

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

Pennsylvania Special Education Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

23767-1920-KE

Child's Name

R.L.

Date of Birth

[redacted]

Parent(s)/Guardian(s)

[redacted]

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Hearing Officer

Brian Jason Ford, JD, CHO

Date of Decision

12/21/2020

Introduction

This special education due process hearing concerns the educational rights of a student (the Student).¹ The Student is a former student of the Radnor Township School District (the District). The Student's parents (the Parents) requested this hearing. The Parents allege that the District violated the Student's rights under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* by failing to provide a free appropriate public education (FAPE) to the Student from February 17, 2018 through the Student's graduation at the end of the 2019-20 school year. The Parents demand compensatory education to remedy the denial of FAPE.

There is no dispute that the Student has Attention Deficit Hyperactivity Disorder (ADHD), a disability that is recognized by the IDEA. For the period from February 17, 2018 through January 7, 2020, there is no dispute that the Student required specially designed instruction (SDI). For this period of time, the Student received accommodations pursuant to a series of Individualized Education Programs (IEPs). The Parents claim that the IEPs fell below the FAPE standard for the Student. The District claims that it provided a FAPE during this time.

The District completed a Reevaluation Report on January 7, 2020 (the 2020 RR) and concluded that the Student continued to have ADHD but no longer required SDI.² From this point forward, the parties dispute whether the Student required special education. Despite this disagreement, the District continued to provide accommodations to the Student pursuant to an IEP

¹ Identifying information is omitted to the extent possible.

² The District argues that the Parents took actions to delay the 2020 RR, and the Student's entitlement to special education may have ended before January 7, 2020. That claim, if true, does not alter the outcome of this case.

until the Student's graduation (a statewide school shutdown in response to COVID-19 notwithstanding). For this period of time, the Parents claim that the Student still required special education and the District still did not provide a FAPE. For this period of time, the District argues that the Student was not entitled to a FAPE because the Student did not require SDI. In the alternative, the District argues that the Student received a FAPE regardless of the Student's eligibility for special education.

The Parents originally brought a claim concerning the Student's eligibility for special education. The Parents no longer seek a determination that the Student is eligible for special education because the Student graduated. The District, however, raises the Student's eligibility as part of its defense.

For reasons explained below, I find that the Student's IEPs fell short of IDEA mandates, resulting in a substantive denial of FAPE. I also find, however, that the harm caused by the FAPE violation was specific and limited. Accordingly, I craft a specific and limited remedy.

Issue

The issue presented in this hearing is: Did the District violate the Student's right to a FAPE from February 17, 2018, through the Student's graduation at the end of the 2019-20 school year?

Findings of Fact and Stipulations

The parties presented 23 item list of joint stipulations. As indicated on the record, I adopt those stipulations as if they are my own findings and restate them here with minor edits to protect the Student's privacy or for clarity. I

also reviewed the entire record of this hearing. I make findings of fact only as necessary to resolve the issue before me. I make findings of fact about events occurring before the period of time in question to provide background and context. I find as follows:

1. At all times pertinent and prior to the Student's graduation, the District was the Student's Local Educational Agency (LEA), the Student and Parents resided within the District, and the District was a recipient of federal funds. *See Stipulations ¶¶ 2, 3.*
2. The exact date that the District first found the Student eligible for special education is not clear from the record of this hearing. The totality of the record, however, indicates that the Student received an IEP from the District long before the 2016-17 school year. *See Stipulation ¶ 4; NT 46-49.*

The 2016-17 School Year (9th Grade)

3. The 2016-17 school year was the Student's 9th grade year. *Passim.*
4. The Student transferred from one of the District's middle schools to its high school for 9th grade. *Passim.*
5. In August 2016, the Student was evaluated by a private psychologist. The private psychologist wrote a report diagnosing the Student with ADHD (predominantly inattentive type) and Disorder of Written Expression (the 2016 Private Evaluation). Both diagnoses were made using medical, as opposed to educational, criteria. The report included

several educational recommendations, including direct instruction of executive functioning skills. P-1.

6. The Parents sent a copy of the 2016 Private Evaluation to the District shortly after the private psychologist issued that document. NT 51.
7. At the private psychologist's recommendation, the Parents retained another private psychologist to work with the Student and the Parents. NT 52-53.
8. District reevaluated the Student during the 2016-17 school year. The reevaluation was completed by a District-employed certified school psychologist (CSP). The reevaluation was what the District describes as a "standard evaluation"³ that incorporated the 2016 Private Evaluation and included a review of the Student's records and progress. The CSP drafted a reevaluation report dated May 4, 2017 (the May 2017 RR). Through the reevaluation, the District determined that the Student continued to be a child with an OHI and continued to need SDI. *Stipulation* ¶ 5; P-2; S-47.
9. The Student's IEP team reconvened and revised the Student's IEP based on the 2017 RR.⁴

³ There is no such thing as a "standard evaluation." The IDEA sets procedural and substantive standards for evaluations and reevaluations. An evaluation or reevaluation either complies with those standards or it does not. The District's use of District-specific lingo does not alter its obligations.

