

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. 21377-1819
CLOSED HEARING**

Child's Name:

G. W.

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

08/22/2019

Introduction

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

Very few facts in this case are disputed. Comparing the factual averments in the parties' closing briefs underscores this point.¹ Rather, the parties view the facts differently. The Parents allege that the educational evaluations conducted by the District were deficient, and that the special education the District provided for the Student was not reasonably calculated to provide the Student a free appropriate public education (FAPE). In contrast, the District points to the same evidence and concludes that its actions satisfied its obligations to the Student.

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

Issues

The issues presented in this hearing are:

1. Did the District offer a FAPE to the Student from October 31, 2016 through the present and, if not, is the Student owed compensatory education?
2. Is the Student's Individualized Education Program (IEP) appropriate and, if not, what amendments are necessary?

Findings of Fact

Some of the documentary evidence is duplicative. For convenience, if the same document was entered as a Parent exhibit (P-#) and as a School exhibit (S-#), I refer to one or the other but not both. My reference to one party's copy of any exhibit comes only after confirmation that the other party's copy is identical.

I carefully reviewed and considered the record in its entirety but make findings of fact only as necessary to resolve the issues before me. I find as follows:

Background

1. There is no dispute that the Student is a child with disabilities as defined by the IDEA. Currently, the Student qualifies for special education as a child with Autism and a secondary classification of Speech and Language Impairment (SLI). P-15.

¹ For the most part, the parties propose the same findings of fact. In instances where the parties propose identical facts, and those facts are supported by the record, I incorporate language from the parties' briefs into my own findings.

2. The Student received Early Intervention Preschool (EI) services as a child with Autism through the Intermediate Unit in which the District is located. P-1.
3. The Student enrolled in the District for kindergarten at the start of the 2008-09 school year.
4. The District first evaluated the Student in May 2008 (technically a reevaluation) and completed speech and language assessments as part of that evaluation. P-1.
5. The District reevaluated the Student again in June 2011 (end of 2nd grade). P-1.
6. The District administered intelligence tests as part of the June 2011 reevaluation, but a Full Scale Intelligence Quotient (FSIQ) could not be calculated because some subtests on the Verbal Comprehension Index (VCI) were not attempted. P-1.
7. Behavior rating scales administered as part of the June 2011 reevaluation revealed deficits in areas of social skills (proximity, conversation skills, understanding body language). P-1.
8. At the time of the 2011 reevaluation, the Student was easily distracted in class, was off-task. P-1.
9. At the time of the 2011 reevaluation, the Student had difficulty with reading comprehension and written expression. P-1.
10. In the 2011 reevaluation, the District concluded that the Student had continuing needs in the areas of Speech and Language (S/L) and Occupational Therapy (OT). P-1.
11. In the 2011 reevaluation, the District concluded that the Student continued to be eligible for special education as a student with Autism and SLI. P-1.
12. The District reevaluated the Student again in September 2013 (start of 5th grade). P-1.
13. The September 2013 reevaluation (2013 RR) included cognitive and academic testing, and ratings of the Student's adaptive skills and behavioral functioning. P-1.
14. On the Wechsler Intelligence Scale for Children, 4th Edition (WISC-IV), the Student scored in the Extremely Low range in Verbal Comprehension (55), Perceptual Reasoning (69), and Working Memory (65). The Student scored in the Borderline range in Processing Speed (75). P-1.
15. The Student's FSIQ was found to be in the Extremely Low range (58). P-1.
16. The District's Psychologist who conducted the 2013 RR noted that the WISC-IV results may have been lowered by the Student's Autism and inattention. However, the Psychologist concluded that the results "should be considered an estimate of [the Student's] intellectual abilities. . ." P-1.
17. For academics, the 2013 RR included the Woodcock-Johnson Tests of Academic Achievement, 3rd Edition (WJ-III). P-1.
18. The Student obtained scores in the Low Average Range on Basic Reading Skills (83), Letter Word Identification (82), Word Attack (86), Math Calculation (83). The Student scored in the

Extremely Low Range on Reading Comprehension (62). The Student scored in the Borderline range on Spelling (75), Writing Samples (73), and Applied Problems (73). P-1.

