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

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

ODR No. 28345-23-24

CLOSED HEARING

Child's Name:
M.R.

Date of Birth:
[redacted]

Parents:
[redacted]

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Hearing Officer:
Brian Jason Ford

Date of Decision:
01/05/2024

Introduction

This special education due process hearing concerns the educational right of a child with disabilities (the Student). The matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. and Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504).

The Student's public school district (the District) has provided special education to the Student for several years. The Student's special education program has remained consistent over the years, with few significant or substantive changes over time.

The Student's parents (the Parents) allege that the Student's special education program is inappropriate, and that the Student has not made meaningful progress while attending the District. At all times, the Student's program was provided pursuant to a series of Individualized Educational Programs (IEPs). The Parents allege that those IEPs were not reasonably calculated to provide a Free Appropriate Public Education (FAPE) when they were offered, and so compensatory education is owed to the Student.

The Parents also allege that the District violated their right to meaningfully participate in IEP development in violation of the IDEA. The Parents demand compensatory education for the Student to remedy this violation as well.

In May of 2022, the Parents obtained a private Neuropsychological Evaluation for the Student and shared that evaluation with the District. The Parents demand reimbursement for that evaluation.

At the start of the 2023-24 school year, the District removed the Student from science and social studies classes so that the Student could spend more time receiving a special education program. The Parents allege that this constitutes disability-based discrimination in violation of Section 504.

Finally, the Parents allege that the Student must be educated in a specialized private school to receive a FAPE. The Parents demand prospective placement in a private school of their choice.

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

Issues

While there are non-substantive differences in how the parties parse the issues, four issues were presented for adjudication:[1]

1. Did the District violate the Student's right to a FAPE from July 24, 2021, through the present? If so, is the Student entitled to compensatory education?

2. Did the District violate the Parent's right to meaningful participate in IEP development for the Student from July 24, 2021, through the present? If so, is the Student entitled to compensatory education?

3. Are the Parents entitled to reimbursement for a private Neuropsychological Evaluation that they obtained on May 13, 2022?

4. Is the Student entitled to prospective placement at a private school selected by the Parents?

5. Did the District discriminate against the Student on the basis of the Student's disability in violation of Section 504?

The Parents' demand for reimbursement arises under Section 504, not the IDEA.

The issue concerning the private school is a *prospective placement* claim. Discussed below, prospective placement and tuition reimbursement are significantly different claims and must not be conflated.

Findings of Fact

I reviewed the record in its entirety but make findings of fact only as necessary to resolve the issues before me.

Both parties proposed findings in their post-hearing briefs (albeit in different structures). To the extent that I find the parties' proposals consistent with the record, I adopt them and intersperse them with my own findings.

I find as follows:

Background

[1] During the hearing, I described these as two issues with various sub-issues. The substance, however, is the same.

1. The Student enrolled in the District [redacted] in the 2018-19 school year. *See, e.g.* P-56.

2. The Student has been identified under the exceptionalities of Specific Learning Disability (SLD) in reading, math, and writing and Other Health Impairment (OHI). *Passim, see, e.g.* J-14, J-45.

3. The Student has not been identified as a child with a Speech and Language Impairment but qualifies for school-based speech therapy and occupational therapy. J-14.

4. Student has average cognitive abilities, with a full-scale IQ of 94 and General Ability Index (GAI) of 103. Working memory and processing speed are relative weaknesses for the Student compared to the IQ score (standard scores of 89 and 76, respectively). The Student's GAI score accounts for those weaknesses. J-45, J-80.

5. More specifically, the District evaluated the Student and drafted a Reevaluation Report on December 5, 2020 (the 2020 RR). J-14. The Parents also obtained a private Neuropsychological Evaluation with a report dated May 13, 2022. J-45. While the District does not accept all of the recommendations in the private evaluation, the parties agree (and I find) that the 2020 RR and the private Neuropsychological obtained similar if not identical data concerning the Student's cognitive profile and academic performance. *c/f* J-14, J-45.