⁴ A "clean" copy of the IEP immediately following the 2017 RR was not entered into evidence. Based on the District's evidence index, it appears that this document was prepared as S-50 but was not offered. Rather, a copy of the Student's IEP that was revised several times was entered as P-4. The Parents point to P-4 when making arguments about the IEP that immediately followed the 2017 RR, but it appears that document was first generated on November 2, 2017. Regardless, there is little dispute about the goals or SDI in the IEP that immediately followed the 2017 RR.

10. During the 2016-17 school year, the Student was enrolled in an Academic Success Center (ASC) class. P-23.

11. The Student's academic progress in the 2016-17 school year was slightly variable quarter to quarter (Algebra was quite variable quarter to quarter). The Student's final grades for the 2016-17 school year were:
 - a. ASC: Pass (the class was Pass/Fail)
 - b. Essentials of Writing: A-
 - c. Video Production and Broadcast Journalism: A+
 - d. Biology: B-
 - e. Essentials of Algebra I: A
 - f. Algebra I: C
 - g. Government & Economics: B
 - h. English 9 Literature and Composition: B-
 - i. 9th Grade Wellness: A+
 - j. 9th Grade Health: A-

The 2017-18 School Year (10th Grade)

12. The 2017-18 school year was the Student's 10th grade year. *Passim*.

13. The Student started the 2017-18 school year under an IEP that contained two goals. The first goal was to identify and monitor assignments and tests to estimate, manage and plan work effort. The second goal was a written expression goal to write a 3-5 paragraph essay earning points for organization, content, style, sentence structure, style-word choice and conventions. *Stipulation ¶ 6; S-41*.

14. During the 2017-18 school year, the Student again was enrolled in the ASC class. *Stipulation ¶ 7.*
15. The District "reissued" the May 2017 RR on October 3, 2017 (the October 2017 RR). The May 2017 RR and October 2017 RR are identical except that the District did some additional testing for the October 2017 RR. P-2; S-47.
16. More specifically, the October 2017 RR found that the Student's intellectual abilities and academic performance were all average to above average (significantly above average in some writing domains), but that the Student's executive functioning, attention, and short-term memory were impaired. P-2.
17. The District's CSP accurately summarized the results of the October 2017 RR (which restated the May 2017 RR – which incorporated the 2016 Private evaluation) as follows (P-2 at 15):

[Student] demonstrates appropriate social and emotional functioning. [Student] also demonstrates at least Average verbal and nonverbal reasoning. [Student's] academic functioning is within the Average range and commensurate with [Student's] cognitive functioning. A learning disability can be ruled out. [Student] demonstrates solid basic skills for reading, writing and mathematics. [Student's] processing speed is well below age expectations. When [Student] needs to perform academic tasks within a time limit, [Student] often sacrifices speed for accuracy. This

suggests [Student] needs extended time in order to create a solid work product. [Student's] attention deficit disorder impacts [Student's] ability to integrate large amounts of information (for example, write an essay appropriately).

18. On November 2, 2017, the Student's IEP team issued a new, annual IEP for the Student. S-41.
19. The IEP team met again on February 1, 2018. The District updated the present education levels in the IEP to reflect the Student's grades for the first marking period of the 2017-18 school year and the discussion that occurred during the IEP team meeting and in emails the next day. S-41 at 8-9. At this time, the Parents and District agreed to move the Student from Advanced Chemistry to College Prep or CP Chemistry. The IEP otherwise stayed the same. S-41.
20. By February 17, 2018 (the start of the period in question), the Student was receiving accommodations pursuant to the February 2018 Revised IEP. That IEP included two goals: the same two goals indicated in the parties' stipulation.
21. The February 2018 Revised IEP also included several program modifications and accommodations in the SDI section of the IEP. These included additional time for tests, assignments, and projects; various methods of helping the Student break larger assignments into manageable pieces; and check-ins with teachers and the Student's case manager to make sure that the Student was on track. S-41.
22. The February 2018 Revised IEP also included the following in the SDI and modifications section (S-41 at 31):

Participation in a structured study environment to focus on studying, organizational skills, completion of assignments, and provide assistance in creating manageable plans for academic success.

23. I find that, by and through the above-quoted language, the IEP team included the Student's participation in the ASC class within the Student's IEP. However, this instruction was to take place in a regular education classroom. This is because the ASC class was an elective general education class available to all students regardless of disability. See S-41 at 31.
24. The February 2018 Revised IEP did not explicitly include direct instruction in executive functioning skills. However, as written in the IEP, the Student's participation in the ASC class targeted executive functioning skills, which could then be measured through the IEP's goals. Said differently, the IEP team determined that the Student should attend the general education ASC class to learn organization and planning skills, and also drafted a goal to measure the Student's ability to plan academic work. See S-41.
25. On April 24, 2018, the Parents contacted the District to raise concerns about the Student's World Literature class. This prompted conversations between the Parents, District, and Student about what accommodations would help the Student in that class. S-36.
26. The IEP team met again on May 7, 2018, to formalize the additional accommodations by placing them into the Student's IEP (the May 2018

Revised IEP). Under the revision, teachers would encourage the Student to restate expectations and would provide supplemental notes and example work product if available. The Student would have seating to minimize distractions, and the Student's testing accommodations were spelled out in greater detail. S-36.

