at 17-20.
60. The OT evaluation was comprehensive and included several OT-specific tests. The OTR/L concluded that the Student continued to exhibit some difficulties with handwriting and typing, but the Student's overall handwriting and typing abilities were within expectations for the Student's grade level. The OTR/L also concluded that the Student required prompting to remember emotional regulation strategies taught in prior years, but that the Student did not exhibit a need for those strategies in school, and could recall and use those strategies with prompting. See S-23 at 17-20.

61. The OTR/L recommended discontinuation of direct OT services, but continuation of consultative OT to work with teachers to improve the Student's typing and handwriting. See S-23 at 17-20.
62. The District also retained a Board Certified Behavior Analyst (the BCBA) employed by the Intermediate Unit in which the District is located to conduct a Functional Behavior Assessment (the 2022 FBA). See S-22.
63. The 2023 FBA included a summary of existing information about the Student, input from Parents and school personnel, a review of current interventions, and formal observations of the Student over five days. With those observations, the BCBA was able to observe the Student in a core academic class with a substitute teacher, a health class, a social skills group, lunch, and recess. S-22.
64. Across those observations, the Student did not exhibit behaviors of concern. Rather, the Student interacted appropriately with peers and was on task for academics. In a math class, while working with peers, the Student was less on task, but that was also true of other students and the Student remained more on task than the peers. S-22.
65. Based on the observations, the BCBA concluded that the Student was managing emotions, limiting outward actions, and recovering from setbacks within a few minutes. This, and the absence of observable negative behaviors, lead the BCBA to conclude that the Student no longer required a behavior support plan. S-22.
66. Considering all of the data generated through the 2023 RR, the District concluded that the Student continued to have a disability but no longer required special education. S-22 at 20-21.
67. On January 17, 2023, the District completed a Section 504 eligibility determination, which included a summary of the 2022 RR. The District concluded that the Student had a disability and required accommodations such that the Student was eligible for a Section 504 plan. S-24.
68. On January 25, 2023, the parties met (again with attorneys) and the District presented at Section 504 Plan. The Section 504 plan included several accommodations, all of which were consistent with recommendations in the 2022 RR. Examples include prompts to use coping strategies, consultative OT, check-ins for organization, a check

list for packing up at the end of the day, and chunking of written assignments. S-25.

69. [redacted]
70. On February 13, 2023, the District issued two NOREPs. One NOREP proposed exiting the Student from special education. S-27. The other NOREP rejected the Parents' request for an IEE at public expense. S-28. The Parents disapproved both NOREPs on February 19, 2023. S-27, S-28.
71. On February 27, 2023, the District requested a hearing to defend the 2023 RR.
72. On March 3, 2023, the Parents requested a hearing, raising the issues described above.
73. On June 22, 2023, the District issued a revised Section 504 Plan. The revision added and updated several accommodations. The updates clarified prior accommodations for use of speech-to-text software and use of the agenda book (to be signed daily by teachers and parents). The new accommodations included an extra set of books to be kept at home, extended time for tests, small group testing in a quiet area, text-to-audio to help with comprehension, and emails to parents if assignments are missing. S-33.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

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

One of the Parents testified, and that parent's credibility was somewhat tarnished. The Parent's contemporaneous, written approval on a NOREP issued with the February 2022 revised IEP contradicts the Parent's testimony that the Parents (collectively) did not approve the IEP revisions. See, e.g. NT 55. Documentation of that IEP's implementation, which was contemporaneously provided to the Parents does the same. This, in combination with the Parent's ardent refusal to accept that the Student's behavioral presentation could be so different at home and in school (a position at odds with the legal theories that the Parents advance and inconsistent with every witness with firsthand knowledge of the Student's in-school behaviors) and the Parent's perseveration on class-wide behavioral incidents that impacted upon all students in the same way³, diminishes the weight to which I assign the Parent's testimony.

Explained in greater detail below, my credibility determination is in no way outcome determinative.

Applicable Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3d 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, both parties are seeking relief and, as outlined above, must bear the burden of persuasion on the issues that they raise.