6. For the entirety of the Student's enrollment in the District, the District used Fountas and Pinnell (F&P) to obtain benchmark reading data for all children, including the Student. F&P benchmarking yields a level tied to that program, and the F&P levels have overlapping grade equivalencies. The Student was benchmarked twice in the 2018-19 school year. In the winter, the Student tested at Level A, which has a Kindergarten grade equivalency. By the spring, the Student had advanced to Level C, which also has a Kindergarten grade equivalency. The Student remained at Level C during fall and winter testing during the 2019-20 school year ([redacted]). J-14, P-56. Only fall benchmark testing was completed in the 2020-21 school year ([redacted]). At that time, the Student remained at Level C.

The 2021-22 School Year ([redacted] Grade)

7. The District found the Student eligible for Extended School Year (ESY) services for the summer of 2021. The District offered an ESY program

for the Student that summer, but the Parents declined. J-31, NT at 143.

8. At the start of the 2021-22 school year, the District provided special education to the Student pursuant to an IEP that was revised on June 6, 2021 (the 2021 Revised IEP). J-31.

9. A nonsense word is a made-up word used to assess the Student's ability to sound out words, as opposed to the Student's ability to recognize and say words on sight without sounding them out. *Passim*.

10. The 2021 Revised IEP included goals is saying nonsense words, reading real and nonsense words, reading high frequency words, encoding words, math computation, and handwriting. J-31.

11. The 2021 Revised IEP included Specially Designed Instruction (SDI) in the form of communication and enforcing clear and consistent expectations, multi-sensory instruction, small group instruction, warnings prior to schedule changes, movement breaks, verbal prompts, chunking and repetition, comprehension checks, visual models, prompts and cues, extended time, encouraging Student to not rush, written expression support, preferential seating, a tracker for reading, chunking of assignments, a visual schedule, early literacy and phonics support, computation support, reading fluency support, timers, a reward system, modification of math assessments, and supplemental math instruction. J-31.

12. The 2021 Revised IEP included 30 minutes of group occupational therapy and 30 minutes of speech therapy per cycle, with a minimum of 24 sessions for each per school year. J-31, J-35.

13. The parties met at an IEP Team meeting on September 23, 2021. At this meeting, Student's current level of academic performance and parents' concerns were reviewed. The resulting IEP update did not substantively change the Student's special education. J-34, J-35.

14. In fall F&P benchmark testing, the Student placed in Level D, which still has a Kindergarten grade equivalency. J-14, P-56.

15. In the fall of the 2021-22 school year, the District also used AIMSweb to obtain benchmark math data for all students. The benchmarking resulted in level scores for math computation and math concepts and applications. Those scores can be compared to expected scores for students based on grade levels. The Student's score in math

computation was 5, compared to an expected level of 22. The Student's score in math concepts and applications was 1, compared to an expected level of 7. J-90.

16. During the 2021-22 school year, the District placed the Student in a co-taught classes for both math and English Language Arts (ELA). NT at 73-74, 143, 643.

17. Wilson Reading (Wilson) is a research based multi-sensory reading and spelling program based on the Orton-Gillingham methodology, which is phonics based. Wilson is sequential and, if the program is followed strictly, a student must master a Wilson level before moving on to the next level. Wilson levels do not correspond with school grades. *Passim*.

18. During the 2021-22 school year, the District provided daily Wilson instruction for 45 minutes per day in a small group. In addition, the District also provided direct instruction in reading comprehension through a "push-in" model (meaning that a special education teacher would instruct the Student inside of a general education classroom through the co-teaching model). *See* NT 60-61, 82; J-34, J-39.

19. During the 2021-22 school year, the District provided daily specialized math interventions for 20 minutes per day using a curriculum called Touch Math. Touch Math was delivered to the Student in a small group within the regular education classroom. NT at 77, 83-84, 144-145, 305; J-34.

20. In the winter of the 2021-22 school year, the Student advanced in F&P benchmark testing to Level E, which has a 1st grade equivalency. J-46, P-56.

