

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**

CLOSED HEARING

ODR No. 29257-23-24

Child's Name:

E.R.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for the Parents:

Scott H. Wolpert, Esquire
400 Maryland Drive
New Britain, PA 18901

Local Education Agency:

Methacton School District
1001 Kriebel Mill Road
Norristown, PA 19403

Counsel for the LEA:

Suzanne Pontious, Esquire
331 East Butler Avenue, P.O. Box 5069
New Britain, PA 18901

Hearing Officer:

Brian Jason Ford

Date of Decision:

09/13/2024

Introduction

This due process hearing concerns the special education rights of a child with disabilities (the Student). The Student's parents (the Parents) requested this hearing against the Student's former public school district (the District). The Parents bring claims under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.*

The history between the parties is lengthy and the record of this case is robust. The issue presented in the due process complaint, however, is relatively narrow. The Parents allege that the District violated the Student's right to a free appropriate public education (FAPE) during the 2022-23 school year in violation of both the IDEA and Section 504.

The District evaluated the Student prior to the 2022-23 school year and then completed a Functional Behavioral Assessment (FBA) at the start of the school year. The Parents allege that the FBA fell short of IDEA mandates. The District also drafted an Individualized Education Program (IEP) for the Student. The Parents allege the IEP was inappropriate at the time it was written because it failed to address the Student's needs. The Parents allege that those errors carried through the entire 2022-23 school year. The Parents also allege that the District failed to implement the IEP with fidelity.

The Parents allege that a classroom aide [redacted] the Student during the 2022-23 school year. Matters related to [redacted] fall outside of my jurisdiction. There is no dispute, however, that the Parents reported the allegations to the District, prompting changes to the Student's program and placement. The Parents allege that those changes compounded the FAPE violations and constitute FAPE violations on their own.

The Parents demand "full days" of compensatory education to remedy the FAPE violation during the 2022-23 school year.

I have reviewed the record of this matter in its entirety and have considered the parties' positions and arguments. While I do not accept all of the Parents' arguments, I find in their favor.

Issues Presented

While the issue breaks into smaller chunks, a single issue was presented for adjudication: Did the District violate the Student's right to a FAPE during the 2022-23 school year?

Findings of Fact

Noted above, the record of this matter is large in comparison to the issue presented. I reviewed the record in its entirety but make findings of fact only as necessary to resolve this matter.

Background

1. The parties agree that the Student is a child with a disability as defined by the IDEA. The parties also agree that the District was the Student's Local Educational Agency (LEA), as those terms are defined by the IDEA, during the entirety of the 2022-23 school year.
2. The Student attended a private school during the 2015-16 and 2016-17 school years. S-1, S-2, S-3.
3. The Student enrolled and attended school in the District for the 2017-18, 2018-19, and 2019-20 school years. S-1, S-2, S-3.
4. The Student attended school in the District from the start of the 2020-21 school year through October 2020. S-1, S-2, S-3.
5. The Parents homeschooled the Student from October 2020 through February 2021. S-1, S-2, S-3.
6. In February 2021, the Student attended an intensive outpatient program for mental health concerns. S-3, S-5.
7. In February 2021, the Parents and District were in communication about the Student's outpatient program and needs. The parties discussed whether the Student required a modified schedule and discussed options for the Student to attend school virtually. See S-10.
8. On March 11, 2021, the District concluded that the Student was eligible for accommodations under Section 504 and drafted a Section 504 evaluation report and accommodations plan. S-10.
9. The District proposed an IDEA special education evaluation, and the Parents declined that offer. S-10.
10. On March 15, 2021, the Parents withdrew the Student and homeschooled the Student for the remainder of the 2020-21 school year. S-11, S-12.

11. At the start of the 2021-22 school year, the Student attended a private school. Stip.
12. On April 29, 2022, the Parents withdrew the Student from the private school. Stip.
13. On May 3, 2022, the Parents began homeschooling the Student. Stip.

