

*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**

**ODR No. 24307-20-21**

### **CLOSED HEARING**

#### **Student's Name:**

A.R.<sup>1</sup>

#### **Date of Birth:**

[redacted]

#### **Counsel for Student:**

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105 Claremont Avenue  
Clarks Summit, PA 18411

#### **Local Education Agency:**

Pittston Area School District  
5 Stout Street  
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#### **Hearing Officer:**

Brian Jason Ford, JD, CHO

#### **Date of Decision:**

April 10, 2021

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<sup>1</sup> The Student is 18 years old and, through counsel, requested this hearing directly. The Student's parents are not parties to this hearing. This distinction makes no difference but is noteworthy because it is exceedingly rare, and because it explains why certain identifying information is omitted from the cover page of this decision in addition to the decision itself.

## **Introduction**

This special education due process hearing concerns the educational rights of a student with disabilities (the Student). On November 10, 2020, the Student requested this hearing against the Student's public school district (the District). The Student amended the complaint on January 25, 2021.

The Student alleges that the District violated the Student's right to a free, appropriate public education (FAPE) in violation of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. from November 10, 2018 through the present and ongoing.

The parties agree that the Student is a child with a disability, as defined by the IDEA. A series of Individualized Education Programs (IEPs) provided the blueprint for the Student's special education during the period of time in question. The Student alleges that the IEPs were not reasonably calculated to provide a FAPE when the District offered them and were not implemented with fidelity regardless of their facial appropriateness.

To remedy the alleged violations, the Student demands a number of Independent Educational Evaluations (IEEs) at the District's expense and compensatory education. Discussed below, the Student seeks an order permitting an atypical use of compensatory education.

For reasons explained below, I find in favor of the Student but do not award all of the remedies that the Student demands.

## **Issues**

The single issue presented in this hearing is: Did the District violate the Student's right to a FAPE from November 9, 2018 through the date of this decision and, if so, what remedies are owed?

### **Findings of Fact**

I reviewed the entire record. I make findings of fact, however, only as necessary to resolve the issues presented for adjudication. I find as follows:

#### **Background**

1. The Student was born in a United States territory and moved to another school district in Pennsylvania for 1st grade. P-1
2. At all times, the Student has been designated as an English Language Learner (ELL). This designation is in no way indicative of the Student's ability to speak and understand English, as evidenced by the Student's testimony in this case. See, NT at 26-93.
3. The 2015-16 school year was the Student's 7th grade year. The prior school district evaluated the Student's educational needs during that school year. P-6.
4. On February 6, 2016 the prior school district documented the findings of its evaluation in an Evaluation Report (the 2016 ER). On February 11, 2016, the other school district gave a copy of the 2016 ER to the Student's parent. P-6.

5. Through the 2016 ER, the prior school district determined that the Student was a child with a Specific Learning Disability (SLD), meeting SLD eligibility criteria in basic reading skills, reading fluency, and math problem solving. P-6.
6. The Student attended the prior school district until moving into the District and enrolling on April 14, 2016. See, e.g. P-1 at 6.

**April 14, 2016 Through the End of the 2015-16 School Year  
(7th Grade)**

7. The parties presented no preponderant evidence concerning this portion of the 2015-16 school year. *Passim*.

**2016-17 School Year (8th Grade)**

8. The parties presented no preponderant evidence concerning the 2016-17 school year. *Passim*.

**2017-18 School Year (9th Grade)**

9. The Student began to attend a program at a multi-district vocational-technical school (the Vo-Tech) during the 2017-18 school year. The Student spent part of the school day at the District and part of the school day at the Vo-Tech. See S-1 at 4.
10. The Student took a full-year Child Care class and a half-year Warehouse Management class at the Vo-Tech during the 2017-18 school year. The Student earned a final grade of 89 in the Child Care

class and an 86 in the Warehouse Management class. For the year, the Student earned 3 credits with a 3.9 GPA. S-1 at 4.

11. The IEP in place at the start of the 2017-18 school year was not made part of the record. However, during the 2017-18 school year, the Student was placed in Read 180 (a reading intervention class) and Learning Support Math. See P-1 at 6.
12. Although the Student's IEP for this period of time is not in evidence, the Student's IEP had a reading comprehension goal. That goal was monitored using "Read 180 Software," which generates a "Lexile score." S-2 at 1.
13. Whenever the IEP in place at the start of the 2017-18 school year was put in place, the Student's baseline Lexile score was 643. The goal was for the Student to improve to a Lexile score of 800. S-2 at 1.
14. The Student's Lexile score was obtained during each of the District's four marking periods in the 2017-18 school year. The scores were: 550 (below the starting baseline), 635, 643, and 754. While this data shows steady progress over the course of the year, it also shows that it took three quarters of the year for the Student to get back to the starting baseline from a regression that is not explained by the record of this case. The same data also shows that the Student did not obtain the IEP goal. S-2 at 1.
15. In the same progress monitoring exhibit containing the Student's Lexile scores, the District included progress reports of other goals as well. Almost all of the other progress reports are undated and are

disconnected from goals in the IEPs that are part of the record of this case. See S-2.