Special Education Eligibility

³ There is much in the record about a class-wide problem with the recess game foursquare.

The term “eligibility” is a colloquialism not found in the IDEA. The term refers to the fact that children who satisfy the IDEA’s definition of a child with a disability are entitled to special education so that they receive a free appropriate public education (FAPE), but children who do not meet that definition have no such entitlement.

In this context, eligibility determinations require a two-part analysis that flows from the IDEA’s definition of a child with a disability, found at 20 U.S.C. § 1401(3):

The term “child with a disability” means a child—
(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
(ii) who, by reason thereof, needs special education and related services.

First, the analysis requires a determination as to whether the Student has a qualifying disability. Second, the analysis requires a determination as to whether the Student, by reason of the disability, requires special education. If both questions are answered in the affirmative, the Student is eligible for special education and has a right to a FAPE.

Free Appropriate Public Education (FAPE)

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

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court’s first consideration of the

substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

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

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

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

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

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

Compensatory Education

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

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

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

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

Despite the clearly growing preference for the *Reid* method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory

education is needed to put the student back into that position. Even cases that express a strong preference for the *Reid* or “same position” method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

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

Jana K. v. Annville-Cleona Sch. Dist., 39 F. Supp. 3d 584, 608 (M.D. Pa. 2014).

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student’s school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) are warranted. Such awards are fitting if the LEA’s “failure to provide specialized services permeated the student’s education and resulted in a progressive and widespread decline in [the Student’s] academic and emotional well-being” *Jana K. v. Annville Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 609 (M.D. Pa. 2014). See also *Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial.

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

Section 504/Chapter 15

At the outset, it must be noted that an LEA may completely discharge its duties to a student under Section 504 by compliance with the IDEA. Consequently, when a Student is IDEA-eligible, and the LEA satisfies its obligations under the IDEA, no further analysis is necessary to conclude that Section 504 is also satisfied. Conversely, all students who are IDEA-eligible are protected from discrimination and have access to school programming in all of the ways that Section 504 ensures.

“Eligibility” under Section 504 is a colloquialism – the term does not appear in the law. That term is used as shorthand for the question of whether a person is protected by Section 504. Section 504 protects “handicapped persons,” a term that is defined at 34 CFR § 104.3(j)(1):

Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

Chapter 15 applies Section 504 in schools to prohibit disability-based against children who are "protected handicapped students." Chapter 15 defines a “protected handicapped student” as a student who:

1. Is of an age at which public education is offered in that school district; and
2. Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student’s school program; and
3. Is not IDEA eligible.

See 22 Pa. Code § 15.2.

Section 504 and Chapter 15 prohibit schools from denying protected handicapped students participation in, or the benefit of, regular education. See 34 C.F.R. Part 104.4(a). Unlike the IDEA, which requires schools to provide special education to qualifying students with disabilities, Section 504 requires schools to provide accommodations so that students with disabilities can access and benefit from regular education.

To accomplish this, a "school district shall provide each protected handicapped student enrolled in the district, without cost to the student or family, those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities." 22 Pa Code § 15.3.

Students are evaluated to determine what related aids, services, or accommodations that a student needs. Chapter 15 includes for conducting such evaluations. 22 Pa. Code §§ 15.5, 15.6.

The related aids, services or accommodations required by Chapter 15 are drafted into a service agreement. Chapter 15 defines a service agreement as a "written agreement executed by a student's parents and a school official setting forth the specific related aids, services or accommodations to be provided to a protected handicapped student." 22 Pa. Code § 15.2. Service agreements become operative when parents and schools agree to the written document; oral agreements are prohibited. 22 Pa Code § 15.7(a).

Evaluation Criteria

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

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

Further, the evaluation must "not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child" and must "use technically sound instruments that may assess the relative contribution

of cognitive and behavioral factors, in addition to physical or developmental factors". 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the District is obligated to ensure that assessments and other evaluation materials are (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments. 20 U.S.C. § 1414(b)(3)(A).