19. In general, the Student's performance on the WJ-III academic assessment was stronger than what would be expected, based on the Student's scores on the WISC-IV. P-1. The statistical validity of the comparison is unknown.
20. Both the Parents and the Student's teachers noted adaptive and behavioral skills concerns, with teachers providing higher ratings in the school setting (indicating a greater concern in school as compared to home). P-1.
21. The District reevaluated the Student again in November of 2014 (6th grade).
22. The November 2014 reevaluation report (2014 RR) included a review of past evaluations, curriculum-based assessments, OT testing, Physical Therapy (PT) testing, and the administration of Comprehensive Testing of Phonological Processing, 2nd Edition (CTOPP-II). P-1.
23. Standardized, normative cognitive academic and intelligence tests were not administered (or re-administered) as part of the 2014 RR. P-1.
24. The 2014 RR continued the Student's eligibility classification of Autism and SLI. P-1.
25. The District began implementing Verbal Behavior (VB) techniques and using the VB-MAPP to assess the Student's progress on skills taught through VB during the 2014-2015 school year. P-35.
26. The District conducted a Functional Behavior Assessment (FBA) of the Student in October 2015 (7th grade). P-3.

2016-17 School Year (8th Grade)

27. The Student attended a full-time autistic support program in one of the District's middle schools during 8th grade. As part of that program, the Student received Math, English Language Arts (ELA), and Science instruction in an autistic support classroom. The Student also received language and functional academic skills in the autistic support classroom as well. This time accounted for about 70% of the Student's day. P-8, P-10.
28. During 8th grade, the Student participated in the regular education environment for specials, lunch, and assemblies. This time accounted for about 30% of the Student's day. P-8, P-10.
29. The Student's IEP included goals for math, written expression, reading, reading comprehension, language, and behaviors. These goals focus on the same domains that were targeted during the prior school year, signal that the Student's 8th grade program was a continuation of the Student's 7th grade program. However, mastery levels for many goals remained the same from the prior school year as well. C/f P-5, P-8, P-10.
30. The Student's IEPs included a 1:1 assistant or Personal Care Assistant (PCA) at all times from the 2016-17 school year through the present. P-5, P-8, P-10, P-17, P-26, P-27.

31. More specifically, the Student received special education pursuant to an IEP dated February 5, 2016. P-5. That IEP was revised on March 3, 2016. The revisions concerned the Student's present education levels and specially designed instruction. P-8. The revised IEP was replaced by a new IEP on February 9, 2017. P-10. The February 2017 IEP includes some new goals, updates some goals from the revised IEP, and copies several goals from the revised IEP verbatim (including baselines and mastery levels).
32. The District implemented Verbal Behavior (VB) techniques within the autistic support classroom. This was done with the assistance of the Pennsylvania Training and Technical Assistance Network (PaTTAN). See, e.g. NT 47-49.
33. The VB-MAPP continued to be an assessment tool used to track the Student's performance on skills taught through VB techniques. The VP-MAPP assesses skills associated with typically developing peers at the 0 to 48 month level. NT 48.
34. The Student completed the majority of the VB-MAPP during the 2014-2015 and 2015-2016 school years. The Student completed the VB-MAPP in the fall of 2017, but the difference between the Student's skill at the end of the 2014-15 school year and the fall of 2017 were minimal according to the VB-MAPP. P-35, NT 47-49.
35. On February 14, 2017, the Parents asked the District to reevaluate the Student. P-11. The District issued a form to obtain the Parents' consent for a reevaluation, and the Parents provided consent on March 7, 2017. P-12.
36. The District completed a reevaluation report on May 6, 2017 (2017 RR). P-15.
37. The 2017 RR included an administration of the WISC-V, an updated version of the WISC-IV. P-15.
38. The Student received higher scores on the WISC-V than on the WISC-IV in 2013. The Student obtained scores in the Extremely Low range (62) on the Verbal Comprehension Index (VCI); the Low range (75) on the Processing Speed Index (PSI); the Low Average range (82) on the Working Memory Index (WMI), the Average range (100) on the Fluid Reasoning Index (FRI); and the High Average range (111) on Visual Spatial Index (VSI). P-15.
39. The testing found the Student's FSIQ and General Ability Index (GAI) in the Low Average range (FSIQ of 80 and GAI of 83) P-15.
40. To assess academic achievement, the 2017 RR included an administration of the Wechsler Individual Achievement Test, 3rd Edition (WIAT-III). P-15.
41. As measured by the WIAT-III, the Student obtained scores the Very Low range on the Oral Language composite (53), the Low range on the Reading Comprehension and Fluency (63) and Written Expression (59) composites, the Below Average range on the Total Reading composite (73), the Low Average range on the Mathematics composite (80), and the Average range on the Reading composite (85). P-15.
42. The Student's reading scores on the WIAT-III were obtained using 3rd grade reading passages, which was the Student's instructional level. P-15.