16. The Student's IEP team reconvened on May 8, 2018 and drafted a new IEP for the Student (the 2018 IEP). Based on progress monitoring, the 2018 IEP was a continuation of the prior IEP. P-1.
17. The IEP in place immediately prior to the 2018 IEP was not entered into evidence.
18. The Present Levels of Academic Achievement and Functional Performance in the 2018 IEP report Lexile scores consistent with the progress monitoring referenced above and explain that the Student's scores place the Student at the 3rd grade reading level. P-1 at 6.
19. The 2018 IEP includes a comment that 8<sup>th</sup> grade level Lexile scores range from 1010 to 1185. A paragraph below, the 2018 IEP states that 9<sup>th</sup> grade Lexile scores range from 1010 to 1185.
20. The same section of the 2018 IEP also reports progress on a writing goal. P-1 at 6. The IEP with this goal is not in evidence and this goal is not captured in the progress monitoring exhibit containing the Student's Lexile scores. See S-2.
21. The same section of the 2018 IEP states that the Student's writing goal was to write "a paragraph with 4-5 sentences with no more than 3 grammatical errors on 4 out of 5 probes biweekly" in response to a writing prompt. P-1 at 6-7.

22. The same section of the 2018 IEP reports what is purportedly the Student's progress in relation to the writing goal. That progress report is a narrative description of the Student's paragraph writing skills with a tally of the Student's errors for the first three marking periods of the 2017-18 school year. None of those narratives are an objective assessment of the Student's progress as measured against the Student's goal. P-1 at 6-7.
23. The same section of the 2018 IEP reports the Student's progress on a math goal. P-1 at 7. The IEP with this goal is not in evidence and this goal is not captured in the progress monitoring exhibit containing the Student's Lexile scores. See S-2.
24. The same section of the 2018 IEP states that the Student's math goal was to "correctly answer 80% or better on questions which demonstrate knowledge in areas such as multiplication, addition, subtraction, fractions, money, one step equations, exponents, etc." P-1 at 7.
25. The same section of the 2018 IEP reports that the Student "scored an average of" 92% in the first marking period, 93% in the second marking period, and 94% in the third marking period on "computation probes." P-1 at 7.
26. The same section of the 2018 IEP reports the Student's grades in the first three marking periods of the 2017-18 school year. According to this report, the Student earned the following (P-1 at 8):
  - a. Learning Support Math: A / A / A

- b. Learning Support English: A / B / B
  - c. General Science I: B / C / C
  - d. Material Handling & Child Care: A / D / B
27. Although the names of the classes are reported differently on the Vo-Tech transcript, the report of the Student's letter grades in "Material Handling / Child Care" correspond to the Student's numerical grades in the Vo-Tech program. *Compare* S-1 at 4, P-1 at 8.
28. The same section of the 2018 IEP includes a summary of information obtained through the 2016 ER. Some of that information is dated and some of it is not. The information obtained in 2016 is interspersed with information obtained by the District through a transition skills and interests assessment called a "O\*NET Interest Profiler." As a result, the information from 2016 could easily be confused for a more recent evaluation completed for the purpose of developing the 2018 IEP. See P-1 at 8-13.<sup>2</sup>
29. The 2018 IEP included three transition goals. The first goal was for the Student to "atten[d a] Vocational-Technical school to become a cosmetologist." P-1 at 14.
30. The 2018 IEP's first transition goal included three services or activities to enable the Student to obtain the transition goal. The first was "Increase study habits." The second was "Increase strategies for note taking [skills]." The third was "increase [the Student's] reading skills

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<sup>2</sup> This hearing officer has experience reading IEPs, but had difficulty separating what information came from the 2016 ER from the prior school district and what information came from the District's own assessment. Comparing the 2018 IEP to the 2016 ER proved the easiest way to resolve the confusion. The fact that such effort was necessary speaks to the clarity of the 2018 IEP.



by going [from] a reader with a Lexile score of 643 to a reader with a Lexile score of 800." P-1.