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

Independent Educational Evaluation at Public Expense

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency..." 34 C.F.R. § 300.502(b)(1). "If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that it's evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense." 34 C.F.R. § 300.502(b)(2)(i)-(ii).

"If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4).

Discussion and Conclusions of Law

The 2023 RR Was Appropriate

The first step in the analysis is to determine if the 2023 RR was appropriate. To do this, I will begin with the assumption that the Parents accurately and

without exaggeration reported the Student's behaviors at home, which are different from the behaviors that the District observed in school. This assumption takes my credibility determination out of the equation. Taking the Parents' averments about the Student's behavior at home as true does not change the outcome of this case. In fact, the District's CSP took a similar approach in the 2023 RR and interpreted testing results accordingly. The CSP did not discount or invalidate the Parents' input or responses on rating scales. Rather, the CSP carefully noted the differences between the Parents' input and ratings and those of District personnel and explained that both observations can be accurate.

The 2023 RR met the statutory requirements at 20 U.S.C. § 1414(b)(2)(A), (B), and (C). Multiple measures were used to gather information about the Student, parental input was collected in several ways and was seriously considered, no single measure was used to determine eligibility, and all the assessments were technically sound.

The 2023 RR also met the statutory requirements at 20 U.S.C. § 1414(b)(3)(A). While much of those requirements are not a factor in this case, the assessments used in the 2023 RR were, without question, used for their intended purposes and were administered by trained and knowledgeable personnel.

The 2023 RR also met the statutory requirement at 20 U.S.C. § 1414(b)(3)(B) by evaluating all areas of suspected disability. The 2023 RR was crafted to target the domains that the Parents were concerned about, even though the District did not share those concerns. At all times (including when the 2023 RR was planned, delivered, and written up) the parties have agreed about the Student's high intelligence and academic performance.⁴ Neither of those domains were suspected areas of disability, and so the absence of evaluations in those domains does not render the 2023 RR inappropriate. Instead, the Parents were concerned about the Student's behavior, emotionality, self-regulation, executive functioning, and the like. The 2023 RR was tailored to gain substantial information about those domains – and did so. I reject the Parents' argument that the 2023 RR not fully evaluate Student's behavioral, organizational, and social communication needs. Actionable information in all of those domains was collected.

I further reject the Parents' argument that they were denied meaningful participation in the evaluation process. The record establishes the opposite. The District evaluated the Student at the Parents' request, targeting the domains that the Parents were concerned about, and solicited parental input

⁴ [redacted]

in multiple ways. The District collected and evaluated the Parents' input through input forms, unprompted parental input, private reports that the Parents shared, and rating scales. Importantly, the District did not just give lip service to parental input. Rather, the District (especially the CSP) took a deep dive into data that came from the Parents and carefully assessed that data both on its own and relative to data from school personnel. On many occasions, the CSP made a point to not discount parental data that conflicted with data from school personnel. Rather, the CSP carefully explained how both sets of data could be true, and what both sets of data indicate for the Student. There is preponderant evidence in the record that the District's interpretation of the data collected through the 2023 RR was appropriate.

For these reasons, I find that the 2023 RR was appropriate and that the Parents are not entitled to an IEE at public expense.

The Student is Not Entitled to an IEP

The Parents disagree with the conclusion that the District reached through the 2023 RR. They believe that the Student both has a disability and requires special education. Since I find no legal error in the 2023 RR, I must reject that argument.

Both parties agree that the Student has a disability, satisfying the first part of the eligibility test described above. The District concluded that the Student no longer requires specially designed instruction, [redacted]. The District's conclusion is well-supported by the 2023 RR, which was appropriate. Just as there is no preponderant evidence that the 2023 RR was inappropriate or reached inappropriate conclusions, there is no preponderant evidence that the Student required special education to derive a meaningful benefit from the District's education.

For these reasons, I find that the Student does not meet the second part of the IDEA's definition of a "child with a disability" and, therefore, is not entitled to an IEP.

