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.
24581-20-21

CLOSED HEARING

Child's Name:
[J.V.]

Date of Birth:
[redacted]

Parent:[1]
[redacted]

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Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
July 2, 2021

[1] [redacted]

Introduction

This special education due process hearing concerns the educational rights of a student (the Student). This hearing was requested by the Student's parent (the Parent) against the Student's local public school district (the District).[2]

The Parent's claims arise under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. More specifically, the Parent alleges that the District violated its Child Find obligation (explained below) by belatedly determining that the Student is eligible for special education. After the Student was found eligible for special education, the Parent alleges that the District failed to offer an appropriate Individualized Education Program (IEP). The Parent argues that an appropriate IEP must include special education interventions detailed in their complaint and discussed below. The Parent also alleges that the District violated the IDEA's procedural protections. Finally, the Parent alleges that the violations resulted in a substantive violation of the Student's right to a free, appropriate public education (FAPE).[3]

To remedy these violations, the Parent demands 1080 hours of compensatory education, representing 3 hours per day from February 2019 through the date of their complaint; and an additional 180 hours of compensatory education to remedy a denial of FAPE that should have been provided in the summers of 2019 and 2020 through an Extended School Year (ESY) program. The Parent also demands a

[2] Except for the cover page, identifying information is omitted to the extent possible.

[3] The Parent's original and amended complaint raised issues about the Student's eligibility for special education. The District determined that the Student was eligible for special education before the Parent filed the original complaint, and that claim was ultimately withdrawn during the first session of the hearing.

District-funded Independent Educational Evaluation (IEE), and a Functional Behavioral Analysis (FBA). The Parent also demands the addition of the following branded special education programs or their functional equivalents to the Student's IEP: Wilson (a reading program), RAVE-O (a different reading program), and Semple Math (a math program).

As explained below, I find in favor of the District.

Issues

The issues presented in this matter are:

1. Did the District violate the IDEA's procedural protections?

2. Did the District violate the IDEA's child find obligation?

3. Is the IEP offered by the District appropriate? If not, are the special education interventions demanded in the Parent's complaint necessary for the provision of FAPE?

4. Has the Student been denied a FAPE and, if so, what form or amount of compensatory education is owed?

Findings of Fact

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

The 2018-19 School Year (Kindergarten)

1. The District offers a half-day kindergarten program with morning and afternoon sections to most children. The District offers full-day kindergarten to some children based on need.

2. The Parent registered the Student for kindergarten during the 2018-19 school year. The Parent registered the Student after the school year stared, and the District placed the Student in a half-day program. *See, e.g.* S-4.

3. After the first marking period of the 2018-19 school year, the District identified the Student as a child who would benefit from a full-day kindergarten program. The Student attended a full-day kindergarten program from the second marking period of the 2018-19 school year through the end of that school year. *See, e.g.* S-4.

4. The District's full-day kindergarten program (sometimes called an extended-day program in the record) is not a special education program. Rather, it is a regular education intervention for children who could benefit from increased academic support.

5. The District's kindergarten does not use a traditional letter grade or percentage grade system. Rather, the Student's kindergarten report card shows the Student's level of proficiency across several skills. The Student's teacher indicated that the Student was "proficient" in some skills and "needs improvement" in others – but the Student was "developing" a significant majority of skills tracked on the report card across the second, third, and fourth marking period of the 2018-19 school year. S-4.

6. The District tracked the Student's nonsense word fluency and phoneme segmentation fluency (both of which are reading skills) during the 2018-19 school year. With some probe-to-probe variability, the Student's nonsense word fluency tracked expectations for same-age children[4] while the Student's phoneme segmentation fluency exceeded expectations. S-15.

7. A comparison of the Student's report card and the Student's progress with discrete reading skills illustrates that, despite strong performance in some domains, the Student's overall ability to read was below the District's expectations. The District recognized this and recommended the Student for regular education reading interventions in first grade.

The 2019-20 School Year (1st Grade)

8. The 2019-20 school year was the Student's first grade year. From the start of that year through March 13, 2020, the Student received daily regular education reading intervention in a separate classroom in addition to the reading instruction provided as a standard part of the first grade curriculum.