27. The District offered the May 2018 Revised IEP through a Notice of Recommended Educational Placement (NOREP) sent on May 14, 2018. The Parents rejected the NOREP on May 25, 2018, and the District received the rejected NOREP on June 8, 2018. S-25.
28. On the NOREP, the Parents stated that their reason for rejecting the May 2018 Revised IEP was that the accommodations provided therein were not sufficiently individualized for the Student. The Parents stated that the Student required individualized help with "project planning" that was not provided through the ASC class. At the same time, the Parents stated that extra time for assignments was "too specific" because they targeted particular classes and depended upon the Student's request for more time. See S-35.
29. The Parents and District corresponded by email several times after the Parents rejected the May 2018 NOREP. The Student's private psychologist (the psychologist that the Student started seeing after the 2016 private evaluation) participated in these conversations. In short, the Parents requested direct, one-on-one instruction from an executive functioning coach. See, e.g. NT 80-83.

30. As a result of those communications, the District offered a revised IEP dated June 12, 2018 (the June 2018 Revised IEP). This revision added two items to the May 2018 Revised IEP (P-6):
 - a. The Student's present education levels were revised to summarize the discussion between the Parents and District. According to that summary, in response to the Parents' request that the Student receive direct instruction of executive functioning skills, the District recommended that the Student take an Essentials of Study Skills (ESS) class during the upcoming 2018-19 school year. See P-6 at 8.
 - b. One item was added to the SDI and program modifications section of the IEP: "Participation in a direct instruction study skills elective to address skills such as (but not limited to) time management, goal setting, planning long/short term assignments, and test taking skills..." (P-6 at 33).
31. The District explicitly stated that new accommodation in the June 2018 Revised IEP was a reference to placement in the ESS class. The District made this statement in the body of the June 2018 Revised IEP itself within the statement added to the present education levels. See P-6 at 8.
32. As with the ASC class, the ESS class was an elective general education class available to all students in the District regardless of disability. See P-6 at 33.

33. With the exception of World Literature, the Student's quarter grades were fairly consistent throughout the school year. The Student's performance in World Literature fluctuated significantly (the lowest point was an F in Q2 and the highest point was a B in Q4). The Student's final grades for the 2017-18 school year were:
- a. Video Production and Broadcast Journalism: A
 - b. ASC: Pass
 - c. Geometry: C+
 - d. Film Analysis I: A
 - e. Spanish I: A
 - f. World Literature: C-
 - g. World Studies: B
 - h. Beginner Swimming: A+
 - i. 10th Grade Health: A+
 - j. Chemistry CP⁵: B-
34. Although the Student was academically successful as measured by report card grades, the Student completed one of two IEP goals:
- a. The Student's writing goal included a baseline stating that the Student scored 3 out of 6 on each writing domain assessed by the District's rubric for a "wholistic score of 18/36." That goal remained unchanged through and included the June 2018 revised IEP. By June 15, 2018, the Student score was exactly the same. The Student made no progress towards the writing goal during the entire 2017-18 school year. C/f P-4 at 33, P-6 at 31, S-9 at 12.

⁵ CP is "college prep" – the level of the course.

- b. The Student's assignment management goal (which the District calls a self-advocacy goal in some documents) started with a baseline of 35%. The Student's progress towards this goal steadily improved over the school year until the Student reached 83% by June 15, 2018 – three percent above the goal's mastery level. See s-28 at 7.⁶

The 2018-19 School Year (11th Grade)

35. The 2018-19 school year was the Student's 11th grade year. The Student started 11th grade under the June 2018 Revised IEP. *Passim*.
36. Both the ASC and ESS class were available to the Student as general education electives. Under District policy, the Parents could choose whether or not to enroll the Student in the ASC and/or ESS classes. For the 2018-19 school year, the Parents chose to not enroll the Student in either the ASC or ESS classes. As a result, the Student did not take the ASC or ESS classes. See, e.g. NT 80-85; see also *Stipulation ¶ 8*.
37. On November 1, 2018, the Student's IEP team reconvened and drafted a new annual IEP for the Student (the November 2018 IEP). S-28.
38. The November 2018 IEP removed the Student's writing goal and kept the Student's work planning goal. S-28. The work planning goal was kept verbatim – including a statement that the Student's baseline was

⁶ Concerns about the District's conclusion that the Student mastered this goal are discussed below.

35%, despite the District's progress monitoring showing 83% at the end of the prior school year. As a result, the goal that the Student did not make progress towards was removed while the mastered goal was repeated. S-28.