The Section 504 Plan Was Appropriate When Offered

The Parents argue in the alternative that the District's proposed Section 504 Plan is not appropriate for the Student even if the Student is not entitled to an IEP. Here, the Parents' argument about the importance of the Student's behaviors at home requires additional consideration.

The Parents rely in large part on *E.P. v. Twin Valley Sch. Dist.*, 517 F. Supp. 3d 347 (E.D. Pa. 2021). In the *E.P.* case, a child's behavioral presentation in

school and at home were very different. The Twin Valley School District took the position that the Student's behaviors at home did not trigger a child find obligation under Section 504. Both the hearing officer and the court disagreed. E.P. was entitled to, and should have received, a Section 504 Plan despite an absence of problems in school. The court wrote:

Twin Valley's argument, that it was not required to adjust E.P.'s academic program even though its standard program was causing E.P. substantial emotional and behavioral dysregulation outside of school, conflicts with the definition of "impairment" in the regulations. As Twin Valley notes, Section 504 is an anti-discrimination statute, and it is enforced consistently with the Americans with Disabilities Act (ADA) and its regulations.

E.P. v. Twin Valley Sch. Dist., 517 F. Supp. 3d 347, 360 (E.D. Pa. 2021) citations omitted.

The court then went on to affirm the hearing officer, who found that E.P.'s Section 504 Plan (once one was in place) was inappropriate because "it did not address the Student's behavioral dysregulation connected to homework." *Id* at 358.

As throughout, I accept the Parent's characterization of the Student at home as accurate. This includes a description of difficulties at home concerning homework. There is other evidence of homework problems that the District addressed through the Student's IEPs, including homework time limitations drafted into the October 21, 2022, IEP revisions.⁵

While there is no similar direct homework time limitation in the Section 504 Plan (either as first proposed or as revised while this hearing was pending), there are several accommodations in the plan that address the Student's ability to do homework at home. The Section 504 Plan includes check-ins for organization, breakdown of multi-step directions, a checklist of items to include when packing up at the end of the day, informal check-ins for writing assignments, use of an agenda book regularly signed by teachers and parents (so that everyone – including the Student – will be on the same page for homework), an extra set of books at home, and mandatory

⁵ I outright reject the Parents' contention that the Student's behavioral problems at home are anything akin to the behavioral problems described in *E.P. v. Twin Valley, supra*. The scope and scale of E.P.'s behaviors at home are entirely distinguishable from the scope and scale of this Student's difficulties. The Parents' argument concerning the broader scope of Section 504 plans is well-taken none the less.

communication with Parents if assignments are missing. Evidence that the Student required different accommodations is not preponderant in the record of this case.

For these reasons, I find that the Section 504 Plan was appropriate when it was offered. This is not, however, an invitation for the District to rest on its laurels. Particularly at the Student's age and grade level, marking period to marking period – let alone year to year – changes may significantly impact upon the type, amount, and difficulty of homework. I have no doubt that the Parents will inform the District of the Student's behaviors at home, particularly as they relate to schoolwork assigned to be completed outside of school (not just homework, but projects, studying and the like). The district has an affirmative, ongoing obligation to carefully consider such input, and propose evaluations and/or Section 504 Plan revisions as necessary.

Compensatory Education

Above, I find that the 2023 RR was appropriate, the Student is not entitled to an IEP, and the District's proposed Section 504 Plan was appropriate. Therefore, I must deny the Parents' demand for compensatory education.

ORDER

Now, September 15, 2023, it is hereby ORDERED as follows:

1. The District's 2023 Reevaluation Report was appropriate, and so the Parents are not entitled to an Independent Educational Evaluation at public expense.
2. The Student is not currently entitled to an IEP.
3. The District's proposed Section 504 Plan was appropriate at the time it was offered.
4. The District's obligation to ensure that the Student receives appropriate disability accommodations is ongoing. As part of that obligation, the District must account for school-related problems that occur outside of school.
5. The Student is not entitled to compensatory education.

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

/s/ Brian Jason Ford
HEARING OFFICER