21. In the winter of the 2021-22 school year, the District repeated AIMSweb benchmark testing in math. The Student's score in math computation was had increased to 10, but fell further behind the expected level, which was now 42. The Student's score in math concepts and applications had increased to 6, slightly closer to the expected level of 11 (in comparison to fall testing). J-90.

22. On December 20, 2021, the Student's IEP team drafted a new, annual IEP (the 2021 IEP). J-39.

23. At the time of the 2021 IEP, the Student's reading fluency was assessed at 13 words correct per minute (wcpm) at the 1st grade level. J-39.

24. At the time of the 2021 IEP, the Student's writing skills were assessed at about a 46% on a third-grade rubric. J-39.

25. The 2021 IEP included goals in completing multi-step tasks in OT, sounding out phonics skills, high frequency words from the curriculum at the 2nd grade level, reading fluency at the 1st grade level, reading comprehension and writing skills at the Kindergarten level, math computation, math application, inference questions, and an articulation goal. J-39.

26. The 2021 IEP continued most of the interventions that had been in place noted above. SDI in the 2021 IEP was substantively similar to SDI in the 2021 Revised IEP with the addition of a self-edit checklist, the option to keyboard assignments, and modeling by the speech therapist. Related services (occupational therapy and speech therapy) were not changed. J-39.

27. Progress through Wilson Reading is measured by advancement through Wilson's books, which can be viewed as levels. Those books are sub-divided into parts, so a student's Wilson level could be described as 1.4 (meaning that the student is being instructed in the fourth part of book 1). Wilson levels do not equate to grade levels. The Wilson system specifies the level of mastery that a student must attain before advancing from one book to another. *Passim*.

28. The parties agree that the Student's progress through Wilson was slow, both in absolute terms and relative to Wilson's expectations.[2] *See, e.g.* NT at 271. The Student started the 2021-22 school year at book 1.3. Between December 6, 2021 and January 31, 2022, the Student progressed from book 1.4 to 1.6. J-88.

29. On February 7, 2022, the Student's teacher advanced the Student from Wilson book 1.6 to book 2 although the Student had not achieved Wilson's mastery requirements. J-88, NT at 137-38.

30. By the end of the 2021-22 school year, the Student was being instructed at Wilson book 2.3. J-88.

31. In the spring of the 2021-22 school year, the Student advanced in F&P benchmark testing to Level G, which still has a 1st grade equivalency. J-45, P-56.

[2] The parties disagree about whether the Student's progress was meaningful.

32. In the spring of the 2021-22 school year, the District repeated AIMSweb benchmark testing in math again. The Student's score in math computation was had increased slightly to 13, but fell even further behind the expected level, which was now 56. The Student's score in math concepts and applications had slightly regressed to 5, and fell further behind the expected level, which was now 15. J-90.

33. Fast Forward is a computer-based reading program published by Wilson that also works on working memory, attention, processing speed and sequencing. *See* J-56, J-52.

34. On June 13, 2022, the IEP team revised the IEP again (the 2022 Revised IEP). The IEP team reviewed data and added the Fast Forward program to the IEP. The IEP also added use of a calculator as an accommodation. J-46.

The 2022-23 School Year ([redacted] Grade)

35. The Student started the 2022-23 school year under the 2022 Revised IEP. The District placed the Student in a co-taught classes for both math and ELA. NT at 192, 266.

36. On September 8, 2022, the IEP team revised the Student's IEP again (the 2022 2nd Revised IEP). This revision added instruction in executive functioning skills two times per month for 30 minutes per session using the "Smarts" curriculum. No goal executive functioning goal was added to the IEP. *See, e.g.* J-52.

37. In the fall of the 2022-23 school year, the District repeated AIMSweb benchmark testing in math. The Student's teacher modified the benchmark testing for math computation by removing a time limitation. This was an effort to accommodate the Student's anxiety about the test. NT at 261-62. Additionally, grade-level benchmark testing is not comparable year-to-year, meaning a score of 13 at the third grade level should not be compared to a score of 9 at the fourth grade level. Rather, the AIMSweb levels should be compared to the expected level at the time of the test. *See, e.g.* J-74, J-90.