9. I take judicial notice that on March 13, 2020, Governor Wolf issued an order requiring all Pennsylvania schools closed for in-person instruction as part of the Commonwealth's COVID-19 mitigation effort.

[4] The Student's final nonsense word fluency score came in below what is expected for same-age children, but the Student's overall progress in this skill clearly established a trend line that closely tracked average expected performance.

10. The District provided no instruction to any student during the first two weeks after the statewide school closure. Thereafter, the District provided remote, online instruction to all students. The remote instruction followed the District's curriculum. For the Student in this case, remote instruction included the reading intervention class. *See, e.g.* S-5 at 3, S-14.

11. Remote instruction was technically difficult for the family. When the Student worked with the Parent, they would have difficulty logging into the District's online system. When the Student worked with the Grandparent, the Student was able to log in but sometimes online materials would not work properly (videos would not play, etc.). Other times, the Student was able to access remote instruction. *See, e.g.* S-14.

12. The family and the District were in frequent communication about these issues. Some of that communication was by email. The family and the District worked cooperatively to resolve technology issues as well as they could. This included at least two visits by the Student's first grade teacher to the family's home to ensure that the Student's computer was properly configured that the Student could access remote instruction and online resources.

13. The District's report card grading system was similar to its kindergarten system, but not the same. In kindergarten, a "developing" skill was a higher mark than "needs improvement." In first grade, "developing" was the lowest level of progress that a teacher could assign while "needs improvement" was the fourth highest of seven possible designations. *C/f* S-4, S-5.

14. It is not unusual for elementary school report cards to not use traditional letter grades or percentages. The designations that the District used, however, are unusual. The report card includes a "Grade Mark Legend" that lists designations from "Outstanding" to "Developing." I find that the

Grade Mark Legend presents the designations in ranked order because I do not accept that they are presented randomly. The designations without the legend can be misleading. For example, "Needs Improvement" shows greater proficiency than "Shows Improvement," and both of those are *above* "Proficient." *See* S-5.

15. The District used this grade reporting system in the first three marking periods of the 2019-20 school year. The COVID-19 school closure order came during the third marking period. The District used a simplified report card for the fourth marking period. *See* S-5 at page 3.

16. The Student's first grade teacher marked the Student as "developing" in most domains across the first three marking periods. The Student's reading intervention teacher marked the Student as "needs improvement" or "shows improvement" in most domains, while the Student's phonemic awareness was "very good." S-5.

17. The Student's first grade report card also includes reading unit test scores from the Student's regular first grade reading program (not the reading intervention program) during the first three marking periods. These tests showed very strong skills, with the Student earning near-perfect scores in most instances. Those scores are not consistent with the Student's "Developing" designation in similar domains at the same time.[5] S-5.

18. On the simplified report card that the District used in the fourth marking period of the 2019-20 school year, the teachers marked the Student as

[5] For example, in the third trimester, the Student scored 41 out of 42 in a test of high frequency words but was also received a "Developing" designation for recognizing high frequency words. S-5.

"proficient" in "English Language Arts" and "Reading Intervention." S-5 at 3.

19. During the 2019-20 school year, the District also used a computer-based progress monitoring system to assess the Student's progress towards specific reading skills. Oral reading fluency data collected in January through March 2020 shows that the Student was performing at or near the "cut point for risk" but was also on track to meet grade-level expectations by the end of the year. S-7.

20. Data collected using the same system on phoneme segmentation fluency in August through November 2019 shows that the Student was performing better than grade-level expectations and continuously improving. S-7.

21. Data collected using the same system on nonsense word fluency / correct letter sounds in August 2019 through March 2020 shows some inconsistency but a general trend of improvement. Benchmark scores collected during this time placed the Student above the "cut point for risk" although some progress monitoring scores fell below that level. On the whole, the trend line generated from the individual data points shows that the Student was on track to meet the grade-level target score by the end of the school year. S-7.

22. Data collected using the same system on nonsense word fluency / whole words read in August 2019 through March 2020 shows some inconsistency and the start of a downward trend after a peak in January 2020. From November 2019 onward, the Student never fell below the "cut point for risk," but the data does not create a clear trend toward the target score, and the downward trend in the second half of the school year was cause for concern. S-7.