IEP Development for the 2022-23 School Year

14. On March 21, 2022, the District sought the Parents' consent to evaluate the Student to determine IDEA eligibility. The Parents signed the District's Permission to Evaluate (PTE) form the same day. Stip.
15. On May 19, 2022, the District completed an Evaluation Report ("ER"). S-14.
16. The ER consisted of input from the Parents, input from the Student's private school teachers, input from a private psychotherapist, a review of records, testing observations, a structured interview of the Student, standardized cognitive and achievement tests, and a behavior rating scale completed by the Parent, teacher, and a Student self-assessment. S-14.
17. Through the ER, the District concluded that the Student was a child with a disability as defined by the IDEA under the categories of Emotional Disturbance and Other Health Impairment. S-14.
18. On June 1, 2022, the Parents told the District that they agreed with the ER's eligibility determination. Stip.
19. On July 20, 2022, the District convened an IEP team meeting and drafted an IEP. In addition to District personnel and the Parents, the Student's private math tutor and psychologist attended the meeting. Stip.
20. The IEP listed the Student's needs as: anxiety (resulting in both physical symptoms, preoccupation with worrying thoughts, and loss of focus), executive functioning skills, difficulty transitioning back to school after weekends and extended breaks, and social skills (including self-awareness and perspective of others). S-15.
21. The IEP included goals for: 1) timely assignment completion, 2) use of coping skills, and 3) self-evaluation of emotional state. S-15.

22. The IEP provided testing accommodations; access to an emotional support teacher; breaks, check-ins, and use of familiar language to support the Student's emotional wellbeing; and accommodations related to the Student's executive functioning deficits. S-15.
23. The IEP include "small group instruction on peer to peer social skills," but specified that the frequency of the intervention was "to be discussed at IEP meeting." S-15 at 41.
24. The IEP included no related services. S-15.
25. The District issued a Notice of Recommended Educational Placement (NOREP) on July 20, 2022, (the same day as the IEP team meeting) offering the IEP to the Parents. S-15.
26. On July 26, 2022, the District sought the Parents' consent to conduct an FBA by issuing a Permission to Reevaluate form (PTRE). Stip.
27. On August 2, 2022, the Parents provided consent for the FBA. Stip.
28. On August 16, 2022, the Parents approved the NOREP. S-15.

The 2022-23 School Year

29. The Student started the 2022-23 school year at the District on August 30, 2022. Stip.
30. On August 31, 2022, the Student began to participate in group counseling sessions through the District's REACH program. Stip.
31. In addition to REACH counseling, the Student was permitted to go to an emotional support classroom when feeling anxious or overwhelmed. Both parties understood this practice to be consistent with accommodations included in the Student's IEP, even if it is not spelled out as such in the document. *Passim*.
32. On September 1, 2022, the District took the first steps to complete the FBA by consulting with a Board-Certified Behavior Analyst ("BCBA"). S-19. During September 2022, the BCBA observed the Student six times. Each observation was 30 to 90 minutes. The observations occurred in multiple academic classes, lunch, and in the emotional support room. The BCBA observed inattentive behaviors on two occasions, and no other behaviors of concern. S-19.

33. On September 8, 2022, the Student began individual counseling through the REACH program. S-72.
34. On September 27, 2022, the Student's IEP team reconvened and revised the baseline data in the Student's IEP goals. At that time, the Student was completing all assignments on time. Stip., S-20.
35. From the start of the 2022-23 school year through the end of September 2022, the Student attended 13 REACH counseling sessions. S-71.
36. In addition to the BCBA's observations in September 2022, the Student was observed for two hours on October 4, 2022. No behaviors of concern were observed. S-19.
37. On October 5, 2022, the District completed the FBA.¹ The final FBA included classroom observations, teacher interviews, and an administration of a Functional Assessment Screening Tool. No significant behaviors of concern were observed. The BCBA opined that there was no need to add behavior goals to the Student's IEP. The BCBA recommended, however, two hours per month of BCBA consultation "to monitor [Student's] progress and behavior across school settings." The BCBA also recommended continuation of the REACH program, and continued access to the emotional support classroom. S-21 at 4.
38. During October 2022, the Student attended 10 REACH counseling sessions. S-72.
39. On November 3, 2022, the Student's IEP team reconvened and revised the Student's IEP in response to the FBA and a change in the Student's math class. The Student's work completion goal remained the same. The coping skills goal was revised to target the Student's ability to use coping skills to return to class within 45 minutes after "feeling dysregulated." The goal for the Student to accurately identify the Student's own feelings was also updated. S-22.
40. The Student's SDI was updated to include two hours per month of BCBA consultation, permit the use of fidget toys, opportunities for