38. In the fall of the 2022-23 school year, the Student's score in math computation was 9, which was below the expected level of 22. The Student's score in math concepts and applications was 2, compared to the expected level of 12. J-90.

39. In the winter of the 2021-22 school year, the Student advanced in F&P benchmark testing to Level I, which has a 1st grade equivalency. J-74, P-56.

40. In the winter of the 2022-23 school year, the District repeated AIMSweb testing. The Student's score in math computation remained at 9, falling further behind the expected level, which was now 42. The Student's score in math concepts and applications increased to 5, slightly further behind the expected level, which was now 16. J-90.

41. Throughout the 2022-23 school year, small IEP revisions notwithstanding, the District continued to provide special education to the Student that was similar to special education provided in prior school years. The Student continued to receive daily Wilson Reading instruction for 45 minutes a day in a small group within the regular education classroom, daily reading intervention via Fast Forward, daily math interventions for 20 minutes a day using Connecting Math, small group math instruction in the regulation classroom, and executive functioning interventions twice per month. J-52, J-55, J-56; NT at 209, 211-12, 265-66, 272, 527-28.

42. On December 2, 2022 the IEP team reconvened and the District issued a new, annual IEP (the 2022 IEP). J-62, J-63.

43. The 2022 IEP included goals in handwriting legibility, typing, reading real and nonsense words, reading fluency, reading comprehension, high frequency words, writing prompt, computation problems, word problems, verbal sequencing, and articulation. J-62, J-63.

44. The Student's reading goal was aligned to the Wilson program with a goal set at Wilson book 3.3. The reading fluency and comprehension goals were set to the 2nd grade level. J-63, P-56.

45. The SDI in the 2022 IEP remained substantively unchanged. J-62, J-63.

46. On April 20, 2023, the Student received a functional hearing assessment, which found the Student did not need supports or SDI for students who are deaf or hard of hearing. J-72.

47. On May 5, 2023, the Speech and Language therapist who worked with the Student began maternity leave. The parties understood that the Student would miss Speech and Language sessions during this time and discussed making up sessions during summer 2023 ESY or during

the 2023-24 school year. However, the sessions were never made up. P-44, J-74, NT at 344, 366-67.

48. No person who worked directly with the Student was familiar with the Fast Forward program. The Fast Forward software monitored the Student's progress through the program. The Student's progress through Fast Forward never reached expected levels and, by June 1, 2023, the software generated an "intervene" warning based on a lack of progress and need for additional intervention. J-104. There are discrepancies in the record as to whether anybody in the District was aware that the software produced that warning. Prior to the hearing, nobody from the District discussed the warning with the Parents. NT at 561, 597.

49. In June 2023, the Student's F&P level had increased to Level K, which has a 2nd grade equivalency. J-14, P-56.

50. On June 12, 2023, the IEP team reconvened and revised the IEP to increase the amount of Fast Forward that the Student received (the June 2023 Revised IEP). J-74.

51. The recommendation to increase the Student's time in Fast Forward came from a District administrator. When this option was presented, the IEP team discussed what should be removed from the Student's schedule to make more time for Fast Forward. The District presented two options to the Parents: 1) remove science and social studies from the Student's curriculum or 2) remove specials and/or recess. The District encouraged the removal of science and social studies and the Parents accepted that recommendation. P-52, J-74.

52. At the time of the June 2023 IEP team meeting, the Student reading fluency was measured at 44 wcpm at the 1st grade level. J-73.

53. At the time of the June 2023 IEP team meeting, the Student's writing ability was assessed at a 61% on a [grade-level] rubric. J-73.

The 2023-2024 School Year ([redacted] Grade)

54. The District continued to implement the June 2023 IEP Revision into the 2023-24 school year. *See, e.g.* J-74.

55. By the fall of 2023, the Student was being instructed at the Wilson 3.0 level. J-88.

56. On July 24, 2023, the Parents filed a due process complaint initiating these proceedings.

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 Laws

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the District is the party seeking relief and must prove entitlement to the relief that it demands by a preponderance of evidence.