31. The remainder of the IEP is silent as to what will be done to increase the Student's study habits or note taking skills. The 2018 IEP does not report the Student's baseline abilities in those areas or suggest that those skills were deficient at the time that the 2018 IEP was drafted. P-1.
32. The second transition goal in the 2018 IEP was for the Student to "gain competitive employment in [the] field" of cosmetology after graduating from the Vocational-Technical program. P-1 at 15.
33. The 2018 IEP's second transition goal included three services or activities to enable the Student to obtain the transition goal. The first was "Increase self advocacy skills." The second was "Increase communication skills." The third called for the Student to improve phonics abilities by increasing an "SPI" score from 8 to 15. Nothing in the 2018 IEP explains what an SPI score is, or how the Student's current SPI score was obtained, or what would be done to improve the Student's SPI score. P-1.
34. The remainder of the IEP is silent as to what will be done to increase the Student's self-advocacy or communication skills. The 2018 IEP does not report the Student's baseline abilities in those areas or suggest that those skills were deficient at the time that the 2018 IEP was drafted. P-1.

35. The third transition goal in the 2018 IEP was for the Student to “live independently.” P-1 at 15.
36. The 2018 IEP’s second transition goal included three services or activities to enable the Student to obtain the transition goal. The first was “increase self-help and social skills.” The second was “increase self-determination skills.” The third was a writing goal measured through Read 180 that called for the Student to “write, revise, and publish writing samples with correct mechanics to demonstrate 85% accuracy.” P-1.
37. Ignoring ambiguities in the writing activity (85% of what?) the writing activity is similar to a goal appearing later in the IEP. The remainder of the IEP is silent as to what will be done to increase the Student’s self-help, social, or self-determination skills. The 2018 IEP does not report the Student’s baseline abilities in those areas or suggest how those skills were deficient at the time that the 2018 IEP was drafted. P-1.
38. The 2018 IEP included three annual goals: a reading comprehension goal, a writing goal, and a math goal. P-1 at 23-26.
39. The reading comprehension goal called for the Student to improve the Student’s Lexile score from 643 to 800. P-1 at 21.
40. At the time that the 2018 IEP was drafted, according to the District’s data, the Student’s Lexile score increased by 93 points between September 5, 2017 and March 20, 2018 (going from 550 to 643). Through the 2018 IEP, the District set an expectation that the Student would improve by 157 points in a similar period of time. The 2018 IEP

did not change the Student's reading program, maintaining Read 180. P-1 at 21.

41. The writing goal in the 2018 IEP is identical to the writing goal in the immediately prior IEP (as reported in the present education levels of the 2018 IEP itself and in the District's progress monitoring). P-1 at 23. This goal is not objective, measurable, or baselined. Progress monitoring on this goal prior to the 2018 IEP reports information about the Student's writing ability, but not in a way that can be measured against the goal, objectively or otherwise. *Id.*
42. The math goal in the 2018 IEP is identical to the math goal in the immediately prior IEP (as reported in the present education levels of the 2018 IEP itself and in the District's progress monitoring). P-1 at 25. Setting aside the ambiguities of the math goal as written, progress monitoring indicates that the math goal was mastered during the first marking period of the 2017-18 school year and remained mastered through the rest of the school year and beyond. *Id.*
43. The 2018 IEP includes a scant number of mostly generic accommodations listed in the section for modifications and specially designed instruction (SDI). All of these are accommodations (actions that the District will take to accommodate the Student's needs) or modifications (changes that the District will make to its programs or curriculum). None are SDI (special education provided by the District to teach the Student skills necessary to master IEP goals). P-1 at 28.
44. To the extent that Read 180 is a specialized reading program used exclusively by children with disabilities, Read 180 could be considered

SDI. Read 180 is listed as such – although not by name – under the Student’s reading goal, but not in the SDI section of the IEP. Neither party presented preponderant evidence to conclude whether Read 180 should be considered SDI in this case. The record as a whole supports a finding that Read 180 is a reading intervention curriculum. *Passim*.

45. On May 8, 2018 (the same day as the IEP team meeting), the District issued a Notice of Recommended Educational Placement (the 2018 NOREP). The 2018 NOREP was the mechanism by which the District sought the Student’s parent’s consent to implement the 2018 IEP. The Student’s parent signed the NOREP, approving the IEP.<sup>3</sup> S-3 at 1-4.
46. During the 4th marking period of the 2017-18 school year, the Student’s Lexile score improved to a 745 (a 102-point increase in 2 months) and continued to demonstrate mastery of the math goal. The District continued to report the Student’s paragraph writing skills, but not in a way that aligned with the Student’s writing goal (which was not measurable). P-1 at 21, 23, and 25.

### **2018-19 School Year (10th Grade)**

47. The Student started the 2018-19 school year under the 2018 IEP.
48. On September 21, 2019, the Student started taking “Essentials of Algebra,” a regular education math class, instead of “Learning Support Math,” a special education math program. S-2.