23. There is no dispute that it was evident that the Student was struggling with reading fluency in the third marking period of the 2019-20 school year. *See, e.g.* NT 565. This is also when the District begins to assess reading fluency as part of its regular curriculum.

24. At the end of the 2019-20 school year, the Parent privately obtained a neuropsychological evaluation of the Student. The evaluation was conducted by a doctoral-level licensed psychologist in private practice. The private psychologist is not a certified school psychologist. P-1, P-20.

25. The psychologist did not consult with District personnel in any way during the private evaluation but did obtain information from the Parent and directly evaluated the Student. P-1.

26. The psychologist diagnosed the Student with "Attention Deficit Hyperactivity Disorder, Combined Presentation," and "Specific Learning Disability with impairment in word reading and reading fluency (Developmental Dyslexia)." P-1 at 9.

27. The psychologist used criteria from the Diagnostic and Statistical Manual of Mental Disorders, 5th edition (DSM-5) to diagnose the Student. For ADHD, the psychologist wrote that the diagnosis comes from DSM-5 criteria at 314.01. Diagnosis 314.01 in the DSM-5 is ADHD Combined Presentation. P-1 at 9.

28. For the reading disability, the psychologist found that the Student met diagnostic criteria from the DSM-5 at 315.00. Diagnosis 315.00 in the DSM-5 is not "Developmental Dyslexia." Rather, 315.00 is "Specific Learning Disorder with impairment in reading." The DSM-5 permits the use of the word "Dyslexia" as an alternative term for this diagnosis when learning difficulties are characterized by a specific pattern of problems with accurate or fluent word recognition, poor decoding, and poor spelling

abilities. The term "Developmental Dyslexia" is not used in the DSM-5 and generally found only in academic or medical texts concerning a biological or genetic theory of Dyslexia.

29. The psychologist included numerous academic recommendations in her report. Generally, the psychologist recommended special education in reading under an Orton-Gillingham methodology that emphasizes phonetic decoding over fluency. The psychologist also recommended many other accommodations (e.g. extra time on tests, visual organizers, study guides and the like). P-1.

30. The psychologist specifically called out Wilson as a reading program that uses an Orton-Gillingham methodology. P-1.

31. The psychologist also recommended several supports and strategies to improve the Student's emotional regulation and impulse control. P-1.

32. The psychologist also recommended a reevaluation in the school setting and an Occupational Therapy (OT) evaluation. P-1.

33. In the summer of 2020, the Parent and the District discussed whether the District should evaluate the Student. Despite some conflicting testimony, I find that the parties acted consistently with the psychologist's recommendation to evaluate the Student in the school setting – not before school started. *See* P-1, S-16, S-17.

The 2020-21 School Year (2nd Grade)

34. On or around September 25, 2020, the Parent verbally requested an evaluation from the District. In response, and as required by law, the District issued a Permission to Evaluate – Evaluation Request form to the Parent. The Parent singed that form on September 28, 2020. The District acknowledged receipt of the form on October 1, 2020. S-17.

35. On October 2, 2020, the District issued a Permission to Evaluate – Consent form. The "Consent" version of the form explained that the District would evaluate the Student to determine if the Student qualified for special education as a child with a Specific Learning Disability and sought the Parent's consent to conduct that evaluation. The Parent signed the form, giving consent, on October 4, 2020, and the District acknowledged receipt on October 8, 2020. S-16.

36. The District evaluated the Student. A District-employed certified school psychologist conducted a substantial part of the testing and compiled the results. The evaluation included, *inter alia,* input from the Parent and teachers, observations of the Student in school, a comprehensive review of records including the private neuropsychological evaluation, standardized assessments of the Student's cognitive and academic skills, a Speech and Language assessment, and an OT assessment. P-5.

37. The District reduced its evaluation to an evaluation report (ER) dated December 11, 2020. The District concluded that the Student qualified for special education as a child with a primary disability category of Specific Learning Disability (SLD) and a secondary disability category of Other Health Impairment (OHI). S-5.