39. The Student's participation in the ASC and ESS classes were removed from SDI and modification section of the IEP.⁷ The SDI and modifications provided through the November 2018 IEP were otherwise similar to the prior Revised IEP. S-28.
40. In addition to the ASC and ESS classes, the District also offered an Essentials for Life Strategies (ELS) class as a general education elective. *Stipulation ¶ 9.*
41. On March 3, 2019, the IEP team met again at the Parents' request. The Parents reiterated their concerns that the Student required direct instruction of executive functioning skills. They also expressed concerns about the Student's ability to communicate with teachers and self-advocate (e.g., request extended time). S-23.
42. In response to the Parents' concerns, the District recommended the Student's participation in the ASC and ESS classes. The Parents declined that offer. S-23.
43. The District proposed a revised IEP dated March 3, 2019 (the March 2019 Revised IEP). Through that document, the District also proposed

⁷ For clarity, none of the Student's IEPs explicitly referenced the ASC or ESS classes in the SDI and modifications section. However, the IEPs prior to November 2018 included SDIs that were an obvious reference to the ASC class and the June 2018 Revised IEP explicitly states that the SDI added in that document is code for the ESS class.

revisions to the SDI and modifications that are nearly identical to those that it proposed in the May 2018 Revised IEP (which the Parents rejected at that time). S-23.

44. The March 2019 Revised IEP did not include placement in the ASC or ESS classes because the Parents declined those placements during the IEP's development. S-23.
45. The District offered the March 2019 Revised IEP through a NOREP dated March 8, 2019. The Parents signed the NOREP on March 15, 2019, checking boxes to both approve and reject the IEP. Based on those marks, and comments that the Parents wrote on the NOREP, I find that the Parents gave the District consent to implement the March 3, 2019 Revised IEP without conceding that IEP was appropriate for the Student.⁸ The District received the NOREP on March 22, 2019. S-22.
46. In addition to the ASC and ESS classes, the District also offered an Essentials for Life Strategies (ELS) class as a general education elective. *Stipulation ¶ 9*. The Student did not enroll in the ELS class.
47. Compared to 9th and 10th grade, the Student's quarter to quarter grades during the 2018-19 school year were more consistent throughout the year. The Student's final grades for the 2018-19 school year were (P-23):
 - a. Video Production and Broadcast Journalism II: A

⁸ As a matter of law, if the Parents had provided unqualified consent, the result would be the same. Parental consent to an IEP (appropriate or inappropriate) does not alter a student's right to a FAPE.

- b. Physics CP: B-
- c. Advanced Acting Honors: A
- d. Physical Education: C
- e. American Literature: C+
- f. American Studies: B
- g. Algebra II: B-
- h. Spanish II: C

48. At some point before June 17, 2019, the Parents retained legal counsel. On June 17, 2019, the Parents reached out to the District, via counsel, to express concerns about the Student's education and request copies of the Student's educational records. P-10.
49. On August 16, 2019, the District sought the Parent's consent to reevaluate the Student by sending the Parents a "Prior Written Notice for a Reevaluation and Request for Consent Form" (the PTRE). S-9. The Parents did not return the 2019 PTRE.

The 2019-20 School Year (12th Grade)

50. The 2019-20 school year was the Student's 12th grade year. *Passim*.
51. The Parents requested an IEP team meeting. The IEP team convened on September 10, 2019. *Stipulations* ¶ 10.
52. During the IEP team meeting, the Parents reiterated their request for direct instruction of executive functioning skills through a one-on-one coach. In response, the District recommended the ASC class and after school tutoring. The Parents declined both offers. The conversation

was documented as a revision to the present education levels in the Student's IEP, which counts as another IEP revision (the September 2019 Revised IEP). See P-12.

53. The September 2019 Revised IEP also adds the following to the modifications and SDI section of the Student's IEP (P-12 at 23):

Participation in a structured study environment to focus on studying, organizational skills, completion of assignments, and provide assistance in creating manageable plans for academic success

54. I find that the added language to the September 2019 Revised IEP is code for the ASC class. Again, the ASC class is a general education elective. The Student did not enroll or otherwise participate in the ASC class after the September 2019 Revised IEP was issued.
55. During the September 10, 2019 IEP team meeting, the District re-issued the PTRE. The Parents did not sign the PTRE at the meeting and did not return the PTRE later. See P-12.
56. On September 13, 2019, the District offered the September 2019 Revised IEP via a NOREP. The Parents marked the NOREP as they did the prior NOREP, consenting to the document without agreeing that it constituted a FAPE. The District received the NOREP on September 23, 2019.

57. On September 20, 2019, the District reissued the PTRE to the Parents. The Parents did not return the PTRE. S-17.
58. On September 25, 2019, the District reissued the PTRE to the Parents. The Parents did not return the PTRE. S-16.
59. On October 9, 2019, the District sent a letter to the Parents explaining that, in the absence of their consent, the District would conduct a review of records and would issue behavior rating scales to the Parents and teachers. *See, e.g.* S-6 at 2.
60. The District issued a reevaluation report on October 22, 2019. *Stipulations* ¶ 11. The District called this a “standard” reevaluation.⁹ A copy of that reevaluation was not introduced into evidence, but the report thereof is referenced in other documents. *See, e.g.* S-6 at 2.
61. The District convened the Student’s annual IEP meeting on October 31, 2019. S-14; *Stipulations* ¶ 12.
62. During the October 2019 IEP team meeting, the Parents expressed concerns that the District evaluated the Student without their consent. In response, during the meeting, the District – for the fifth time – reissued the PTRE. S-13.
63. After the October 2019 IEP team meeting, the District issued a new annual IEP for the Student dated October 31, 2019 (the October 2019 IEP). S-14.