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<sup>3</sup> Although the Student’s parent did not date the 2018 NOREP, there is no dispute that the parent approved the NOREP either during the IEP team meeting or shortly thereafter.

49. In the first quarter of the 2018-19 school year, the Student's Lexile score dropped to 651 (a 94 point drop over the summer) and continued to demonstrate mastery of the math goal. The District continued to report the Student's paragraph writing skills, but still not in a way that aligned with the Student's writing goal (which was still not measurable). P-1 at 21, 23, and 25.
50. The District reevaluated the Student during the 2018-19 school year and documented that reevaluation in a reevaluation report dated February 3, 2019 (the 2019 RR). P-2.
51. The 2019 RR included parent and teacher input, the Student's progress on IEP goals, the Student's grades, a review of two minor disciplinary infractions, and the results of an administration of the Wide Range Achievement Test, 5<sup>th</sup> Edition (the WRAT-5). P-2.
52. On the WRAT-5, the Student scored three standard deviations below the norm in a range that the test calls "Extremely Low" in Word Reading and Spelling. The Student scored one deviation below the norm in a range that the test calls "Low Average" in Math Computation and Sentence Comprehension. The Student's Math Computation score was one point outside of the average range. The 2019 RR does not report the WRAT-5's margin of error. P-2.
53. The progress reporting towards IEP goals in the 2019 RR is dated "January 2019." At that time, the Student's Lexile score was 669, an improvement of just 18 points of an expected 158-point improvement. P-2.

54. Again, progress reported towards the writing goal bears no relation to the goal itself, and so the Student's progress towards the writing goal was unknown. P-2.
55. The Student's progress towards the math goal was similarly disjointed but, taken broadly, continued to indicate mastery. P-2.
56. The 2019 RR includes a statement that [a language other than English] is the Student's primary language, is spoken in the Student's home, that the Student has limited English proficiency, and that limitation is a factor in the Student's education. P-2.
57. Regardless of what language is primarily spoken in the Student's home, or what language should be considered the Student's primary language, there is no support in the record that the Student has limited English proficiency. Rather, there is abundant evidence, including the Student's testimony and comprehension score on the WRAT-5, that the Student's English proficiency is not a factor in the Student's education. P-2, NT *passim*.
58. The Student's grades through the date of the 2019 RR, including partial grades for the third marking period, were (P-2):
- a. Health Assistant (Vo-Tech): A / A / B
  - b. Essentials of Algebra: B / A / A
  - c. Biology: B / B / C
  - d. English 9 & 10: A / B / Not Reported

59. Thorough the 2019 RR, the District concluded that the Student continued to qualify for special education as a child with a specific learning disability. However, the District also concluded that the Student no longer required special education for math. P-2.
60. The Student's IEP team met on February 11, 2019 to draft a new, annual IEP for the Student (the 2019 IEP). P-3.
61. The Transition Services section of the 2019 IEP includes a postsecondary education and training goal (to enroll in a postsecondary career/technical college to pursue nursing), an employment goal (to obtain competitive employment after college), and an independent living goal (to live independently). P-3.
62. The 2019 IEP included two goals: one for reading comprehension, and one for writing. P-3.
63. The reading comprehension goal was the same as the goal in the prior IEP, but now the criteria for mastery was reduced to a Lexile score of 770. P-3.
64. The writing goal was: "Given a writing prompt, [Student] will write a 5 sentence paragraph that will begin with a topic sentence and include 4 supporting sentences on a bi-weekly basis on 4 of 5 occasions." P-3 at 19.
65. The 2019 RR includes a small number of generic, ill-defined accommodations and modifications, none of which relate to the IEP's goals and none of which constitute SDI. As with the prior IEP, the only

item in the 2019 RR that could be considered SDI is the Read 180 program itself, and there is little evidence in the record of this case about what the Read 180 program is. P-3.

66. The Student's parents approved the 2019 IEP via a NOREP. S-3.
67. The 2019 IEP was operative for the remainder of the 2018-19 school year. *Passim*.
68. Progress reporting for the 4<sup>th</sup> marking period reported the Student's Lexile score had risen from 669 to 803, exceeding mastery for the reading comprehension goal. Unfortunately, and as per usual, the narrative report of the Student's writing ability was so disconnected from the Student's writing goal that progress was unknown (setting aside that the writing goal was not objective). S-2.
69. The Student finished 10<sup>th</sup> grade with an A in Health Assistant (Vo-Tech), a B in English 9-10, a B in Essentials of Algebra, and a B in Biology. The Student's cumulative GPA was 3.333. S-1.