¹ More specifically, a third party contracted through the District completed the FBA. For IDEA purposes, that is a distinction without a difference.

“second chance learning” should the Student fail an assignment, and use of a Student-made reference card for math assignments. S-22.

41. On November 30, 2022, the District began tracking the Student’s time spent in the emotional support classroom to better understand how much time the Student was out of regular education classes. S-25.
42. In November and December 2022, the Student attended 17 REACH sessions. S-72.
43. On December 22, 2022, the District called the Parents to respond to an incident in school during which the Student [redacted]. NT 240-241.
44. In late December 2022, the Parents learned that the Student was the victim of [redacted] by an adult classroom aide. That incident may have occurred on the same day as the tape incident. *See, e.g.* NT 76-78.²
45. On January 9, 2023, the Student’s IEP team reconvened to discuss Student’s progress and class attendance. Parents and Student attended the meeting. Stip.
46. The District operates its own remote or “virtual” education program called Brandywine Virtual Academy (BVA). BVA is a District program, not a Pennsylvania cyber charter school. *Passim*.
47. During the January 9, 2023, IEP team meeting, the Parents and District agreed that the Student would attend regular education social studies and math classes through BVA during a two-week trial period. The parties also agreed that the Student would complete reading and science assignments virtually. The parties also agreed to a delayed school day start time for the Student. These changes were incorporated into the Student’s IEP. The IEP otherwise did not change. S-31.
48. On January 20, 2023, the District held an IEP meeting. Parents, Student, Student’s outside counselor, in-District case manager, REACH counselor, BCBA, and the District’s Supervisor of Special Education attended the meeting. Stip.

² This finding reflects the Parents’ understanding and should not be taken as evidence of [redacted] in any other proceeding. As discussed in the introduction section of this decision, I am mindful of my jurisdiction. At the same time, it is impossible to resolve this special education case without reference to the incident.

49. During the January 20, 2023, meeting, the District proposed to move the Student's program almost entirely to BVA. All of the Student's academic classes would convene through BVA. However, individual REACH therapy sessions and check-ins with the Emotional Support Teacher would convene in person. The Student could also attend 8th period in the District (a time when clubs meet) but would not be required to do so. S-31.
50. The same day as the IEP team meeting, the District proposed a revised IEP with a NOREP. Stip.
51. On January 23, 2023, the Student attended school under the new schedule although the Parents had not formally accepted or rejected the NOREP. The Student eloped from the program, hid in a stairwell, and texted the Parent with request to be picked up from school. NT 271.
52. On January 24, 2023, the Parents rejected the NOREP and requested an informal meeting. Stip.
53. On January 27, 2023, the District and Parents reconvened at an IEP team meeting. The parties agreed that the Student would participate in REACH sessions and check-ins with the Emotional Support Teacher online instead of in person. The District issued a NOREP reflecting these changes, and the Parents approved the NOREP. Stip.; S-44.
54. After the REACH sessions and check-ins were moved online, the Student lost interest and became resistant to both. The Student attended 3 REACH session in January 2023 and 2 in February 2023. Neither were productive and the February sessions ended early. S-72.
55. On February 20, 2023, the Parent wrote to the District to discontinue the check-ins. At that point, the check-ins were not productive and the Parents' efforts to make the Student participate were, in some ways, counterproductive. See S-52, S-53.
56. On March 22, 2023, the IEP team reconvened. Stip. During the meeting, the Parents expressed that the Student was benefiting from private therapy and was socially engaging with peers. No academic concerns were reflected in the Student's grades. The Parents expressed the Student was not engaging with the online REACH sessions and asked to discontinue that service. The parties did not come to an agreement. See, e.g. S-56.