43. The Student's total achievement as measured by the WIAT-III was in the Low range (62). P-15.
44. The 2017 RR also included the administration of several rating scales to assess the Student's behaviors. The Behavior Rating Inventory of Executive Functioning, 2nd Edition (BRIEF-2), the Conners-3, the Social Responsiveness Scale, 2nd Edition (SRS-2), and the Behavior Rating System for Children, 3rd Edition (BASC-III) were all used. P-15
45. Across the various rating scales, Parents and teachers signaled concerns about the Student's executive functioning, attention and hyperactivity, social skills, language skills (as measured by deficits in social communication, and reciprocal social behaviors), communication skills, behavior, and adaptive skills. The same ratings endorsed a lack of social motivation, restricted interests, and repetitive behaviors. P-15.
46. The 2017 RR also included a Central Auditory Processing Evaluation, a vocational skills assessment, and updates to prior S/L, OT, and PT assessments. P-15.
47. The 2017 RR included a review of parent input. P-15.
48. The 2017 RR included a review of current classroom-based assessments including a review of Student's progress in Reading Mastery and the VB-MAPP. P-15.
49. The 2017 RR included a transition assessment. P-15.
50. The 2017 RR did not include an assistive technology evaluation or a new FBA, but included updated FBA information taken without a formal assessment or behavioral observation. P-15.
51. The Student's IEP team convened on May 19 and June 6, 2017. P-16, P-17. The Student's full-time autistic support teacher for the upcoming 2017-18 school year attended the meeting. The team agreed that the Student would benefit from community-based instruction as a method for generalizing skills. The team also agreed that the Student should receive direct instruction and SDI for reading comprehension, written expression, math, functional life skills, social skills, and task completion. See, e.g. NT 34-37.
52. The District offered an IEP to the Parents with a Notice of Recommended Educational Placement (NOREP) on June 6, 2017. P-17. Through SDI and participation in the District's "Functional Academy," the IEP provided programming aligned with the IEP team's discussion on May 19 and June 6, 2017.
53. Regarding goals, however the June 2017 IEP includes several goals that are copied verbatim from the February 2017 IEP (including baselines and mastery levels), or carried over with updated baselines but the same mastery level. Reading and reading comprehension goals were revised to clarify the Student's 3rd grade instructional level.
54. On the whole, despite some wording changes, the goals of the June 2017 IEP were substantively similar if not identical those of the February 2017 IEP, which was mostly carried over from the March 2016 revised IEP, which was substantively identical to the February 5, 2016 IEP. C/f P-17, P-10, P-8, P-5.
55. The June 2017 IEP did not change the Student's PBSP. P-17.

56. The June 2017 IEP did not change the nature of the Student's special education placement (as opposed to building placement) or the Student's level of inclusion. P-17.

2017-18 School Year (9th Grade)

57. The Student attended one of the District's high schools for the 2017-18 school year.

58. During the 2017-18 school year, the Student received reading instruction in an autistic support classroom. The District used the Reading Mastery program, which is a research-based, systematic program. The Student's autistic support teacher modified some of the Reading Mastery protocols on an *ad hoc* basis to incorporate VB techniques. NT 51-52.

59. The Student received instruction in written expression in the autistic support classroom. The District did not use a packaged writing curriculum during the 2017-18 school year. NT 53.

60. The Student received math instruction in a learning support classroom using the Math 180 program. Math 180 is a research-based program that has whole group instruction, small group instruction, computer-based instruction, and independent work. NT 54-55. The Student's teachers would modify Math 180 protocols on an *ad hoc* basis. NT 54-55.