### **The 2019-20 School Year (11<sup>th</sup> Grade)**

70. The Student started the 2019-20 school year under the 2019 IEP.
71. In the first marking period of the 2019-20 school year, the Student's Lexile score was reported as 797. S-2.
72. In the first marking period of the 2019-20 school year the report of the Student's progress bore some relation to the goal itself. The Student



was able to compose a paragraph with a topic sentence and six “detail sentences” (the goal calls for “supporting sentences”). If a supporting sentence and a detail sentence are the same thing, the Student’s exceeded mastery criteria on the writing goal one time. The frequency with which the Student had to demonstrate that skill is ambiguous, so it is impossible to know if the goal was mastered. S-2.

73. The IEP team met again on February 3, 2020 to draft a new IEP for the Student (the 2020 IEP). Although technically a new IEP, the 2020 IEP is a continuation of the 2019 IEP. *Compare* P-3, P-4.
74. By February 2020, the Student had completed the O\*NET assessment and the results are reported in the 2020 IEP. P-4.
75. The 2019 IEP’s reading comprehension goal continued into the 2020 IEP, but the target Lexile score was set to 872. P-4.
76. No NOREP for the 2020 IEP is in evidence. There is no dispute, however that the District implemented the 2020 IEP, and there is no claim that the District did so without consent.
77. The Student’s writing goal was both elevated and re-written, curing the ambiguities of the prior writing goal. The goal in the 2020 IEP was: “Given a writing prompt, [Student] will write a 5-7 sentence paragraph that begins with a restatement of the prompt and includes at least 2 pieces of textual evidence to support [Student’s] argument on a monthly basis.” P-4 at 21.

78. In the second marking period of the 2019-20 school year, the Student's Lexile score was reported as 896 (a 99 point increase to a level above the IEP goal's target). S-2.
79. The report of progress towards the Student's writing goal in the second marking period of the 2019-20 school year went back to reporting information not related to the goal (mostly grammar and punctuation). An effort to relate the report to the goal itself reveals that the Student could write paragraphs of the targeted length, but the report does not say if those paragraphs included the targeted content. S-2.
80. I take judicial notice that, on March 13, 2020, Governor Wolf ordered Pennsylvania schools to close in response to the COVID-19 pandemic.
81. For the remainder of the 2019-20 school year, the District sent work home to the Student and provided some assignments thorough its website. *See, e.g.* NT at 239.
82. On April 22, 2020, the District sent a NOREP to the Student's parent, giving notice that the Student's special education would be provided online and that the District would determine whether compensatory education was warranted after schools reopened. The Student's parent approved the NOREP. S-3
83. In the third marking period of the 2019-20 school year, the Student's Lexile score was reported as 1018. S-2. Lexile scores are derived from a computer-based program, and so it was possible to obtain a Lexile score from the Student after school closed. *Passim*.

84. In the third marking period of the 2019-20 school year, the Student's progress towards the writing goal was not obtained due to the COVID-19 school closure. S-2.
85. In the fourth marking period of the 2019-20 school year, the Student's Lexile score was reported as 979. S-2.
86. In the fourth marking period of the 2019-20 school year, the majority of the progress report towards the Student's writing goal did not relate to the goal itself. A fair reading of the report, however, indicates that the Student was performing at the goal's mastery level. S-2.
87. The Student earned an A in the first three quarters in the Vo-Tech's Health Assistant class. No fourth quarter or final grade was reported. S-1.
88. The Student earned all As and Bs in all classes in the first three quarters of all classes run by the District. S-1.
89. The District reported the Student's fourth quarter grades for the 2019-20 school year as pass/fail. The Student passed all District classes in the fourth quarter. S-1.
90. The Student finished the 2019-20 school year with an A in "Learning Starts," an A in English 11-12, a B in Algebra I, an A in Physical Education, an A in Health Education, and a B in Civics and Economics, and a 3.375 cumulative GPA. S-1.

## **The 2020-21 School Year (12<sup>th</sup> Grade)**

91. The Student started the 2020-21 school year under the 2020 IEP with remote instruction from the District and in-person instruction at the Vo-Tech two days per week. The in-person Vo-Tech instruction ended on October 9, 2020 due to the COVID-19 pandemic. NT 240-242.
92. In the first marking period of the 2020-21 school year, the Student's Lexile score was reported as 1000.
93. As with the last marking period of the prior school year, in the first marking period of the 2020-21 school year, the majority of the progress report towards the Student's writing goal did not relate to the goal itself. A fair reading of the report, however, indicates that the Student was performing at the goal's mastery level. S-2.
94. On November 10, 2020, the Student filed a due process complaint, initiating this hearing.
95. On January 25, 2021, the Student filed an amended due process complaint.
96. The Student's IEP team reconvened on February 1, 2021 to draft a new IEP for the Student (the 2021 IEP). The 2021 IEP is a continuation of the 2020 IEP. *Compare P-4, P-5.*
97. The reading comprehension goal from the 2020 IEP was continued into the 2021 IEP, but the mastery level was set to a Lexile score of 1050.