⁹ Again, the law does not recognize anything called a “standard” evaluation or reevaluation. An evaluation or reevaluation either complies with IDEA mandates or it does not. District-specific nomenclature does not change those mandates.

64. The October 2019 IEP included one goal: the work planning goal that the Student had mastered by the end of 10th grade (the 2017-18 school year). Except for the baseline, that goal is repeated verbatim. S-14 at 17.
65. Regarding the baseline, the District wrote: "This goal was mastered and at this time **will not be monitored.**" (emphasis added). Consequently, the October 2019 IEP included one goal that the District would not monitor.
66. The Parents approved the October 2019 IEP via a NOREP. They noted on the NOREP that an evaluation was pending. The District received the NOREP on November 19, 2019. S-12.
67. Accommodations written into the SDI and modifications section of the October 2019 IEP remained unchanged. As a result, the Student continued to receive accommodations despite the fact that the Student's IEP, for all practical purposes, had no goal. S-14.
68. The Parents signed PTRE, providing consent for the District's proposed reevaluation. The District received the PTRE back from the Parents on November 8, 2019. S-13, S-73, *Stipulations* ¶ 13.
69. The District performed additional assessments after it received November 8, 2019 PTRE. *Stipulations* ¶ 14.

70. On January 7, 2020, the District issued a reevaluation report (the 2020 RR). The District's CSP who reevaluated the Student in 2017 was the principal author of the 2020 RR. *Stipulations* ¶ 14; S-9.
71. The 2020 RR concluded that the Student had a disability but was no longer in need of specially designed instruction and, therefore, was no longer eligible for special education. The 2020 RR also concluded that the Student would benefit from a Section 504 Service Plan. S-9; See also *Stipulations* ¶ 15.
72. More specifically, the 2020 RR included a review of all prior evaluations and records, teacher input, parent input, new standardized normative assessments of the Student's cognitive abilities and academic achievement, and new assessments of the Student's attention and executive functioning. The Student's assessed cognitive abilities and academic performance, including writing, were all in the average range.¹⁰ S-9.
73. Regarding the Student's executive functioning, the CSP analyzed multiple rating scales and sub-tests to conclude that the Student's cognitive efficiency and processing speed were still areas of weakness. As a result, the Student could become taxed in the classroom setting and may learn new information at a slower rate. The Student's ability to organize and plan were still noted as a concern. S-9.

¹⁰ Some sub-tests produced results in the "high average" or "low average" range. One sub-test, the Similarities sub-test that was part of the assessment of the Student's cognitive abilities, placed the Student in the "superior" range. That sub-test was part of a verbal comprehension index, which was found to be in the high average range.

74. On January 30, 2020, the District convened a Section 504 Meeting. During or immediately after the meeting, the District proposed a Section 504 Plan. S-7; *see also Stipulations ¶ 16; S-7.*
75. On February 7, 2020, the District issued a Notice of Recommended Educational Placement (NOREP) proposing to exit the Student from special education. S-6; *see also Stipulation ¶ 16.*
76. On February 14, 2020, the Parents signed and returned the NOREP stating that they did not approve the District exiting the Student from special education and were requesting a due process hearing. S-6; *Stipulations ¶ 17.*
77. On February 17, 2020, the Parents filed a due process complaint. *Stipulations ¶ 18.*
78. On February 28, 2020, the parties entered into a tolling agreement whereby the Parents withdrew their due process complaint without prejudice but agreed that the original filing date (02/17/2020) would control for purposes of the IDEA's statute of limitations if the Parents refiled their complaint. *Stipulations ¶ 19.*
79. The Student's IEP remained pendent during the tolling period. *Stipulations ¶ 19.*
80. On March 13, 2020, Governor Wolf ordered that all Pennsylvania schools close in an effort to mitigate the COVID-19 pandemic. Ultimately, Governor Wolf extended the school closure through the end of the 2019-20 school year. *Stipulations ¶ 20.*

81. On April 3, 2020, the District provided a "COVID-19 Interim Individualized Emergency Special Education Plan (IIESEP)" to the Parents. S-5; *Stipulations* ¶ 21.
82. On May 29, 2020, the Parents reinstated their due process complaint. The District filed its written Answer on June 6, 2020.
83. The Student's academic performance as measured by report card grades was somewhat variable throughout the school year. S-72. As with prior years, some of that variability is partly attributable to teachers posting quarter grades at a time when the Student received no credit for late, outstanding assignments. Teachers gave the Student full credit once the assignments were turned in, causing some part of the quarter-to-quarter fluctuation. The Student's final, senior year grades were (S-72):
 - a. Video Production & Broadcast Journalism II: A-
 - b. Algebra 3 and Trigonometry CP: B+
 - c. Physical Education: B+
 - d. Psychology: B
 - e. Earth & Space Science: C-
 - f. Film Analysis II (a two semester course that convened in Q3 and Q4): A-
 - g. British & Modern Literature: B
 - h. Spanish III: C+
84. The Student's cumulative GPA at graduation was 3.0297. S-72.