61. The Student participated in a functional academics class as part of the District's transition program. As part of that class, the Student received some Community Based Instruction (CBI) two to three times each week. On the days where the Student did not participate in CBI, the Student would deliver mail or copies to staff in the high school, and work on snack cart prep. NT 56-59.

62. The Student participated in social skills group lessons two times per six day cycle. See NT 56-59.

63. The Student's IEP team convened on September 25, 2017. The IEP team revised the Student's IEP to update the Student's present education levels. P-18.

64. The Parents had the Student evaluated by a private neuropsychologist (the Private Evaluator). The Private Evaluator assessed the Student in February and March 2018, and drafted a Neuropsychological Report (the Private Evaluation).² The Private Evaluation is dated March 25, 2018. P-20.

65. The Parents testified that they gave a copy of the Private Evaluation to the District immediately upon receipt in March 2018. The District claims that it received the document sometime in June 2018. The District's copy of the Private Evaluation is S-22. That document does not have a receipt date stamp. I decline to make a finding as to the date of the District's receipt of the Private Evaluation. As discussed below, that date is in no way outcome determinative, and has no impact upon remedies.

² Independent Educational Evaluation (IEE) is a term of art related to a family's right to an evaluation by someone outside of the LEA at public expense if certain conditions are met. The Parents describe the Private Evaluation as an "Independent Evaluation." I use the term Private Evaluation to avoid confusion with IEEs — especially because reimbursement is not an issue.

66. The Private Evaluator administered tests of cognition, verbal functioning, visuospatial functioning, attention and executive functioning, processing speed, memory, fine motor skills, and academics. The Private Evaluator had Parents and teachers complete rating scales to assess the Student's social, behavioral, and emotional functioning. The Private evaluator also observed the Student in school. P-20
67. The Private Evaluation includes the results of testing and rating scales, a report of the school observation, parental input, and a review of the Student's records, including prior testing. P-20.
68. The Private Evaluator concluded that the Student continued to be a child with Autism and a Language Disorder.³
69. The Private Evaluation includes 15 recommendations for specially designed instruction (SDI), accommodations, supports, and placement. P-20. Generally, the Private Evaluator recommended that the Student receive SDI to address broad reading, writing, and math skills, executive functioning skills, social skills, and independent living / transition skills. P-20.
70. Through the recommendations, the Private Evaluator provided examples of the type of SDI that the Student would benefit from across the identified domains, but without recommending particular packaged curricula or methodologies. P-20
71. The Private Evaluator recommended "1:1 [one-to-one] instruction and small group instruction in a self-contained support setting with a low student-teacher ratio for academic content areas in reading/literacy, mathematics and written language; inclusion settings (with a regular education and language/autistic support teacher) can be considered for Science, History/Social Studies and special classes in classrooms with low student-teacher ratios." P-20 at 16.
72. Several of the Private Evaluator's recommendations urge an assertive technology evaluation or use of particular devices. P-20.
73. The Private Evaluator recommended an updated FBA followed by revisions to the PBSP depending on the FBA's findings. P-20.
74. The Private Evaluator recommended development of an individualized transition plan for the Student, focused on generalization of vocational and independent living skills. P-20.
75. The Private Evaluator recommended that the Student would benefit from a 12 month program. P-20.
76. On July 11, 2018, the Student's IEP team reconvened with the Private Evaluator to review the Private Evaluation. The District agreed to initiate the SETT framework to determine the

³ The precise extent to which the medical/psychological diagnosis of "Language Disorder" overlaps with the IDEA's definition of SLI is not established by the record. However, the Private Evaluator did not recommend removing either Autism or SLI as the Student's qualifying disabilities.

Student's assistive technology needs in the fall of 2018.⁴ The District also agreed to conduct a transition assessment in September 2018 using the Practical Assessment Exploration System (PAES), help the Student use a planner to develop organization skills, and include supported work experience as part of the Student's transition program. P-22.