38. The SLD determination was based on the Student's reading fluency scores, which were below what would be expected of a child with the Student's intelligence. Those same tests, like all data generated by the District, show that the Student's decoding abilities (including phonological

processing), reading comprehension, and total reading composite scores were all in the average range. S-5.

39. The District's reading assessments, like the private neuropsychological assessment, show that the Student's ability to decode nonsense words was just below the average range but technically in the "below average" range. P-5.

40. Credible, uncontested testimony from District personnel, taken as a whole, is that as children learn to read, they build and rely upon a larger pool of sight words. At the same time, they fall back to a combination of phonics skills and context clues to decode new words. Consequently, as a child's global ability to read improves (as seen in reading comprehension and other measures), the child's ability to fluently read isolated nonsense words may stagnate or decline. The Student's data matches this pattern. *Passim*.

41. Through the ER, the District recommended explicit reading instruction to improve the Student's fluency, classroom accommodations for the Student's attentional needs, and a "whisper phone" to enable the Student to verbalize to the teacher without disrupting class. The whisper phone was based on the OT evaluation conducted as part of the ER. P-5.

42. The Student's IEP team convened on January 8, 2021 and developed an IEP for the Student (the January IEP). P-7.

43. The January IEP includes a thorough review of the Student's present levels of academic and functional performance based on the ER. P-7 at 5-10.

44. The January IEP includes a reading fluency goal that calls for the Student to read "47 words correct per minute on a 1st grade passage for three

consecutive probes over a nine week period." P-7 at 18. This is the only goal in the January IEP.

45. The January IEP includes several program modifications and specially designed instruction (SDI), all of which relate directly to the Student's needs as identified in the ER and the recommendations provided therein. P-7 at 19-20.

46. For the most part, the accommodations in the January IEP are not generic but are individualized for the Student. For example, the January IEP does not simply provide preferential seating, but rather explains that the Student should be seated near instruction so that the teacher can provide redirection. P-7 at 19.

47. The modifications and SDI in the January IEP are generally consistent with the recommendations in the private neuropsychological report. C/f P-1 and S-7. The exception to this is that the private psychologist recommended an Orton-Gillingham based reading intervention program (like Wilson) to improve the Student's decoding while the IEP targeted reading fluency.

48. The goal-specific SDI (that is, the special education that the District would provide that is directly related to reading fluency) does not specify the specific reading program that the District would use. Rather, the IEP would guarantee "direct, small group instruction in reading to improve [the Student's] academic skills." P-7 at 19. In context this means that the Student would receive a special education reading program that targets reading fluency.

49. The IEP would provide an itinerant amount of learning support. The Student would spend 91% of the school day inside of a regular education classroom (roughly 34 minutes per day in special education). P-7 at 25.

50. In Pennsylvania, the Notice of Recommended Educational Placement (NOREP) is a form by which schools offer IEPs to parents. Parents can use the NOREP to either provide or withhold consent for the IEP. There is no evidence that the District offered the January IEP with a NOREP. Despite this, the parties agree that the District offered and the Parent rejected the January 2021 IEP. *Passim*.[6]

51. On February 9, 2021, the Parent filed a due process complaint initiating this matter.

52. The Student's IEP team met again, with counsel for both parties present, on February 19, 2021. During that meeting, the District offered a different IEP (the February IEP). S-12. Substantively, the February IEP is a revision of the January IEP. C/f P-7 and S-12.

53. The February IEP includes three goals. The first of those is the same reading fluency goal as in the January IEP. The second goal is a math goal targeting addition fact fluency. The third goal is also a math goal targeting subtraction fact fluency. S-12 at 16-19.

54. The modifications and SDI in the February IEP are substantively the same as those in the January IEP, except the February IEP adds "direct, small group instruction in math to improve [the Student's] academic skills." S-12 at 20.

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[6] The Parent, via counsel, was particularly adamant during the hearing that the January IEP should be viewed as the District's only offer of special education. The Parent, via counsel, made a point of preserving objections and presenting arguments that I may not consider IEPs offered by the District after the Parent requested this hearing. Those arguments and objection are necessarily predicated on the fact that the District actually offered the January IEP. That, and the absence of a dispute on this issue, are factors in my conclusion that the District did offer the January IEP.