57. In April 2023, the Parents applied for the Student to attend a Pennsylvania cyber charter school (the Cyber Charter). NT 210.
58. Throughout April 2023, the parties continued to discuss the Student's need for school-based therapies and emotional support check-ins. The parties met on May 2, 2023, to discuss the issue but did not come to a resolution. On May 5, 2023, the District invited the Parents to an IEP team meeting. The Parents declined that meeting as they were in the process of retaining an attorney. S-59, S-60, S-61.
59. On May 23, 2023, the Cyber Charter sent a records request to the District as part of the Cyber Charter's pre-enrollment process. S-63.
60. I take judicial notice that the District's final day of school in the 2022-23 school year was in June 2023.
61. On July 6, 2023, an IEP meeting was held with legal counsel present. S-66.
62. On July 25, 2023, the District issued an IEP, NOREP and a PTRE. The IEP projected the Student's return to in-person instruction at the District at the start of the 2023-24 school year. Parents did not return the PTRE and on August 4, 2023, rejected the NOREP. S-66. S-67.
63. The July 2023 IEP removed the work completion goal, which had been mastered for some time. The IEP retained the coping skills goals that were added in November 2022. The IEP added an executive functioning goal targeting the Student's ability to plan out long-term assignments. The IEP also added a social skills goal targeting the Student's ability to "respond appropriately as measured by [Student's] tone, active listening, and appropriate response" to questions by a peer or adult, as measured by a rubric. S-66.
64. The July 2023 IEP included the same modifications and SDI as in prior IEPs, but also increased BCBA consultation to 8 hours per month, increased individual REACH counseling sessions to two sessions per week and, for the first time, provided direct instruction in social skills, coping skills, and executive functioning skills (as opposed to accommodations without direct instruction in those domains). S-66.
65. On August 7, 2023, the Parents withdrew the Student from the District and enrolled the Student in the Cyber Charter. S-69, NT 214-215. By

operation of law, the Cyber Charter became the Student's LEA on that day.

66. There is no dispute that the parties were in very frequent communication with each other through the 2022-23 school year. *Passim*. Through these communications, the Parents frequently raised concerns about the Student's behaviors (like the ability to remain in class) and emotional wellbeing. *Passim*.
67. On February 23, 2024, the Parents requested this hearing.

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.³

In this case, I find that all witnesses testified credibly. To the very small extent that witnesses contradicted each other, the differences reflect each witness' genuine recollections, opinions, and understandings.

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*

³ 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).

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 Parents are the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, 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*, 580 U.S. 386, 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 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 IDEA 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 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.

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 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. 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 “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., 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 (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.*, 2014 U.S. Dist. LEXIS 114414 at 39.⁴

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.⁵

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

The Parents overarching claim that the District violated the Student's right to a FAPE breaks into smaller chunks. I will take them in order.

The FBA and Behavioral Needs

⁴ 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).

⁵ The availability of these fallbacks hinges on the demand. Demands for compensatory education often include demands for various calculations in the alternative. Hearing officers have held that demands that do not specify a method of calculation are the same as demands in the alternative. I am aware of only one due process decision in Pennsylvania in which parents demanded make-whole compensatory education to the exclusion of any other method.

The Parents argue that the District's FBA was flawed to the point that yields a substantive violation of the Student's right to a FAPE.

The District evaluated the Student as part of the IEP development process for the 2022-23 school year. That evaluation was completed while the Parents were homeschooling the Student in May 2022. The District conducted behavior ratings as part of that evaluation. Those rating scales, along with information reported by the Parents, suggested that an FBA was needed. On June 1, 2022, the Parents agreed with the ER's eligibility determination and on July 20, 2022, approved the Student's IEP for the 2022-23 school year. Six days later, before school started, the District sought the Parents' consent for an FBA and the Parents provided consent seven days after that.