2018-19 School Year (10th Grade)

77. The SETT framework started at the beginning of the 2018-19 school year as planned, with oversight from IU personnel.
78. During the 2018-19 school year, the Student participated in a learning support classroom for math and science. The Student received the Reading Mastery program in an Autistic support classroom — the same program as in the 2017-18 school year, delivered by the same teacher. The Student also received functional academics in the Autistic support classroom, but from a new teacher. P-40, NT 96-99).
79. During the functional academics class, the Student was working on meal preparation, shopping for meal preparation, and working with the school snack cart. These activities took place on Tuesdays, Wednesdays, and Fridays. NT 210- 222. The shopping included trips to grocery stores so that the Student could practice using a shopping list, interacting with store employees and paying for items. See, e.g. NT 96-98, 212.
80. On Monday and Thursday, the Student participated in a supported work program at a nearby convenience store.⁵ When participating in the supported work program, the Student would miss functional academics, Read 180 (an additional reading program started during the 2018-19 school year; see findings below), and lunch. See, e.g. NT 96-98, 212.
81. In addition to Reading Mastery, the Student received an additional period of reading instruction from a learning support teacher using the Read 180 program. Similar to Math 180, Read 180 includes whole group, small group, independent and computer-based instruction. The Student received Read 180 daily in lieu of the CBI and prevocational instruction that the Student received during the 2017-18 school year. NT 88-91.
82. The Student's IEP team reconvened on October 2 and 5, 2018. The District then issued a revised IEP, updating the Student's Present Education Levels and changing the Related Services provided through the IEP. P-26. Regarding the Related Services, the revised IEP removed direct OT, but provided consultative OT serves once per semester. All other related services remained substantively identical. C/f P-17, P-26.
83. The District issued the revised IEP with a NOREP. The Parents used the NOREP to reject the IEP on October 12, 2018. S-26.

⁴ SETT stands for Student, Environment, Tasks, and Tools. The framework is an evaluative process in which children use assistive technology and the benefits of the technology are assessed. This prompts either ongoing implementation or adjustments. In this way, strictly speaking, the SETT framework is different than an "evaluation." An evaluation captures a child's abilities at a point in time. The SETT framework is an ongoing process.

⁵ Naming the store may give readers a clearer sense of the supported work environment. Weighing that against the Student's privacy interests, I decline to do so.

84. On October 29, 2018, the IEP team met again. The District proposed revisions to the Student's Present Education Levels, Participation in Assessments, and SDI. P-27. Regarding the SDI, the proposed IEP added: a letter grade system for "academic environments;" clarification that teachers had discretion to use *unmodified* assignments in regular education classes, but that the Student would be graded on *modified* assessments; reminders for late or missing work with teacher check-ins; chunking of larger assignments and projects;⁶ tools like graphic organizers for written assignments; testing accommodations; and reminders to self-advocate. P-27.
85. On October 31, 2018, the Parents requested this due process hearing.
86. The SETT framework was discontinued when the Parents requested this hearing. NT 441-443.
87. The PAES assessment, which is designed to be an ongoing process completed over time, started in December 2018 (after this hearing was requested). NT 336-339.
88. In March of 2019, the District's Transition Coordinator informed the Parents that the PAES assessment was being incorrectly administered, as such, the results were invalid, and the assessment would need to be re-administered in its entirety. P-41.

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 Parent 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, 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)

⁶ "Chunking" breaks larger projects into more manageable tasks. The term is described in the IEP. P-27.

(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.

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

A school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. See, *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "de 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 *Endrew 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." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id.* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute indication of progress even for an academically strong child, depending on the child's circumstances.

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated

at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Independent Educational Evaluation at Public Expense

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

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

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).

In this case, all witnesses testified credibly. It is worth repeating that few facts were in dispute. Not all witnesses shared the same opinion about what the facts imply, or what the law requires, but those discrepancies are honest disagreements, not an attempt at deception.

Discussion

The difficult question in this case is also the underlying basis of the parties' dispute: what amount of progress should be expected of the Student over a period of time? There is no dispute about the Student's actual progress. Rather, the Parents argue that the Student could have gone further with appropriate special education and the District argues that the Student's progress is evidence of appropriate special education.