55. The February IEP continued to provide an itinerant amount of learning support but increased the amount of time that the Student would receive instruction outside of a regular education classroom. Under the February IEP, the Student would receive instruction in a regular education classroom for 87% of the school day (roughly 50 minutes per day in special education). S-12.

56. The District issued the February IEP with a NOREP. The Parent rejected the NOREP. On the NOREP, the Parent wrote that his reasons for rejecting the IEP were that it would not provide a FAPE to the Student and because the February IEP was actually an incomplete settlement offer. S-13.

57. At all times pretendent, the Student was subject to classroom-specific behavior management systems. In some instances, those systems resulted in reports of negative behaviors to the Parent. Beyond classroom behavior management, the Student has never engaged in behaviors warranting school discipline. S-19.

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.

I do not typically remark upon the behavior of individual witnesses. In this case, the Student's second grade teacher displayed significant frustration during cross examination by the Parent's attorney and was occasionally combative with the Parent's attorney (who was also confrontational, but within appropriate boundaries for this proceeding). The second grade teacher's behavior, though remarkable, does not diminish her credibility. To the contrary, her frustration flowed from an intense desire to both tell me the facts as she understood them, and to not allow anybody to put words in her mouth.

Additionally, the Parent, via counsel, attempted to impeach the credibility of several District personnel by testing their understanding of Developmental Dyslexia. Broadly speaking, most District personnel were not familiar with that term (or were generally familiar with Dyslexia but not *Developmental* Dyslexia). These repeated attempts to diminish these witnesses' credibility fail entirely. It is not at all surprising that teachers, special education administrators, and even certified school psychologists (who work in educational settings under educational frameworks) are not familiar with a term that appears nowhere in the IDEA, the IDEA's state and federal implementing regulations, or the DSM-5.

Applicable Legal Principles

The Burden of Proof

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

Eligibility

Although the Student's eligibility for special education is not an issue in this matter, understanding the IDEA's eligibility criteria is helpful to understanding the issues in this case.

The IDEA defines the term "child with a disability" at 20 U.S.C. § 1401(3)(A) as follows:

> The term "child with a disability" means a child—
>
> (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments

(including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

The terms "special education" and "related services" are also defined. The IDEA defines the term "special education" at 20 U.S.C. § 1401(29) as follows:

The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including— (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education.

The definition of "special education" uses the term "specially designed instruction," (SDI) which is also a defined by IDEA regulations at 34 C.F.R. § 300.39(b)(3) as follows:

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

The IDEA defines the term, "related services" at 20 U.S.C. § 1401(26)(A) as follows:

> The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

With this information in place, the definition of "child with a disability" establishes a two-part test to determine whether a child is entitled to the substantive rights and procedural protections established by the IDEA. First, the child must have any of the disabilities recognized by the IDEA. Second, "by reason thereof," the child must need SDI and related services.

Notably, the child's disability in no way limits or proscribes the type or amount of special education that the child may receive.

Child Find

The IDEA's Child Find provision requires states to ensure that "all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located and evaluated." 20 U.S.C. 1412(a)(3). This provision places upon school districts the "continuing obligation . . . to identify and evaluate all students who are reasonably suspected of having a disability under the statutes." *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009); *see also* 20 U.S.C. § 1412(a)(3). The evaluation of children who are suspected to be learning disabled must take place within a reasonable period of time after the school is on notice of behavior that is likely to reflect a disability. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999). The failure of a school district to timely evaluate a child who it should reasonably suspect of having a learning disability constitutes a violation of the IDEA, and a denial of FAPE. 20 U.S.C. § 1400.

Free Appropriate Public Education (FAPE)

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

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive

FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

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

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

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

Compensatory Education

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

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

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

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

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

> "… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that

> time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

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

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

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

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

Discussion

No Procedural Violations Resulting in Substantive Harm

My examination of the record reveals only one procedural violation: The District completed its evaluation 64 days after acknowledging receipt of the Parent's consent to evaluate. Under IDEA and Pennsylvania regulations, the ER was four days late. *See* 22 Pa. Code § 14.123. There is no preponderant evidence in the record, however, that this four-day delay – in and of itself – impeded the Student's right to a FAPE, significantly impeded the Parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits. Therefore, I find that this procedural violation does not constitute a breach of the Student's right to a FAPE. 20 U.S.C. § 1415(f)(3)(E)(ii).