98. The Student's writing goal was elevated again. The standard for what a paragraph should include remained the same, but now the Student was expected to write one to three paragraphs in response to a prompt and was expected to demonstrate this skill once per quarter. P-5.
99. The modifications and accommodations in the 2021 IEP were written out differently as compared to the 2020 IEP. The substance, however, remained the same. As before, there is no SDI in the 2021 IEP other than the Read 180 program (which may or may not be SDI). P-5.
100. No NOREP for the 2021 IEP is in evidence. See S-3.
101. No progress monitoring beyond the first quarter of the 2020-21 school year was presented. See S-2.
102. The first session of this due process hearing convened on February 25, 2021.

### **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).

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

## **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 [Student] is 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 meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child’s individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

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

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

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

benefit is relative to the child's potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Andrew F.* decision is no different.

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

In *Andrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than *de minimis*" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of



grade-level work. *Id.* Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress. Rather, I must consider the totality of a child's circumstances to determine whether the LEA offered the child a FAPE.

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

### ***Compensatory Education***

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

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

The hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523

(D.D.C. 2005). In *Reid*, the court concluded that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. *Reid* remains the leading case on this method of calculating compensatory education.

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

Despite the clearly growing preference for the *Reid* method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the *Reid* or “same position” method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

“... the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he

or she would have occupied absent the school district's deficiencies."

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

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

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

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

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

### **Discussion and Conclusions of Law**

For the period of time in question, every IEP that served as the blueprint for the Student's education falls short of the IDEA's FAPE standard. At the same time, by most measures, the Student was successful. As a result, analysis of the Student's IEPs is straightforward, but analysis of remedies is complicated.

### **Some Portions of All of the Student's IEPs Were Substantively Inappropriate**

That period of time in question starts on November 10, 2018, in the Student's 10<sup>th</sup> grade year. At that time, the Student was educated pursuant to the 2018 IEP.

The 2018 IEP called for the Student to improve reading comprehension skills to a Lexile score of 800. The same IEP noted that Lexile scores from 1010 to 1185 represented either the 8<sup>th</sup> or 9<sup>th</sup> grade level. At the same time, the Student was earning As and Bs in Learning Support English, and transferred to regular education English during 10<sup>th</sup> grade.

Nothing in the record explains why the District determined why the Student's goal should have been anything but grade level reading comprehension. Nothing in the record explains the incongruity between the Student's Lexile scores and class performance. The District made no effort to reconcile this conflicting information.

Further, the IEP included no special education (targeting the Student's reading comprehension abilities or otherwise). Special education is a service, not a place. The Student's placement in Learning Support English at the time that the 2018 IEP was written is not evidence of goal-specific SDI, and that placement was irrelevant during the 2018-19 school year. Similarly, the record does not support a finding that Read 180 itself is goal-specific SDI. Judging the IEP on its face, I find no services provided by the District to improve the Student's reading comprehension abilities.

The math goal in the 2018 IEP is poorly written and inappropriate on its face. At a minimum, a goal must clearly describe what it is that the Student is expected to accomplish. As written, scoring an 80% or better [on] any single test of any length of any basic math skill constitutes mastery. While I do not think the District intended to reduce the Student's math goal to a single test of one-step addition problems, doing exactly that would have been acceptable under the goal as written.

The Student's writing goal was worse. How often should probes be administered? How many probes should be administered at any one time? How many paragraphs does the Student have to write – and over what period of time – to show mastery? The fact that the goal itself does not answer these questions is problematic. If the District's intention was to administer one probe every other week, the District should have said that. If a single paragraph of 4 to 5 sentences with no more than 3 grammatical errors constituted success on a probe, the District should have said that. If success in 4 out of 5 consecutive probes constituted mastery of the goal, the District should have said that.<sup>4</sup> But the District said none of these things, leaving readers (even readers familiar with IEP lingo) to wonder what the District meant.

In February 2019, the District completed the 2019 RR. The Student's comprehension score on the WRAT-5 was in the Low Average range. That score was consistent with the Student's classroom performance and inconsistent with the Student's Lexile score. The District did not explore, let alone resolve this discrepancy.

After the 2019 RR, the District drafted the 2019 IEP. I find that it was appropriate for the District to remove the math goal from the Student's IEP. Although the 2018 IEP math goal was vague, the Student's actual progress in math (including a transition from Learning Support Math to Essentials of Algebra) constitute preponderant evidence that the Student no longer required special education in math.

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<sup>4</sup> I want to be very clear that this interpretation of the goal is just one possible interpretation of exceedingly vague language.