No evidence in this case establishes the Student's anticipated rate of skill acquisition or academic progression.⁷ The Student received FSIQ scores of 53 in 2014 and 80 in 2017. Absent a brain injury or certain neurological conditions, FSIQ should be stable over time. In the context of this case, I conclude that the Student's 2014 FSIQ score is more indicative of the Student's ability to sit for the examination than of the Student's intelligence (test publisher's validity guidelines notwithstanding). The FSIQ of 80, and the GAI of 83, however, yield virtually no information about what rate of progress should be expected of the Student. Both parties agree that the Student's needs are many, complex, and interconnected. Drawing broad conclusions about the Student's abilities from a single number on one intelligence test that may not actually measure the Student's intelligence is inappropriate.⁸

In the absence of objective evidence establishing a reasonably expected acquisition rate, I cannot take the amount of the Student's progress as evidence that FAPE was or was not offered. The best evidence in the record of this case what amount of amount of progress to expect from the Student is the Student's IEP. Starting with the IEP in place on October 31, 2016, the Student's goals set a reasonable expectation of the Student's progress over the anticipated duration of the IEP. In the absence of any better evidence, if the IEP called for the Student to move from a baseline of X to a goal of Y over the IEP's duration, I conclude that expectation was reasonable at the time that the IEP was drafted by the District and approved by the Parents.

October 31, 2016 Through February 8, 2017 (8th Grade)

At the start of the period of time in question, the Student received special education pursuant to the February 2016 IEP, as modified on March 3, 2016. That IEP included goals for math, pragmatic language, following directions, sentence writing, defining homonyms (described as an intraverbal language skill), progress through the Reading Mastery curriculum (baselines indicate that the Student had nearly met that goal when it was offered), reading comprehension at the 2nd grade level, describing recent events (described as an intraverbal retell skill), identifying the similarities and differences between items, and generating synonyms. The IEP also had two behavior goals (tied to the PBSP), a functional goal calling for the Student to independently complete a pre-vocational work checklist, and a sensory goal targeting the Student's ability to identify the Student's own behaviors when prompted. 14 goals in all.

The record does not support a finding that the 2016 IEP, as revised, was inappropriate at the time it was offered. I award no compensatory education for the period from October 31, 2016 through February 8, 2017.

February 9, 2017 Through June 6, 2017 (8th Grade)

For the period of time in question, the March 3, 2016 revised IEP was in place until February 9, 2017 when a new, annual IEP was drafted. Based on the analysis above, it was appropriate to

⁷ To my knowledge, there is no assessment that objectively establishes an anticipated rate of acquisition for children with atypical cognitive profiles. This is also the primary problem with the *Reid* standard.

⁸ The IDEA's requirement for multiple measures using valid instruments flows from the same concern. See 20 U.S.C. § 1414(b)(2)(B), (C).

expect the Student to master the 14 IEP goals by February 2017. Further, if the Student made the expected amount of progress, the Student would either have new goals in the February 2017 IEP, or would be working towards the same skills at a higher level.

The February 2017 IEP's goals were, in significant part, repeated verbatim from the February 2016 IEP because the Student had not mastered those goals. This repetition does not indicate a denial of FAPE by itself. If a goal is appropriate, and a child does not master the goal, the IEP team must determine how the IEP should change to enable the child to reach the goal. A gross oversimplification illustrates the point: If a child cannot read, a goal for the child to read is appropriate. If the child still cannot read by the end of the IEP term, the team must decide what it will do differently to teach the child to read. Simply the expectation that the child will read is likely inappropriate under those oversimplified facts.

The transition from the March 2016 revised IEP to the February 2017 IEP is where the denial of FAPE begins. The SDI and related services that the District provided to the Student did not substantively change for the remainder of the 2016-17 school year. February is not too late in a school year to modify a child's program after the child does not reach expected goals.

Conversely, if the District provided appropriate special education under the 2016 IEP, that would signal a problem with the goals. If the special education was appropriate and the goals were not met, the goals did not set a reasonable expectation of the Student's progress. If that were true, the IEP team would be obligated to revise the Student's goals.

A third option would be for the District to propose a reevaluation so that it could better understand the Student's needs. Thanks to consistent data collection, the District was not surprised by the Student's progress when the 2016 IEP expired, and so there was time for the District to reevaluate. There is no dispute that the District did not ask to reevaluate the Student. Rather, the Parents asked for a reevaluation after the District offered the February 2017 IEP.

In this case, neither the goals nor the special education changed in substance after the Student did not make the progress expected in the 2016 IEP. Under the facts of this case, the District's failure to reassess the Student's goals or the Student's special education, or both, or propose an evaluation constitutes a substantive denial of FAPE for which I will award compensatory education. Given the pervasiveness of the Student's disabilities and the stagnation of the Student's program, I award full days of compensatory education from February 9, 2017 to the end of the 2016-17 school year.