Regarding the deprivation of educational benefits, even a one-day delay can be too much in some cases. In this case, if the District completed the ER four days earlier, there would still be at least ten days between the MDT meeting to discuss the ER and the IEP team meeting to develop the IEP (absent a waiver). 22 Pa Code §

14.123(d). Therefore, if the District completed the ER and convened the MDT meeting on day 60, it would not be able to convene an IEP team meeting until December 17, 2020 at the *earliest*. The District sent an invitation to an IEP team meeting to the Parent on December 22, 2020, and the IEP team convened on January 8, 2021. S-10, P-7. The total IEP development timeline was consistent with IDEA mandates even if the ER was four days late, and so I find that the delay itself caused no deprivation of educational benefits.

Two other alleged procedural violations merit discussion: First, the Parent alleges that the District did not send the PTE-Request form within 10 days of his verbal request for an evaluation. Second, the Parent alleges (during the hearing if not in the Complaint) that the District unilaterally changed the Student's placement after this hearing was requested.

Regarding the oral request, the District was required to send the PTE-Request form within ten calendar days of the Parent's oral request. 22 Pa. Code § 14.123(c). Discussed above, there is conflicting testimony about when the Parent made an oral request for the District's evaluation. There is no preponderance of evidence that the Parent made an oral request for an evaluation more than 10 days before the District issued the PTE-Request form. Where I to assume a delay, there is no evidence that the delay resulted in substantive harm. The evidence is to the contrary. In the summer of 2020, both the District and the Parent's private evaluator took the position that the Student should be evaluated once the Student was back in school. That is exactly what happened.

Regarding the change in placement, the Parent's assertion is contrary to the record. During the hearing, the Parent relied on Second Circuit case law to argue that the District may not unilaterally change the Student's placement once the due process complaint was filed. I agree. That rule is very well established, and one need not look past the IDEA itself to find it. *See* 20 U.S.C. § 1415(j). But the Parent's

assertion that the February IEP is somehow a change in placement is meritless. Time did not stop when this due process hearing was requested. All the District's obligations to offer a FAPE to the Student remained in place. The same rule that prohibits the District from unilaterally changing the Student's placement explicitly permits the parties to change the Student's placement by agreement while a hearing is pending. *Id.* Such agreements may come from negotiations or from the regular IEP process, and a request for a due process hearing should never stop the regular IEP process because pendency does not alter the parties' rights and obligations.

No law prohibits the District from offering a placement while a hearing is pending and no case equates offering an IEP to actually changing a child's placement.[7] In this case, the record is clear that the Parent rejected both the January and February IEPs, and that the District implemented neither of those documents. There simply was no mid-hearing change in placement.

No Child Find Violation

Child Find concerns the District's obligation to offer an evaluation to children suspected of having a disability and needing special education. Child Find violations, by definition, end whenever a school offers an evaluation or starts an evaluation at parental request. The alleged Child Find violation in this case runs from February 2019 (the start of the Parent's demand for compensatory education) through October 2, 2020 (the date that the District offered to evaluate the Student).

[7] The Parent's attorney's insistence that an offered-but-rejected IEP that was never implemented *is* an actual change in placement troubles me.

From February 2019 through the end of the 2018-19 school year, no preponderance of evidence establishes that the District knew, or had reason to know, that the Student was a child with a disability. The record does establish that the Student displayed academic needs, that the District was alert to those needs, that the District was providing increasing levels of regular education interventions, and that the Student was responding positively to those interventions.

It is not appropriate to delay a special education evaluation for the sake of exhausting all regular education interventions. Similarly, passage through regular education interventions (tiered or otherwise) cannot be a prerequisite to a special education evaluation. Rather, the IDEA requires Districts to offer a special education evaluation whenever it has reason to suspect that a child is eligible – no matter the child's progress through regular education interventions.