The Parents do not take issue with the District's timeline for offering the FBA. Rather, they challenge the FBA based on the time of year that it took place. The BCBA began consulting with the District and observing the Student in September 2022. The FBA concluded with a lengthy observation on October 4, 2022, and a written report the next day. Both parties describe September 2022 as a honeymoon period for the Student. During this time, the Student exhibited few concerning behaviors and nothing that would suggest that school-based behavioral interventions were needed. The Parents argue that the District should have expected a honeymoon period, and should have waited until October at the earliest to conduct the FBA.

I do not accept the argument that the District should have waited to conduct the FBA. By the time the District had completed the ER, to quote the Parents brief, the "IEP team recognized the critical importance of conducting an FBA." I agree with the Parents' assessment. An FBA was critical, and so it would have violated the Student's IDEA rights to wait for the Student to act out in school. The IDEA is not a 'forced to fail' statute under which children cannot get social, emotional, or behavioral help before a catastrophe. The District's prompt action in obtaining a critically needed FBA was exactly what the IDEA required.

It is also true, however, that the District's obligation to monitor the Student and respond to the Student's changing needs was an ongoing obligation that is not forever discharged by an appropriate FBA. The Parents argue that the District violated its ongoing obligation to monitor the Student's behavior, collect data, and respond to data collection. The Parents also argue that the Student's behaviors were interfering with the Student's education, and that the frequency of those behaviors increased throughout October, November, and December 2022. I agree.

The record, taken as a whole, paints a picture of a child who would use access to an emotional support classroom as a mechanism to escape non-preferred activities in academic classrooms. Both parties were concerned about these behaviors. The Student's IEPs consistently stated that the Student's behaviors interfered with learning. By November 30, 2022, the District began tracking how much time the Student lost in academic programs by going to the emotional support classroom. By that time, the Student's IEP, as implemented, enabled the Student to miss large chunks of class time.

The District, as an entity, is charged with knowledge of whether the Student attended class. While the Student regularly attended school, the Student missed significant class time. The District knew this, and the parties discussed the concern. It is unfortunate that the District made no systematic effort to improve the Student's ability to regulate emotions and remain in class. While the District provided REACH counseling and emotional support check-ins, the District offered no direct instruction in social skills or coping skills until July 2023. I agree with the Parents that the District's *ad hoc* approach violated the Student's right to a FAPE.

It is striking that the Student was academically successful during this time. If the Student's right to a FAPE was measured only by the Student's academic progress, the District would prevail. Discussed above, however, education encompasses much more than academics. This is especially significant for children who, likely the Student, have disabilities that manifest primarily in educational but non-academic domains. The Student's ability to cope and self-regulate to enable classroom participation was flagged for the parties before the 2022-23 school year through the District's evaluation.

Further, the split between the Student's academic and non-academic performance shows the value of systematic data collection. The Student improved in the domains that were rigorously tracked: timely work completion and submission.

In sum, I find that the 2022 FBA was appropriate at the time it was drafted and reject the Parents' argument to the contrary. I also find, however, that the District did not put systems in place to monitor the Student's behavioral needs despite a clear need to do so, and did not systematically respond to the Student's avoidant and interfering behaviors as they increased. This amounts to a substantive violation of the Student's right to a FAPE.

The IEP

The Parents argue that the IEP was inappropriate when it was drafted in July 2022. While I do not accept every argument that the Parents make, I agree that the July 2022 IEP was not reasonably calculated to provide a FAPE when it was offered.

The Parents juxtapose the Student's needs as recognized in the IEP with the goals in the same document and argue that they do not match. As applied in this case, I reject that argument. The IDEA does not require a one-to-one correspondence between a child's needs and a child's IEP goals. The IDEA does, however, require LEAs to provide special education targeting a child's needs. The Student's IEP failed to do so.