Free Appropriate Public Education (FAPE)

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

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

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

Third Circuit consistently interpreted Rowley to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew F.* decision in 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 *Endrew 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." *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.

Compensatory Education

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

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

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

leading case on this method of calculating compensatory education, and the method has become known as the *Reid* standard or Reid method.

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

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

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

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) are warranted. Such awards are fitting if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. *See also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch.*

Dist. v. E.E. ex rel. H.E., 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

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

I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default. Full-day compensatory education can also be awarded if that standard is met. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Parental Participation in IEP Development

The IDEA creates several procedural rights for parents. Among them is the right to meaningfully participate in IEP development. *See generally* 20 U.S.C. § 1414(d)(1)(B).

Compensatory education is a remedy for substantive violations of a child's right to a FAPE. Generally, compensatory education is not available for procedural IDEA violations unless the procedural violation resulted in a denial of FAPE or caused a deprivation of educational benefits. *See* 20 U.S.C. § 1415(f)(3)(E)(ii).

The Parent's procedural right to participate in IEP development is an exception to the above rule. If an LEA's actions or inactions "significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child" hearing officers may find a substantive violation. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II).

Prospective Placement v. Tuition Reimbursement

Prospective placement as a remedy is extremely rare, but not unheard of. *See, e.g. A.D. v. Young Scholars – Kenderton Charter School*, ODR No. 15202-1415KE (2014). Prospective placement was also an issue in one of the two cases that form the core of the test for tuition reimbursement: *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985). Also, prospective placement is permissible under Third Circuit precedent. *See D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553 (3d Cir. 2010) (upholding a New Jersey ALJ's order of prospective placement).

No law or regulation explicitly grants administrative hearing officers authority to order prospective placement at a private school at an LEA's expense. But, like Hearing Officer Skidmore in Young Scholars, I conclude that I may award prospective placement in a due process hearing. Hearing officers enjoy broad discretion to fashion an appropriate remedy under the IDEA. *See, e.g., Forest Grove v. T.A.*, 557 U.S. 230, 240 n. 11 (2009); *Ferren C., supra*, at 718. Case-specific analysis is required to determine whether it is appropriate for the hearing officer to use discretionary powers to issue extraordinary remedies. *See, e.g., School Committee of Burlington v. Department of Education*, 471 U.S. 359, 370 (1985); *Draper v. Atlanta Independent School System*, 518 F.3d 1275, 1285-86 (11th Cir. 2008); *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 248-49 (3d Cir. 1999).

I further agree with Hearing Officer Skidmore that, while the tuition reimbursement test may not be directly applicable, its prongs provide guidance for evaluating this type of claim. Tuition reimbursement (a vastly more common remedy in comparison to prospective placement) hinges on the three-part "*Burlington-Carter* test," named for *Burlington, supra* and *Florence County School District v. Carter*, 510 U.S. 7 (1993).

The first step in applying the *Burlington-Carter* test is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that merit a reduction or elimination of a reimbursement award. *See also, Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.

Prospective placement in a private school, however, requires something more. Unlike parents in tuition reimbursement cases, parents in prospective placement cases do not face the same risk of financial loss – a factor that courts consider in many of the tuition reimbursement cases cited above. In

addition, the cases cited above concerning compensatory education illustrate the well-established remedies for denials of FAPE: compensatory education to remedy past denials and IEP changes to stop ongoing denials. Since past and ongoing denials of FAPE can be fully remedied without prospective placement, prospective placement must be viewed as an extraordinarily remedy.

To support such an extraordinary remedy, the record must establish that the LEA is not able to make timely and reasonable revisions to its special education program in order to offer and provide FAPE. This does not mean that the Parent must establish that the LEA cannot "in theory" provide an appropriate program. *Draper, supra*, at 1285 (quoting *Ridgewood, supra*, at 248-49). That standard is impossible for parents to satisfy. Rather, under current case law, prospective placement must be a heavier burden for parents than tuition reimbursement. Parents seeking prospective placement must prove both that the District has failed to offer a FAPE and that the time it would take for the District to provide a FAPE would compound the harm in a way that requires unique relief. *See Ferren C.,* supra (discussing hearing officers' authority to award unique relief).