85. The Student was accepted to a competitive four-year undergraduate program at a selective university.¹¹ See, e.g. NT 130.
86. The Student graduated from the District's high school on or about June 10, 2020. *Stipulations* ¶ 23.

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).

¹¹ The name of the university appears in the record. I do not name the university here to protect the Student's privacy. The adjectives used in this finding are my own and are intended to convey the type of college to which the Student was granted admission. Those adjectives are not terms of art and in no way alter the outcome of this due process hearing.

With one exception, I find no issue with any witnesses' credibility as all witnesses testified honestly and to the best of his or her ability. To the extent any witnesses' testimony conflicts with another's, those witness either recall events differently or have different opinions. To the extent that my findings of fact depend on accepting one witnesses testimony over another's, I have accorded more weight to the witness based on the witnesses' testimony and the other evidence presented.

The sole exception to the above concerns the Student's private psychologist. The private psychologist testified with great certainty about why the District's proposed programs were not appropriate for the Student before revealing that she had little to no information about those programs. The private psychologist also relied heavily on the 2016 private evaluation to draw conclusions about the Student's current needs. This is not to say that the private psychologist was disingenuous or purposefully misleading in any way. Rather, I cannot give weight to opinions that are formed from outdated information and assumptions.

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 (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 particular 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*, 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.

Before *Endrew*, the Third Circuit interpreted *Rowley* to mean that the “benefits” to the child must be meaningful, and the meaningfulness of the

educational benefit must be 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 holding in *Andrew F.* 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 minimus*" 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 minimus*" 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 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. 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. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

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

student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default. Full-day compensatory education can also be awarded if that standard is met. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

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 in order 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 LEAs are obligated to ensure that:

assessments and other evaluation materials... (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).

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 must 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 they need. 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).

For IDEA-eligible students, the substance of service agreements is incorporated into IEPs. Schools do not issue separate service agreements for IDEA-eligible students.

When parents and schools cannot reach an agreement, a number of dispute resolution options are available, including formal due process hearings. 22 Pa Code §§ 15.7(b), 15.8(d).

Discussion and Legal Conclusions

There is no suggestion in any part of the record of this case that the Student’s grades were anything but earned. Looking at report cards, the Student performed well in most classes, graduated on the strength of that performance, and was admitted to a prestigious university. There is, therefore, considerable merit to the District’s theory of the case: the Student is a success story. Despite having a disability, the Student successfully accomplished what an overwhelming number of high school students seek to accomplish: graduation and advancement to undergraduate studies. Further, to the small extent that the Parents ask me to consider how much better the

Student could have done had the Student received a FAPE, I reject such speculation outright. Bluntly, I take the District's point.

While the District's theory is compelling, it is not the legal standard that applies to this case. The Student's actual progress may inform remedies but is not a factor in the initial FAPE analysis. I must determine whether the IEPs in question were reasonably calculated at the time they were issued to provide a FAPE to the Student. Only after resolving whether the District violated the Student's right to a FAPE will I consider what harm any such violation caused. I will, therefore, parse the alleged FAPE violation and the demand for compensatory education separately.

FAPE Violations

IEP goals specify the amount of progress that a student is expected to make during the term of the IEP. SDIs are the special education that schools provide to enable students to achieve the goals. Modifications and accommodations enable students to access education. In this way, SDIs and accommodations are fundamentally different. Students with disabilities who require accommodations but do not require specially designed instruction are protected by Section 504, not the IDEA.

At the start of the period of time in question (February 17, 2018), the Student's IEP had two goals: a writing goal and a planning goal. Nothing written in the SDI section of the IEP explains what special education the District will provide to enable the Student to obtain the writing goal. The only thing written in that section explaining what special education the District will provide to enable the Student to achieve the planning goal was the ASC placement. But even that statement is confounding. On its face, the

IEP provides an elective, general education class to enable to the Student to achieve a goal. Nothing in the SDI section of the Student's IEP constitutes specially designed instruction.

The IDEA requires more. Once an IEP team sets a goal, the team must also say what special education the LEA will provide to enable the Student to achieve that goal. The District did not do that in this case. Modifications and accommodations are required by the IDEA but are not special education. Giving the Student more time to take a test does not teach the Student the skills that the Student needs to require less time to take the test.

Section 504 approaches the same distinction from a different perspective. If the giving the Student more time to take a test will yield a score that reflects the Student's knowledge instead of the Student's test-taking ability, a Section 504 Plan can provide that accommodation/modification only because extra time is not special education. In this case, the District concluded that the Student required special education as a result of OHI (ADHD), and then offered an IEP provided many modifications and accommodations but no discernable special education. As such, the IEP in place on February 17, 2018 could not have been reasonably calculated to provide a FAPE at the time it was offered.