The focus and function of laws like Section 504 is accommodation; that is, what the District must do so that the Student can access its programs. The IDEA requires more than accommodation. Rather, the IDEA obligates the District to provide special education for the purpose of remediating the Student's disability-based educational needs. Discussed above, that special education need not be "best," let alone perfect. But it must be *present*. The IEPs prior to July 2023 fall short of that standard.

The July 2022 IEP held that the Student's needs included anxiety, executive functioning deficits, transition needs, and social skills needs. The July 2022 IEP includes multiple accommodations for each of those needs. The July 2022 IEP is, however, ambiguous-to-silent about what special education the District would provide to address the Student's anxiety or social skills needs.

The Student's anxiety provides a clear example. The IEP accommodated the Student by providing multiple escape valves when confronted with anxiety-producing situations. The Student could go to the emotional support room when feeling overwhelmed. But nothing in the IEP says what special education the District would provide to reduce the Student's need for accommodations. In the absence of such special education, the Student's need for accommodations grew and became a problem in and of itself. This logic is equally applicable for the Student's social skills needs. Across both of these domains, the IEP fell short of the standard set in *Andrew, supra*. This resulted in a substantive violation of the Student's right to a FAPE across the entirety of the 2022-23 school year. I find that the District is not entitled to a reasonable rectification time for this violation because it had actual knowledge of the Student's needs and the absence of programming to address those needs on the day that the IEP was offered.

At the same time, I reject the Parents' argument concerning the Student's executive functioning and transition needs. I find that the IEP appropriately addressed the Student's executive functioning needs with a measurable goal

targeting work completion and SDI related to that goal. The IEP did not include direct instruction in executive functioning but, through robust data collection, the District established that its program was effective. Regarding transition needs, I find no preponderance of evidence in the record that the Student demonstrated an inability to return to school after a weekend such that special education was required for this need.

IEP Implementation

I reject the Parents arguments about IEP implementation. These arguments flow from a broad claim that the District did not systematically collect or report data on the Student's needs. Discussed above, there are domains in which the Student's IEPs were deficient. Consequently, there is a lack of data in those domains. Problems related to that lack of data, both on its own and compared to domains in which data was collected, is also disused above. None of that, however, is evidence of an IEP implementation failure.

An IEP that requires nothing is not breached when a school does nothing. The Student's IEPs over the entirety of the 2022-23 school year required the District to accommodate the Student's anxiety and social skills deficits. Those IEPs did not require the District to provide SDI to remediate those needs. It is not as if the District failed to do something that it promised to do. While the IEPs fell short of the *Andrew* standard, they were implemented with fidelity.

Virtual Instruction

The Parents characterize this issue as a failure on the District's part to address the effects of [redacted] that the Student suffered in school. Discussed above, any determination that the Student is a victim of [redacted], or any other type of abuse, falls to a different tribunal. There is no dispute, however, that the Parents and District discussed the incident⁶, recognized that the Student's needs changed, and made significant changes to the Student's program in response. Disputes concerning the appropriateness of those changes through the lens of special education laws fall squarely within the scope of my authority.

The Parents do not argue that the change to virtual instruction was inappropriate for the Student *per se*. How could they, considering their

⁶ I recognize that reducing the events to the term "incident" could be taken as an insulting minimization of the events. Bluntly, my use of that term, and terms like it, is part of my effort to stay in my lane. The events, both as told through testimony and contemporaneous documentation, implicates laws that far exceed my authority. My intention is to avoid any prejudice to either party in other proceedings, if any.

ultimate decision to place the Student in a cyber charter school? Rather, the Parents argue that the BVA placement, and program changes surrounding that placement, represent a more extreme version of what was already happening – moving the District’s response to the Student’s needs from *ad hoc* to haphazard. I agree.

The record indicates that the Student’s behaviors changed significantly following the incident. The Student [redacted], eloped from designated areas, hid in the school building, and demanded to leave school early. The District did not offer to reassess the Student’s needs despite a clear change (to say nothing of the growing behavioral needs prior to the incident). The District’s response was to change the location and format of the Student’s instruction. Those changes were in response to a crisis, not in response to a new evaluation of the Student’s needs, or data collected through the Student’s program.