The 2017 RR

Shortly after the District offered the February 2017 IEP, the Parents requested a reevaluation. The evaluation concluded with the 2017 RR. The Parents do not specifically challenge any part of the 2017 RR, including the test results. Rather, the Parents argue that the 2017 RR was inappropriate because it failed to include an assistive technology evaluation, a transition assessment, or a new FBA. The Parents argue that the 2017 RR did not assess all of the Student's suspected disabilities as a result of these omissions.

I find that the 2017 RR comprehensively assessed all of the Student's suspected areas of disability. However, under the facts of this case, the omission of a transition assessment — or a plan for a transition assessment — was inappropriate. The transition assessment is different

from the omitted assistive technology evaluation and new FBA. The District already had information concerning the Student's use of technology. The District also had good information about the Student's behaviors both through a prior FBA and current data. In contrast, the District did not have a systematic, objective assessment of the Student's transition needs to either support its transition plan or suggest changes. Consequently, the District did not gather some information necessary for IEP development as a result of the omission.

To date, the District has not evaluated the Student's transition needs. I believe that the District has every intention to conduct the PAES assessment at the start of the upcoming 2019-20 school year. I find that the PAES assessment is an appropriate way to gain information about the Student's transition needs. I also find that, under the circumstances of this case, it is appropriate to order the District to conduct the evaluation regardless of its willingness to do so.

June 6, 2017 Through July 11, 2018 (9th Grade)

The February 2017 IEP remained in place until June 6, 2017. At that time, the District reconvened the IEP team to adjust the IEP for the Student's move from middle school to high school. It was appropriate for the District to bring the high school autistic support teacher to the meeting. I also see no flaw in the parties' agreement to make changes to enable the Student to participate in the District's Functional Academy.

While these changes enabled the Student to take advantage of programs available at the high school that were not available at the middle school, there was no corresponding change to the Student's goals on the whole. As a result, in large part, the Student was working on goals set in February 2016 (near the middle of 7th grade).

To be clear, a number of the goals changed between the February 2017 IEP and the June 2017 IEP. The Student's reading goals were connected to the Student's instructional level, and some goals were new. Moreover, as described above, it is appropriate to continue unmet goals if those goals are appropriate and if the IEP changes the services that the Student will receive to enable the Student to reach the goals. Under the circumstances, leaving goals in place may have been consistent with the District's FAPE obligation if the District was also offering significant changes to the Student's special education.

Comparing 2016-17 school year to the 2017-18 school year, the District's provision of special education for the Student was more similar than different. The Student's level of inclusion did not change, nor did the Student's special education placement. Even so, some of the Student's academic programs changed, CBI was a new service, and there was a greater emphasis on social and vocational programming with an ultimate goal of skill generalization.

I find that these changes, though small in number, are significant. As discussed above, I rely on IEP goals to set the measure of what amount of progress should be expected of the Student over the term of an IEP because there is no better evidence. In this case, therefore, the District had offered an IEP with several stale goals, but with fresh programming. As such, the June 2017 IEP was reasonably calculated to provide a FAPE at the time it was offered.

By February 2018, however, the Parents were concerned enough about what they viewed as the Student's lack of progress under the June 2017 IEP to retain the Private Evaluator. Under the IDEA, the Parents were well within their rights to obtain the Private Evaluation, and the

District was obligated to consider the Private Evaluation. It was appropriate for the District to facilitate the Private Evaluator's observation and participation at an IEP team meeting.

The results of the Private Evaluator's testing are consistent with the District's RRs. In that regard, the Private Evaluation produced very little new information about the Student's needs. Rather, the parties' disagreement about the Private Evaluation centers on its recommendations. From the Parents' perspective, the Private Evaluation recommends a host of new services that would enable Student to make meaningful progress. From the District's perspective, the Private Evaluation recommends a slew of general special education techniques that are consistent with the special education that the Student was already receiving.

For the most part, I agree with the District's perspective concerning the Private Evaluation. It may be that the Private Evaluator felt uncomfortable endorsing particular curricula or methodologies. Whatever the reason, the result is that the recommendations were categorical, not specific. The District was providing the broad categories of services that the Private Evaluator recommended at the time the Private Evaluation was written.