Discussion

The District Violated the Student's Right to a FAPE

There is no dispute that the Student's cognitive profile, including the Student's FSIQ and GAI, is average. Every cognitive assessment in the record of this case suggests that the significant gap between the Student's expected levels academic achievement (based on the Student's cognitive profile) and the Student's actual academic achievement is closable. Unfortunately, over time, that gap has widened.

There is no dispute that the Student made progress, and there is no dispute about the quantum of progress that the Student made. The parties characterize the Student's progress differently, and I disagree with both parties' characterizations. The Parents characterize the Student's progress as *de minimis* and partly fabricated. That description trivializes the actual gains that the Student made because of the District's programming and the Student's hard work, and cherry picks a single instance of deviation from what is required of Wilson's rigid program. The District characterizes the Student's progress as significant or slow but steady. That description inflates the Student's small amount of progress by any measure (relative to the years of programming in question) and ignores the Student's cognitive potential as measured by the District's own assessments.

Reviewing the totality of the findings above, I find that the Student's progress was not meaningful in light of the Student's circumstances. Those circumstances include what the Third Circuit has described as the Student's "intellectual potential." *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009). The whole point of special education for the Student in this case is to close the gap between what the Student can do and what the Student is capable of doing. By the District's own measures, that gap has widened in many domains.

The meaningfulness of the Student's progress is not the deciding factor to resolve the Parent's demand for compensatory education. The question hinges on whether the Student's IEPs were reasonably calculated to provide a FAPE at the time they were offered. It is possible for a school to satisfy this standard even if the IEP ultimately falls short in practice. In cases like this, which involve multiple IEPs and revisions over time, if a student does not make meaningful progress under an IEP, the question morphs into a consideration of how the District changed the Student's program in response to the Student's actual performance. That consideration is straightforward in this case: the IEPs did not change in a meaningful way. The Student's program remained consistent regardless of how the Student responded to the special education that the District provided. As a result, and despite the Student's capable intellect, the gap between the Student's academic abilities and those of same-age peers either did not change or grew, depending on the domain assessed.

In a great many cases, parents bring due process complaints in the hope of obtaining a special education program like the program that the District provided to the Student in this case. Wilson is very highly regarded and has been recognized as effective in many studies, including the What Works clearinghouse. Wilson is not, however, a panacea. The District's obligation is to offer a program reasonably calculated to enable the Student to make meaningful educational progress. In this case, given the Student's intellectual abilities, a program is not calculated to provide a meaningful educational benefit unless it is designed to close the gap between the Student and peers. The expected level of achievement set in each IEP and revision would place the Student significantly below peers, even assuming faithful implementation and goal mastery. This is not to say that the District must bring the Student to grade level over the span of a single IEP. Rather, the Student's next IEP must be designed to change the Student's current trajectory.

I find that the District's violation of the Student's right to a FAPE permeated the Student's entire educational experience. Education certainly involves more than academics, but nearly everything school-related in some way

involves a child's ability to read or do math. I award full days of compensatory education for each day that school was in session between July 24, 2021, and the date of this decision. I further find that the FAPE violation is ongoing, as the Student does not currently have an appropriate IEP. Compensatory education shall, therefore, continue to accrue at the same rate until such time as the District offers an appropriate IEP.

The Parents may direct the use of all awarded compensatory education for any appropriate developmental, remedial, or enriching educational service, product, or device that furthers the Student's educational needs. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. The cost of services and produced obtained with this award may not exceed the market rate for those or similar services and products within the District. Any compensatory education that is not used by the end of the school year in which the Student turns 21 years old is forfeited.

I have awarded the maximum amount of compensatory education for the period in question. The Parents have proven that Speech and Language survives were missed and not made up. The Student is not entitled to additional compensatory education as a remedy.