I do not fault the District for taking immediate action. Putting virtual services in place as a stopgap while the Student had a new, significant problem simply going to school is laudable. Those same circumstances, however, illustrate the need for reassessment and reevaluation to gather information to guide programming. See 20 U.S.C. § 1414. In fact, had the District offered a reevaluation, the District could have taken advantage of the IDEA’s evaluation timeline. The District could not be penalized for taking statutorily granted time to complete an evaluation. Unfortunately, the District did not propose an evaluation until July 25, 2023.

I find that the BVA placement was not inappropriate *per se*. Rather, I find the District was obligated to propose a reevaluation in response to the Student’s significantly changed circumstances and failed to do so. I also find that all of the problems of the pre-incident IEPs carried forward into BVA. The IEPs still did not provide appropriate specially designed instruction to address the Student’s growing social, emotional, and behavioral needs. Therefore, the District’s violation of the Student’s right to a FAPE continued through the end of the 2022-23 school year.

Compensatory Education

The Parents do not demand a “make-whole” compensatory education remedy. They demand “whole-day” compensatory education which, discussed above, is a version of hour-for-hour compensatory education. I find that the Parents have satisfied their burden to prove entitlement to this relief.

Said simply, the District knew before the start of the 2022-23 school year that the Student had needs related to anxiety and social skills deficits. The District recognized those needs through its own evaluations and drafted those needs into its IEPs. Those IEPs represented a commendable effort on the District's part to accommodate the Student's disability. Those accommodations, however, do not reach the *Andrew* standard. At a minimum, an IEP must say what special education (SDI and related services) a school will provide to address the needs that flow from a child's disability. None of the IEPs that the District offered prior to or during the 2022-23 school year did that.

Looking only at the time from the start of the 2022-23 school year through December 2022, the consequences were clear. In the absence of any SDI rising above the level of an accommodation that targeted the Student's ability to cope with anxiety and regulate emotions, the Student's needs in those domains grew. The Student spent less time in class and began to abuse accommodations. Those harms were exacerbated by the District's failure to propose a reevaluation when the Student's needs changed in January 2023.

The nature, severity, and impact of the Student's needs permeate the Student's educational experience. The District's response to those needs did not comport with IDEA mandates, and the Student's needs grew worse. The Student is entitled to one hour of compensatory education for each hour that the District was in session during the 2022-23 school year.

The Parents may decide how this compensatory education is used. 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 in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through Student's IEPs to assure meaningful educational progress.

Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age twenty-one (21).

The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost 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.

Section 504

The Student's Section 504 claims are subsumed by the Student's IDEA claims. To whatever extent those claims may require separate analysis, that analysis is moot because the IDEA remedies provided above provide a complete remedy for the Student, even assuming a Section 504 violation.

Further, and perhaps more importantly, 22 Pa Code § 15 (Chapter 15) is the exclusive basis of my Section 504 jurisdiction. That is, of the wide range of Section 504 claims that can be brought in a host of forums, I can hear the subset that falls within Chapter 15. By its own terms, children who are protected by the IDEA and its Pennsylvania implementing regulation, 22 Pa Code § 14, are not protected by Chapter 15. See 22 Pa Code § 15.2 (regarding the definition of "protected handicapped student"). But I need not resolve that jurisdictional issue because, in this case, any Section 504 violation is remediated through IDEA remedies.

ORDER

Now, September 13, 2024, it is hereby **ORDERED** as follows:

1. The District violated the Student's substantive right to a free, appropriate public education during the 2022-23 school year, as detailed above.
2. The Student is awarded one hour of compensatory education for each hour that the District was in session during the 2022-23 school year.
3. The Parents may direct the use of said compensatory education in any way that comports with the limitations and restrictions above.

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

/s/ Brian Jason Ford
HEARING OFFICER