The IEP in place on February 17, 2018 remained in place until the June 12, 2018 revision. That revision added the ESS class in the SDI and modifications section of the IEP. Like the ASC class, the ESS class was a general education elective and, therefore, cannot be special education. The June 2018 Revised IEP could not have been reasonably calculated to provide a FAPE for the same reason as its predecessor. While it provides substantial modifications and accommodations, it provides no special education.

The June 2018 Revised IEP remained in place until it was replaced by the November 2018 IEP. That IEP is confounding. By this point in time, the Student had mastered the planning goal but had made no progress towards the writing goal (according to the District's June 2018 progress monitoring). Despite this, the District then continued the mastered planning goal and removed the stagnant writing goal. The record provides no logical basis for this decision.

At the same time, the District also removed references to the ASC and ESS classes. Technically, neither of those classes constitute SDI and so their removal does not render the November 2018 IEP any more or less appropriate. But the elimination of services that the District touted as responsive to the Parents' concerns is striking. That those classes were removed in acquiescence to parental demands is discussed below.

In sum, the November 2018 IEP could not be calculated to provide a FAPE at the time it was issued because 1) it kept a mastered goal for no explicable reason, 2) it discarded an unmet goal for no explicable reason, and 3) it provided no discernable special education, relying instead on general education modifications and accommodations. That sort of plan may be appropriate for students with disabilities who do not require special education. In fact, that sort of plan is the type of plan that Section 504 provides. Regardless, at the time that the District issued the November 2018 IEP, it had concluded that the Student was a child with a disability as defined by the IDEA. As matter of law, the Student required specially designed instruction. The District's failure to provide SDI violated the Student's right to a FAPE.

The November 2018 IEP remained in place until the Parents provided consent for the District to implement the March 2019 Revised IEP. In this document, the District provided a more detailed breakdown of how and when the Student could obtain modifications and accommodations, most of which were extended time for tests, assignments, and projects. Again, it is notable that the District did not include regular education classes that it believed to be beneficial because the Parents had rejected those classes. While that speaks to the relationship between the parties, the inclusion of a general education class in the Student's IEP (or lack thereof) does not alter the analysis. March 2019 Revised IEP is inappropriate for all of the same reasons that the November 2018 IEP was inappropriate.

The March 2019 Revised IEP remained in place until the Parents provided consent for the District to implement the September 2019 Revised IEP. In substance, the only change was the inclusion of the ASC class in the SDI and modifications section of the IEP. The addition of a regular education class to an IEP is something other than the addition of special education to an IEP. Moreover, the ASC class remained an elective that the Parents rejected. The September 2019 Revised IEP continued to be inappropriate.

The September 2019 Revised IEP remained in place until the Parents provided consent for the District to implement the October 2019 IEP. The October 2019 IEP is baffling because, by any reasonable definition, it is not an IEP. The October 2019 IEP contains one goal that the Student mastered years ago. The District was explicit that it would not monitor that goal. Functionally, the October 2019 IEP had no goal. Like its predecessors, the October 2019 IEP also provided no special education. The many modifications and accommodations in the October 2019 IEP do not amount to SDI. An IEP that has no goals and provides no special education is an IEP

in name only. The document has more in common with a Section 504 Plan than anything else. That is problematic because the reevaluation report concluding that the Student no longer required SDI had not been written at this point in time. The October 2019 IEP was inappropriate.

In sum, the Student did not have an IEP that was reasonably calculated to provide a FAPE at any point from February 17, 2018 through the Student's graduation.

Compensatory Education

The argument implicit in the District's theory of the case is that whatever flaws may be present in the Student's IEP are harmless. The Student graduated and went on to a prestigious university. Indeed, under *Andrew, supra*, grade-to-grade progress for students capable of such work is a strong indication that the child derived a meaningful benefit from his or her special education. The challenge of this case is that most of the evidence establishes that the Student derived a meaningful benefit from the District's regular education program in the absence of special education.

The Parents point to the Student's report card grades and documented difficulties completing work on time as evidence of the substantive harm that the Student suffered. The report card grades do not establish substantive harm. Rather, they establish that the Student was academically successful. The Student's academic progress also establishes that the Student was capable of high-level academic work with only regular education accommodations.

Beyond report cards and grade-to-grade advancement, the Student mastered the planning goal. It is striking that the planning goal is not

measured by the Student's timely completion of assignments. Rather, the goal was designed to track how frequently the Student used various planning techniques (leading the District to describe the goal as a self-advocacy goal in some documents). Progress, however, was sometimes reported in terms of assignment completion per class. Such reports cannot be measured against the IEP goal as written. *C/f* P-4 at 33, P-6 at 30, S-9 at 14. Such reports do, however, suggest that the Student had difficulty managing assignments and projects. The Parents' contemporaneously reported concerns amplify the District's own data in this regard. Further, when the District reported progress in a way that aligns to the goal, the source of the District's data is not reported.

While I am left to wonder how the District calculated the Student's progress towards this goal, the burden of proof in this case rests with the Parents. There is no preponderant evidence in the record to establish that the District's progress reporting was incorrect, invalid, or fraudulent. I must conclude that the District's progress reports are accurate.