The Student's reading comprehension goal remained inappropriate in the 2019 IEP. That goal was inexplicably low and out of sync with other information about the Student's reading comprehension abilities (including the WRAT-5 and the Student's classroom performance).

The Student's writing goal in the 2019 IEP was an improvement over the 2018 IEP in that it objectively set forth what the Student was expected to write. The 2019 version of the goal was still vague, however, in terms of how frequently the Student must demonstrate the skill to achieve mastery. The language of the goal, "a bi-weekly basis on 4 of 5 occasions," is effectively meaningless (5 probes every other week? One probe scored at 80% twice per week? Something else entirely?).

Of equal if not greater importance, like the 2018 IEP, the 2019 IEP says nothing about what the District will do to enable the Student to achieve the IEP's goals (problems with those goals notwithstanding). There is a difference between an accommodation and SDI. An accommodation lets the Student access the curriculum despite disabilities. SDI is the special education that the District will provide to build skills so that the Student no longer requires accommodations. The 2019 IEP does not say what special education the Student will receive. The record reveals that the Student received Read 180 but does not warrant a determination that Read 180 *is* SDI.

Even if I were to assume that Read 180 is SDI that is designed to improve the Student's reading comprehension as measured by Lexile score, that would not resolve the massive discrepancies between the Student's Lexile score, classroom abilities, and reading compression level on the WRAT-2. As a result, even if I were to make assumptions to cure the lack of SDI in the

2019 IEP, that assumption would not signal that the SDI provided to the Student was appropriate.

By the end of the Student's 10<sup>th</sup> grade year, the Student's Lexile score improved, but was still below the 8<sup>th</sup> or 9<sup>th</sup> grade level. The Student's progress in writing was unknown because progress was not reported in a way that can be compared to the goal. Yet the Student earned a B in English 9-10. The District made no effort to resolve this discrepancy.

At the start of 11<sup>th</sup> grade, the Student's Lexile score declined a bit even as progress towards the writing goal tended to indicate improvement (setting aside problems with how writing progress was reported). The 2019 IEP was in place through February 2020. At that time, in practice, the 2019 IEP was continued through the 2020 IEP.

The reading comprehension goal in the 2020 IEP was inappropriate for the same reasons as the reading comprehension goal in the 2019 IEP. Nothing explains why the goal was set so low. Nothing explains the discrepancy between the Student's classroom performance and the IEP goal.

The writing goal in the 2020 IEP was a significant improvement from the 2019 IEP. This goal, for the first time, explained what the Student was supposed to do and how frequently the Student was supposed to do it. This goal also aligned with prior progress reports, calling for the Student to improve upon established skills. The writing goal in the 2020 IEP was appropriate.

As with the 2019 IEP, the 2020 IEP included no SDI. As with the 2019 IEP, were I to assume that Read 180 is SDI, I cannot conclude that SDI was



appropriate for the Student given the conflicting information about the Student's abilities and the District's failure to reconcile that information.

The 2020 IEP was in place for the remainder of the 2019-20 school year, including the period of time that school was closed pursuant to the Governor's order in response to COVID-19. The Student argues that the District did not provide services during this period of time. A bizarre aspect of this case, however, is that the 2020 IEP provided no SDI, and so no SDI was missed when school closed. The Student's program violated IDEA mandates during the school closure for all of the same reasons that it violated IDEA mandates before the school closure. The school closure did not yield an IEP implementation failure, however, because the IEP did not provide SDI to implement.<sup>5</sup>

Despite inappropriate IEPs, and despite the school closure, the Student was successful during the 2019-20 school year to the extent that success can be measured by grades and progress towards IEP goals. The Student's grades were excellent. The Student made significant progress towards the appropriate writing goal. The Student's Lexile score also improved, although not yet to an 8<sup>th</sup> or 9<sup>th</sup> grade level. As in prior years, the Student's 11<sup>th</sup> grade performance in class was not reconcilable with the Student's Lexile score, and the District made no effort to investigate this discrepancy.

The 2020-21 school year (12<sup>th</sup> grade) started under the 2020 IEP, but with the April 2020 NOREP permitting online implementation. The Student attended programming at the Vo-Tech two days per week until October 2020. Then, the Vo-Tech program also closed. There is support in the record that the Vo-Tech's closure made it impossible for the Student to obtain

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<sup>5</sup> The April 2020 NOREP does not change this analysis.

certain certifications and prerequisites that the Student was counting on for a transition to postsecondary education. This derailment must not be trivialized, but it does not constitute an IDEA or Section 504 violation. The Vo-Tech's closure impacted upon the Student's future plans no more or less than the Student's nondisabled peers. Therefore, I continue the analysis as I did for prior school years.