Applied to this case, the Student's positive response to the District's regular education interventions is key. Regardless of when the District suspected or should have suspected that the Student has a disability, the District had no reason to know that the Student was in need of special education at any time before it offered an evaluation. By February 2019, after a late start to kindergarten, the District had moved the Student into a full-day kindergarten program. Despite progress in full-day kindergarten, the Student was not performing at the District's expected level. This prompted the District to offer a significant amount of regular education reading intervention in 1st grade, both in person and then remotely.

Reports of the Student's progress in 1st grade show some internal inconsistences. However, taken as a whole, the most objective measures of the Student's progress in reading show improvement except for reading fluency. I find the Student's objective performance on reading assessments to be a more accurate indication of the Student's ability to read than a teacher's subjective marks using a confusing comment key.

I have no doubt that the transition to online instruction was complicated and frustrating for both parties. I am sure that the Student missed some instruction as a result of the family's inability to access the District's remote learning platforms. I am equally sure that, even when the Student was able to log in, the District's remote instruction had technical glitches. The Parent and Grandparent's testimony about consternation over technical issues was completely credible. As a legal matter, however, the Student was not a special education student at this time. That designation would not protect the District from a Child Find violation but, even during remote instruction, the Student continued to improve across multiple reading domains.

The Student's progress was, of course, neither perfect nor universal. The downward trend in the Student's reading fluency concerned the District, even if the most objective measures brought nonsense words into the equation. The Parent was equally concerned and obtained the private neuropsychological evaluation.

There is some ambiguity in the record as to when the Parent shared the private evaluation with the District. There is also some ambiguity in the record about when the parties first discussed a District evaluation (and about which party started that conversation). Regardless, preponderant evidence from contemporaneously drafted documents establishes that both parties were concerned about the Student's reading in the summer after 1st grade, and both parties did what the private evaluator recommended: evaluate the Student in school once 2nd grade started.

By the end of September, the District acknowledged the Parent's request for an evaluation and by October 2, 2020, the District had proposed an evaluation. I find no preponderant evidence in the record that the District should have proposed the evaluation sooner, and so I find that the District did not violate its Child Find obligation to the Student.

The IEPs Were Appropriate

Preponderant evidence establishes that the January IEP was reasonably calculated to provide a FAPE at the time it was offered. Both parties agree that the Student has a reading disability, even if they do not agree about what that disability should be called. Both parties agree that the Student requires special education to improve the Student's ability to read fluently. The crux of the parties' disagreement, therefore, concerns what methodology should be used to remediate the Student's reading disability.

Some educational terminology is important for this analysis. A methodology is a system and overarching philosophy or approach for teaching. A curriculum is a prescribed (to greater or lesser degree) scope and sequence for teaching skills or concepts. Orton-Gillingham is a *methodology* in which teachers provide reading instruction through multisensory methods that focus on phonics skills to improve decoding. Wilson is a *curriculum* that use the Orton-Gillingham methodology. *See In re: M.S., a Student in the Upper Darby School District*, ODR No. 23355-1920 (June 15, 2020); *In re: E.M., a Student in the School District of Philadelphia*, ODR No. 23642-1920-KE (September 8, 2020).

Although Wilson is not a panacea, I agree with the Parent's private psychologist that there is very strong evidence that Orton-Gillingham-based programs are effective for children with Dyslexia. Despite that, case law on methodology disputes favors the District.

Courts in the Third Circuit draw a distinction between educational methodologies and IEP components like related services. *See Case v. Allegheny Intermediate Unit,* No. 2:07-cv-374, 2007 U.S. Dist. LEXIS 87721 (W.D. Pa. Nov. 29, 2007); *L.G. v.*

Wissahickon Sch. Dist., No. 06-0333, 2011 U.S. Dist. LEXIS 476 at *8-9 (E.D. Pa. Jan. 4, 2011). Parents are equal members of IEP teams and have a voice in deciding what special education their children receive, but school retain broad discretion to choose methodologies to accomplish IEP goals. This is because nothing in the IDEA requires schools to specify methodologies in an IEP. *W.D. Wat'chung Hills Regional Highschool Bd.*, 602 F. Appx. 563, 568 (3d Cir. 2015) (quoting 71 Fed. Reg. 46,540, 46,665 (August 14, 2006).