The Student did not master the writing goal, which was removed without explanation. Yet the record of this case does not establish what harm the Student suffered as a result. There is no evidence in the record establishing which, if any, of the Student's classes were writing intensive. Even if I were to make assumptions about which classes were writing intensive (something I cannot do), there is no evidence establishing that the Student's lower grades in those classes were the result of the Student's writing difficulties.

The clearest evidence that the Student suffered some substantive harm comes from the Student's consistent struggles with executive functioning skills. There is preponderant evidence that the Student's ability to plan out

and manage assignments was a consistent problem during the entire period of time in question. The District knew about this problem through the Parents' communications with District personnel. The Parents consistently requested special education to address these problems. Difficulties with planning and organization were also found thorough the District's 2020 RR, which also connects these problems to the Student's disability.

As noted above, education encompasses more than academics. Up until the 2020 RR, the District had concluded that the Student had OHI (due to ADHD) and, by reason thereof, required specially designed instruction. The District was aware of the Student's planning problems and wrote a goal to address them. The Student mastered that goal but continued to exhibit the same problems. The District did not offer special education to address the Student's executive functioning. Rather, the District provided general education accommodations so that the Student would not be academically penalized for having a disability. Although the Student did not suffer an *academic* harm for the District's failure to address executive functioning needs, the Student did suffer an *educational* harm for the same reason.

In making this determination, I recognize the obviously contentious relationship between the parties, and that the Parents rejected significant general education programs that were designed to target the Student's executive functioning needs. Third Circuit has spoken about how the relationship between parents and schools does not diminish the rights of student. In its closing brief, the District expresses some frustration with that jurisprudence. The District wrote:

When parents refuse recommendations, the school team is often placed in a very difficult position. If they feel that an ASC class is

required for FAPE, they must state in the NOREP that it is required for FAPE, and if Parents disagree, advise them they must either file for mediation or due process. This is easier said than done. Teachers, trying to be cooperative and nonconfrontational, sometimes acquiesce to parents' demands. Parents, however, can then turn around and file for due process arguing that – yes, we insisted that the school team bend to our will but now that they have done exactly what we insisted they do, they have failed to provide FAPE and we now demand compensatory education.

Its frustration notwithstanding, the District is correct. If the ASC placement was a necessary component of FAPE, and the District removed the ASC placement, then the Student received something less than a FAPE – even if the ASC was removed at the Parents' request. In this case, however, the record establishes that the ASC was a regular education class available to all students, regardless of disability. The ASC class cannot be SDI and is not special education. Even if the Parents had agreed to keep the Student in the ASC class, the District still would not have provided special education in response to the Student's executive functioning needs. Such special education was necessary because, until the 2020 RR, there was no disagreement about the Student's eligibility for special education.

Having found substantive harm, it is still difficult to craft a remedy in this case. A generic award of compensatory education is not equitable, given the specific nature of the harm and the clear evidence that the impact of the harm was not pervasive in that it did not spread into academic or social domains. There is no preponderant evidence that the Parents' preferred configuration of direct instruction of executive functioning skills was the only

configuration that could have constituted a FAPE for the Student. Moreover, the Student is an undergraduate enrolled in a university outside of Pennsylvania.¹² Nothing in the record establishes what executive functioning instruction would be currently beneficial to the Student. Of equal importance, nothing in the record establishes what type of instruction the Student – who is an adult for nearly all purposes outside of this hearing – would be amenable to.

Given these challenges, I find it equitable to award 15 hours of direct instruction of executive functioning skills to the Student.¹³ The District may provide such instruction through its own personnel or may contract for those services. Those services may be provided at any time mutually convenient to the Student and District and may be provided through remote video conferencing. Any hours not used by the end of the school year in which the Student turns 21 years old are forfeited.

Miscellaneous

I find that the 2020 RR complied with all IDEA requirements described above. I make no determination as to the propriety of the District's ultimate determination that the Student had a disability but no longer required SDI because that issue is moot. The Parents withdrew claims concerning the Student's eligibility for special education, and the 2020 RR did not change the services that the Student received.

¹² I have no information about how the Student is attending university during the COVID-19 pandemic and make no finding as to whether the Student currently resides out of state.

¹³ The lack of evidence about the Student's current needs as an undergraduate could justify a complete denial of compensatory education under the unique facts of this case. On the whole, I must conclude that some remedy is owed.

I make no determination about the appropriateness of the Section 504 Plan that the District offered after the 2020 RR for the same reasons, and because that Plan was never implemented.

As the Student did not receive special education to address executive functioning, the COVID-19 shutdown did not alter the Student's receipt of special education. The COVID-19 shutdown has no impact upon the remedy that I award below.

ORDER

Now, December 21, 2020, it is hereby ORDERED as follows:

1. For reasons set forth in the accompany decision, none of the Student's IEPs during the period of time in question were reasonably calculated to provide a FAPE at the time that they were issued. This order constitutes declaratory relief of the same.
2. The Student is awarded fifteen (15) hours of compensatory education in the form described in the accompanying decision. Any hours unused at the end of the school year in which the Student turns twenty-one (21) years old are forfeited.

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

/s/ Brian Jason Ford

HEARING OFFICER