The Parents also argue that the District violated the Student's right to a FAPE by not assessing the Student's need for assistive technology. There is no preponderant evidence in the record that an assistive technology evaluation was required. While an assistive technology evaluation may have been (and still may be) helpful, the absence of the same is not a violation of the Student's right to a FAPE. Similarly, the Parents allege that computer-based programs like Fast Forward are not appropriate for the Student. While the record supports a finding that the Student has attention issues and struggled with Fast Forward specifically (and without a teacher who knew about that program), there is no preponderant evidence that computer-based programs are inappropriate for the Student *per se*.

The Parents Meaningfully Participated in IEP Development

The Parents allege that they were denied the opportunity to meaningfully participate in IEP development. The Parents acknowledge that the District provided a forum for them to participate during IEP team meeting. There is ample evidence of the Parents' active involvement in those meetings. But the Parents' argument is not based on their literal participation. Rather, under current case law, the Parents argue that the District did not provide enough information for them to make informed decisions during IEP development. *See Zakary M. by Donna M. v. Chester Ct. Intermediate Unit*,

1995 WL 739708 at 3-4 (E.D.Pa. Dec 6, 1995); *N.S. ex rel Stein.*, 709 F.Supp. 2d at 72-73; *see also D.S. v. Bayonne Board of Education*, 602 F.3d 553, 565 (3d Cir. 2010); 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

To support this argument, the Parents point to the District's use of Fast Forward with the Student. The Parents have proven that nobody who worked directly with the Student understood that program. There is also evidence that District personnel were unable to answer the Parents' questions about Fast Forward or the Student's progress therein.

This single instance does not yield a conclusion that the District violated the Parent's meaningful participation rights. The totality of the record of this case illustrates that the Parents were engaged, well-informed, and knowledgeable. Even accepting that the Parents did not have complete information about the Fast Forward program, the Parents had a sufficient understanding of the program that the District was providing and the Student's progress therein. It is not the District's obligation to turn the Parents into educational professionals. Rather, it is the District's obligation to enable the Parents to make informed decisions. The District satisfied its obligations to the Parents.

Prospective Placement

Under the standard that I must apply, I cannot award prospective placement to the Student.

In their closing brief, the Parents correctly describe the standard for prospective placement and many of the problems associated with that standard. In essence, to obtain prospective placement, the Parents must satisfy all three prongs of the *Burlington-Carter* test and then also prove that the District cannot make timely and reasonable revisions to the Student's program. The Parents are absolutely correct that the prospective placement standard places an additional and exceptionally high burden on parents who cannot afford to put their children in private schools and then seek reimbursement. The cases discussed above that point to the parents' financial risk in tuition reimbursement cases make no mention of parents who are unable to front the cost of tuition, or of families that would be financially devastated by an adverse decision.

My opinion of the prospective placement standard, however, is irrelevant. I am bound by precedent and am obligated to apply the standard established by that precedent to the facts of this case.

Above, I find that the District has not offered an appropriate IEP to the Student. This satisfies the first prong of the *Burlington-Carter* test. Regarding the second prong, the Parents presented evidence about the private school in which they would place the Student, were I to award prospective placement. Above, I make no findings about that private school. Instead, I will assume that the private school is appropriate for the Student.[3] Regarding the third prong, there is nothing in the record establishing equitable factors that would reduce or eliminate a tuition reimbursement award. With my assumption in place, all three prongs of the *Burlington-Carter* test are satisfied.

The Parents have not proven that the District cannot make timely and reasonable revisions to the Student's program. The Parents argue that, for years, they requested a more substantial program for the Student and the District took no action in response. The facts above are sufficient to establish that the Parents were always dissatisfied with the Student's progress and shared their opinions with the District. *See* J-31, J-38, J-63, P-31. There is a distinction, however, between what the District has not done and what the District cannot do. While I share the Parents' concern about the District's ability quickly craft an appropriate program for the Student, the record of this case does not support a finding that the District is unable to comply with its mandate to do so.[4]

Section 504 Discrimination, Reimbursement

My jurisdiction to hear claims arising under Section 504 is limited. The source of my authority is 22 Pa Code § 15 (Chapter 15). Under Chapter 15, I do not have authority to resolve broad claims of deliberate indifference.[5] Rather, my jurisdiction is limited to disputes concerning the appropriateness of accommodations that enable children with disabilities to access the school's programs.