Even so, Parents can challenge a school's methodology. For example, the IDEA does not permit schools to select a methodology if there is evidence that the methodology will not enable the student to attain IEP goals. *See Lebron v. N. Penn Sch. Dist*., 769 F. Supp. 2d 788 (E.D. Pa. 2011) (denying parents' request to introduce new evidence on appeal concerning the efficacy of the school's chosen methodology because that evidence could have been introduced during the hearing).

In this case, the Parent attempted to do what the parent in *Lebron* did not: introduce evidence that the District's chosen methodology is inappropriate. The record in this case does not preponderantly support that conclusion. Again, the Parent's evidence supports a conclusion that Orton-Gillingham based programs like Wilson that focus on phonics and decoding may be effective for the Student and might be superior to the District's fluency-focused methodology. This conclusion does not support a finding that the District's methods are inappropriate.

I must examine the District's method on its own, and not in comparison to other methods (even of those other methods may be superior). The record of this case is that the Student's reading disability manifests primarily as a weakness in reading fluency. The record of this case also establishes that the District's methodology, implemented through its chosen curriculum, targets the Student's reading fluency. Nothing in the record proves that the Student's reading fluency is not likely to

improve under the District's methodology. Consequently, I find that the January IEP was reasonably calculated to provide a FAPE at the time that it was offered. The February IEP was appropriate for the same reasons.

Similarly, there is no evidence that the Student's behaviors and attentional needs in school require anything more than what would have provided through the January IEP. The same is true of the February IEP.

The record establishes that the Student has a relative weakness in math fluency. The record does not establish that the Student requires specially designed instruction in math to obtain a meaningful educational benefit from the District's math programing. The January IEP was appropriate without a math goal, and I will not punish the District for exceeding its obligations by including a math goal in the February IEP.

No Compensatory Education is Awarded

Above, I find that the District complied with its Child Find obligations and then offered IEPs that were reasonably calculated to offer a FAPE at the time that they were drafted. Consequently, I award no compensatory education.

I award no compensatory education for ESY summer programming for the same reasons, and also because there is no evidence that the Student qualified for ESY (the Student's regular education status notwithstanding) under any of the factors enumerated at 22 Pa. Code § 14.132(a)(2).

Dicta re: Concerns Going Forward

I am concerned that this decision leaves the parties in limbo. The February IEP is, to my knowledge, the last IEP that the District offered. The Parent rejected that IEP in its entirety. As a result, the Student is a regular education student as a matter of law, even though both parties agree that the Student is eligible for special education. 20 U.S.C. § 1414(a)(1)(D)(ii). I cannot order the Parent to approve the February IEP. The District cannot implement the February IEP without parental consent and, since the February IEP is an initial IEP, the Parent's rejection discharged the District's FAPE obligations to the Student. 20 U.S.C. § 1414(a)(1)(D)(ii)(III).

Regardless of the District's FAPE obligation, I urge the District to carefully monitor the Student through its regular education interventions. Similarly, I urge the District to take swift action if that monitoring suggest the need for a new evaluation.

I urge both parties to not let procedural issues stand in the way of the Student's rights. Procedurally, the Parent has rejected the District's initial placement offer. Under the circumstances of this case, there is no need to start at square one if the Parent reconsiders that choice. If the Parent decides to accept the February IEP, the IDEA does not prohibit the District from issuing a NOREP so that the Parent can provide consent. Similarly, there is no need to scrap all prior work if the parties decided to reconvene the Student's IEP team. I agree with both parties that the Student should have an IEP. I hope that the parties will agree to put an IEP in place as soon as possible, and not let perfection be the enemy of good (or appropriate).

ORDER

Now, July 2, 2021, it is hereby **ORDERED** as follows:

1. Did the District did not violate the IDEA's procedural protections.

2. Did the District did not violate the IDEA's child find obligation.

3. Both the January IEP and February IEP offered by the District are appropriate.

4. I award no compensatory education.

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

/s/ Brian Jason Ford
HEARING OFFICER