There are two contrary examples, however, in the Private Evaluation. The Private Evaluator recommended a transition assessment and an assistive technology assessment. The Parents had raised concerns about those domains, and the Private Evaluation made it clear that those domains were (from that point forward) suspected areas of disability.

As noted in the findings above, there is a discrepancy between the parties' account of when the District received the Private Evaluation. Either there was a three month delay between the District's receipt and the IEP team meeting called to review the Private Evaluation, or the District called the meeting as soon as it could after getting the document. Resolving the discrepancy makes no difference.

The only actions that the parties agreed to after reviewing the Private Evaluation were the only actions that the law required: agreements to conduct transition and assistive technology evaluations. There is no dispute that the parties agreed to the evaluations during the July 11, 2018 IEP team meeting. The date of the meeting represents either immediate action or a three-month delay. The dispute is irrelevant, however, because both evaluations were seriously flawed. Starting inappropriate evaluations sooner would yield the same outcome.

In sum, for the 2017-18 school year, the Student primarily worked on IEP goals set years before, but with programming sufficiently different to justify the lack of change under the particular facts of this case. The Parents then became concerned about the Student's progress and obtained the Private Evaluation. On the whole, the Private Evaluation was consistent with prior RRs and recommended programming similar in substance to what the District was providing. The parties also agreed to the assessments recommended by the Private Evaluation (either with or without a three-month delay between the Private Evaluation and the IEP team meeting), and agreed to start those assessments in September 2018. I find no denial of FAPE in the 2017-18 school year.

July 12, 2018 Through July 26, 2019 (10th Grade)

The SETT framework started at the beginning of the 2018-19 school year as planned, but was discontinued when the Parents requested this hearing, and never concluded. The PAES

evaluation did not start until December 2018, and was conducted incorrectly yielding unusable results. To date, the Parents have no resolution about the Student's assistive technology and transition needs. Both the Private Evaluation itself and the parties' agreement to conduct those SETT and PAES evaluations indicate an expectation that both would produce information to drive IEP development. The PAES evaluation is particularly important, as it relates to the Student's future beyond high school.

The District's failure to collect necessary information yields a substantive denial of FAPE. For the entirety of the 2018-19 school year, the District knew that it was missing information from necessary evaluations. Regarding the SETT, the litigation does not stop pending evaluations absent an explicit revocation of consent. Regarding the PAES, both the delay and the errors were out of the District's control, but those difficulties cannot diminish the Student's right to a FAPE. Satisfaction of that right requires an IEP based on data obtained through evaluations and progress monitoring. Evaluation data was missing during all of the 2018-19 school year, and the District had actual knowledge evaluations agreed upon in July 2018 were not completed. The final session of this hearing was July 26, 2019. The Parents still do not have the information that both parties agreed to obtain over a year before. I award compensatory education to remedy this denial.

The denial of FAPE occurred in discrete domains related to the evaluations. However, the missing PAES assessment is directly related to the overarching functions of the Student's education. Given the equitable nature of compensatory education and the particular importance of unknown information in this case, I award 30 minutes of compensatory education for each hour that the Student attended school during the 2018-19 school year.

Extended School Year

The Parents demand compensatory education for the District's alleged failure to provide a FAPE during ESY in the summers of 2017, 2018, and 2019. No evidence was presented in support of those claims, and so they are denied.

ORDER

Now, August 22, 2019, it is hereby **ORDERED** as follows:

1. For the period from October 31, 2016 through February 8, 2017, I find no denial of FAPE and order no remedy.
2. For the period from February 9, 2017 until the end of the 2016-17 school year, I order one hour of compensatory education for each hour that the Student attended school.
3. For the 2017-18 school year, I find no denial of FAPE and award no remedy.
4. For the 2018-19 school year, I order 30 minutes of compensatory education for each hour that the Student attended school.
5. Compensatory education may be used by Parents in their sole discretion. If used for services, the provider of the services is properly credentialed, licensed, or certified, and the services take the form of appropriate developmental, remedial, or enriching instruction. If

used for products, the products must be materials that further the goals of Student's current or future IEPs. Products and services must be obtained at market rates for the District's geographical area.

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

/s/ Brian Jason Ford
HEARING OFFICER