In Pennsylvania, children who do not require special education but do require disability accommodations, receive accommodations pursuant to a Section 504 Plan or Service Agreement. Students who require special

[3] There is significant evidence that the private school is appropriate for the Student. I also agree with the Parents that the District's LRE argument against the private school's appropriateness is unavailing. Were this a tuition reimbursement case, my findings in these areas would have been robust. But this is a prospective placement case, and my practice is to make findings only as necessary to resolve the issues before me.

[4] While it may be cold comfort to the Parents, the compensatory education award is crafted to mitigate harm caused by any slowness on the District's part. Compensatory education continues to accrue until the District offers an appropriate program.

[5] I recognize that not all hearing officers have reached this conclusion, and that my own conclusions about the scope of my authority have evolved over time.

education receive accommodations through their IEPs and do not receive a separate 504 Plan. Similarly, for IDEA-eligible children, schools comply with their obligations to provide appropriate accommodations under Section 504 by offering an appropriate IEP.

The Parents allege that the District excluded the Student from social studies and science on the basis of the Student's disability. There is no dispute that the Student is a qualified individual with a disability. Every IDEA-eligible student meets that criterion by definition. The Parents have also proven the District excluded the Student from science and social studies to make room for more Fast Forward. The exclusion, therefore, is a direct function of the Student's disability. Under the facts of this case, however, I cannot find that the exclusion violates the very narrow band of Section 504 that falls within my jurisdiction.

The number of hours in the school day are finite. Every student who requires a form of special education outside of the general education classroom or different from the general education curriculum receives that service while other things are happening in school. All such students receive those services because they have disabilities and require special education. Missing some amount regular education to receive special education does not violate Section 504. Rather, there are a host of protections embedded into the IDEA designed to ensure placement in the least restrictive environment (LRE). Removing a student from general education to receive special education when less restrictive methods could be used may constitute an LRE violation, but not a Section 504 violation. Similarly, and for similar reasons, Chapter 15 (again, the *only* source of my Section 504 jurisdiction) does not apply to IDEA-eligible children.

Regarding reimbursement for the private Neuropsychological Evaluation, the Parents premise their demand on the alleged Section 504 violation. The Parents do not argue that the standard for IEEs at public expense, described in IDEA regulations at 34 C.F.R. § 300.502(b), are met. Similarly, the Parents do not disagree with the District's reevaluation. Both parties point to the similarities between the District's reevaluation and the private Neuropsychological Evaluation to make their arguments. I find no Section 504 violation and, therefore, do not award reimbursement.[6]

Summary and Conclusions

[6] The Parents also demand reimbursement for expert testimony. That demand exceeds my authority, even if I were to find a Section 504 violation.

There is no dispute about the Student's intellectual ability. The Student's cognitive profile suggests that the Student's disabilities are amenable to remediation with appropriate special education. Unfortunately, for years, the District offered IEPs that – if flawlessly executed – would not close the gap between the Student and peers. Compounding this problem, the programs offered through the IEPs were not always executed with fidelity, and the Student did not make expected progress. The District made no substantive changes in response to the Student's actual performance. This constitutes a substantive, pervasive, and ongoing violation of the Student's right to a free appropriate public education.

To remedy the District's violation of the Student's right to a FAPE, I award full days of compensatory education, beginning on July 24, 2021, and accruing until such time as the District offers an appropriate IEP. The Parents may direct the use of that compensatory education, subject to the limitations described above.

Under the standards that I must apply, the Parent's other claims are denied.

ORDER

Now, January 5, 2024, it is hereby **ORDERED** as follows:

1. As set forth in the accompanying decision, the District violated the Student's substantive right to a FAPE, beginning on July 24, 2021, and ongoing through the present.

2. The Student is awarded one hour of compensatory education for each hour that the District was in session, beginning on July 24, 2021, and accruing until such time as the District offers an appropriate IEP to the Student.

3. All other claims are denied.

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

/s/ Brian Jason Ford
HEARING OFFICER