The 2020 IEP was in place at least through February 2021. During that time, the Student's Lexile score continued to increase, the Student's writing as measured by IEP progress reports continued to improve, and the Student's classroom performance was strong. Now in 12<sup>th</sup> grade, the Student's improving Lexile score still fell below the range that the District described as 8<sup>th</sup> or 9<sup>th</sup> grade. Moreover, the discrepancy between the Student's actual performance and Lexile score was not addressed.

In February 2021, the parties met with this hearing pending. There is no record of the District offering the 2021 IEP to the Student. Understandably, the parties did not enter evidence about the Student's actual progress generated after the hearing started.

Analysis of the 2021 IEP is identical to the 2020 IEP. The writing goal was an appropriate step forward, the reading comprehension goal was confounding both because of the low bar it set and because of the discrepancy between the Student's Lexile score and the Student's classroom performance, and the IEP as a whole was inappropriate for its failure to include SDI.

## **Remedies**

Above, I have highlighted the ambiguities presented in this case. The most pressing of those ambiguities is that the Student's current ability to read is unknown. The District used a single measure, the WRAT-2, to assess the Student's reading comprehension. Then, the District used an unrelated measure, the Lexile score, as a proxy for the Student's reading comprehension ability. The Lexile score, viewed by itself, suggests that the Student's reading comprehension has not yet reached the level expected of 8<sup>th</sup> or 9<sup>th</sup> graders. All the while, the Student received strong grades in general education (not special education) reading classes. The Student's grades across the board also very strongly indicate that the Student is able to learn by reading.

Under the facts of this case, I reject the Lexile score as an accurate measure of the Student's reading ability. The Lexile score establishes that the Student's reading ability is impaired, but nothing more. The Student's Lexile score is inconsistent with all other evidence of the Student's reading ability. That, and the fact that the WRAT-2 is hardly a comprehensive reading assessment, compel me to conclude that several of the IEEs that the Student demands are appropriate, equitable remedies in this case.

A comprehensive, independent psychoeducational evaluation will provide robust, actionable information both about the Student's ability to read, and about the Student's ability to understand written information. The same evaluation will provide information about what SDI's will help improve the Student's reading ability. The District must fund such an evaluation.

An independent transition to adult life assessment is also an equitable remedy in this case. While the O\*NET assessment may help explore the Student's aptitudes and interests, the District has never conducted a

vigorous analysis to determine if the Student has necessary postsecondary and independent living skills. The Student is just months from graduation, the postsecondary plan embedded in the Student's IEP has faced an unexpected setback, and the Student's progress towards transition goals is unknown. The District must fund such an evaluation.

There is no preponderance of evidence that the Student requires an independent assistive technology evaluation. I decline to order such relief.

Finally, resolution of the Student's demand for compensatory education is confounding. There is very little objective evidence of the harm that the Student suffered as a result of the District's failure to provide a FAPE. The Student was capable of grade level work, and the Student thrived academically. Under *Endrew, supra*, that tends to suggest that the various inappropriate IEPs did not yield substantive harm.

At the same time, the Student's reading is impaired, the Student's actual ability to read is unknown, and the District made no effort to reconcile the contradictory information about the Student's reading ability. In addition, the District set IEP goals that would not have the Student reading at an 8<sup>th</sup> grade level by graduation (if those goals were an accurate proxy for the Student's reading comprehension). All of this taken together amounts to preponderant evidence of substantive harm.

With no make whole evidence, I default to an hour for hour approach. The best evidence in the record to calculate hours owed is the amount of time that the Student spent in the Read 180 computer-based program. I round that to one hour per day for each day that school was in session from November 10, 2018 through the date of this order. That includes days that

the District was open for remote or hybrid instruction during the COVID-19 pandemic.

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

Until the Student graduates, the compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent.

After the Student graduates, all of the same limitations on the use of compensatory education apply except for restrictions that limit the use of compensatory education to items not provided through the Student's IEP (because the Student will not have an IEP after graduation).

Under the unique circumstances of this case, the hours of compensatory education may be used at any time from the present until Student turns age twenty-five (25). The compensatory services shall be provided by appropriately qualified professionals selected by the Student. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

## ORDER

Now, April 10, 2021, it is hereby **ORDERED** as follows:

1. The District shall fund an independent psychoeducational evaluation of the Student.
2. The District shall fund an independent transition to adult life evaluation of the Student.
3. The Student is awarded one hour of compensatory education for each day that the District was in session from November 10, 2018 through the date of this order, including days that the [school] was open for remote or hybrid instruction during the COVID-19 pandemic.
4. The Student may use the compensatory education awarded herein in any way consistent with the limitations set forth in the accompanying decision.

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

/s/ Brian Jason Ford  
HEARING OFFICER