

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 Hearing Officer

DECISION

Child's Name: M. H.
Date of Birth: [redacted]

OPEN HEARING

ODR File No. 17076-15-16 KE

Parties to the Hearing:

Representative:

Parents
Parent[s]

Parent Attorney
None

Local Education Agency
Pittsburgh School District
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Date Record Closed:

May 1, 2016

Dates of Hearing:

12/21/2015, 2/1/2016, 2/22/2016,
3/7/2016, 4/4/2016, and 4/25/2016

Date of Decision:

May 16, 2016

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.
Certified Hearing Official

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a pre-teen, late elementary school-aged student in the Pittsburgh Public School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student's Parents filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,³ as well as the federal and state regulations implementing those statutes.

The case proceeded to a due process hearing convening over multiple sessions.⁴ An Interim Ruling followed the District's Motion to limit the scope of the claims, in which this hearing officer concluded that the District had not withheld information from the Parents that it was statutorily required to provide, and that no exception to the statute of limitations had therefore been established.⁵ The hearing then proceeded with the Parents seeking to establish

¹ Although this was an open hearing, in the interest of confidentiality and privacy, Student's name and gender, and other potentially personally identifiable information, are not used in the body of this decision to the extent possible. Student's medical and mobility needs are understood by this hearing officer as reflected throughout the record, despite omission of those details from this decision for purposes of avoiding personally identifiable information. It should also be noted that the term Parents in the plural is used where it appears that one of the parents was acting on behalf of both.

² 20 U.S.C. §§ 1400-1482.

³ 29 U.S.C. § 794.

⁴ No evidence was taken at the first hearing session for reasons placed on the record; it should also be noted that this hearing officer's statement at Notes of Testimony (N.T.) 53 Line 12 should include the word "not," as follows: "which I understand you are not prepared to do today" consistent with N.T. 16-17, 26-29. The second session was devoted to evidence on the statute of limitations only; evidence on the substantive claims was presented at the remaining sessions, most of which were not full days. Exhibits were admitted on the record (N.T. 1242-46); in addition, this hearing officer hereby admits on her own motion S-14, which was discussed during the testimony (N.T. 660-66) and provides information critical to understanding some of the events in June 2015. The parties are also reminded that this hearing officer made a correction (N.T. 582-83) to a particular statement she made at a previous hearing session (N.T. 438-39) that was inaccurate and misspoken.

⁵ Hearing Officer Exhibit (HO-) 5. Several of the Parents' claims were dismissed based on lack of jurisdiction of a special education hearing officer. (HO-4) A number of other procedural matters were addressed before and during the course of the hearing, including the provision of prehearing materials to the parties by this hearing officer (HO-1) and rulings and communications that related to, among other things, requests for subpoenas and witnesses and a motion for recusal that was denied. (HO-2, HO-3, HO-6, HO-7, HO-8, HO-9, HO-10)

that the District failed to provide Student with FAPE throughout the relevant time period, specifically with respect to Student's medical, behavioral, social, and communication needs. The District maintained that its special education program, as offered and implemented, was appropriate for Student.⁶

For the reasons set forth below, I find in favor of the District.

ISSUES

1. Whether the District has failed to provide Student with an appropriate educational program during the time period in question, from November 2013 forward;
2. Whether the District should be ordered to develop and implement a special education program for Student that includes additional behavioral, nursing, social, and academic support services; and
3. Whether the Parents were provided with the opportunity to participate meaningfully in the development and implementation of Student's educational program?⁷

FINDINGS OF FACT

1. Student is a pre-teenaged student who is a resident of the District. Student has been identified as eligible for special education under the IDEA under the classifications of Multiple Disabilities, Visual Impairment, and an Intellectual Disability. (N.T. 312; Parent Exhibit (P-) 4; School District Exhibits (S-) A, S-7)
2. Student has very complex medical and educational needs, including communication. Student is nonverbal and engages in self-injurious behavior to express frustration and needs. As of the spring of 2016, Student had begun to learn a few sign language signs. (N.T. 424, 483-86, 510-12, 522-26, 877-78, 1053, 1057-58; P-20, P-20A, P-20B; S-13, S-20)

⁶ Final disposition of this matter was delayed due to scheduling difficulties (for example, the Parents were only available for hearing sessions on Mondays, and witness availability was necessary to consider) and unforeseen circumstances resulting in emergency cancellation of two sessions that were rescheduled for April 2016. The parties agreed to Instruction in the Home while this matter proceeded. (N.T. 379, 486-87, 532-34, 564-67)

⁷ This third issue was not identified in the Parents' opening statement, but became apparent fairly early in the testimony on the substantive claims, as subsumed within the first two issues. (N.T. 375-79, 446-47)

3. Student previously was provided early intervention services before attending a District school pursuant to an Individualized Education Program (IEP) in kindergarten. (S-3, S-7, S-20 p. 2)
4. An incident occurred with Student at a District school sometime in early 2011. Following that incident, the Parents asked that Student's placement be changed. That incident remains a significant concern to the Parents to this day. (N.T. 110-12, 133-34, 318-21, 433, 499, 512, 537, 572; S-4, S-5)

2013-14 School Year – Program Planning

5. The Parents contacted the District in the summer of 2013, and met with several District representatives while a reevaluation was conducted. The Parents resisted attending an IEP meeting at that time but had expressed an interest in Student returning to school, and District representatives shared that goal. (N.T. 526-27, 529, 775-81, 792, 1167-70; S-26, S-36 pp. 1, 6)
6. The District conducted the reevaluation of Student that was completed in August 2013 with consent of the Parents. The resulting Reevaluation Report (RR) summarized Student's medical and educational history and included assessment of Student's physical, occupational, and speech/language therapy needs. (N.T. 780-88; S-6, S-7, S-37)
7. Educational needs identified in the RR related to communication development, aggressive behavior, activities of daily living, health and safety, mobility, vision, sensory sensitivity and stimulation, social skills, and functional academic skills. Student was determined to be eligible for special education under the Multiple Disability and Intellectual Disability classifications. (S-7)
8. The RR included an FBA that was based upon observations during the assessments of the related service providers for the RR, with input from the Parents. Self-injurious behavior and aggression towards others were identified, with attention and escape from demands, tasks, and noises specified as consequences of the behaviors. The hypothesis developed was that Student engaged in these behaviors to communicate discomfort/needs, gain attention, or respond to overstimulation and gain control over the environment. The District planned to observe Student at school when the school year resumed in order to develop a behavior plan. (N.T. 786-89, 848-49; S-38)
9. The District sent the RR to the Parents in September 2013. (N.T. 788-90)
10. The District attempted to schedule an IEP meeting in the fall of 2013, but were unsuccessful in confirming a date with the Parents in part because the District had an incorrect telephone number for them and in part because the Parents were not ready for an IEP meeting. (N.T. 790-95, 809-12, 820-21, 1229; S-39)
11. Two meetings convened in March and April 2014 with the Parents, District special education representatives, and an assistant superintendent to develop an IEP for Student. The team discussed a draft IEP that was based on the RR, and reached an agreement on Student's placement in an approved private school (APS) that had accepted Student. The

Parents approved the Notice of Recommended Educational Placement (NOREP). (N.T. 432-33, 439, 440, 455-56, 491-92, 500, 624-27, 795-800, 802-03, 1091, 1178-79, 1205, 1231-34; S-8, S-9, S-40, S-42, S-43, S-67)

12. A meeting to revise the IEP for Student convened in May 2014. Student was also determined to be eligible for ESY services at that time. (N.T. 624, 627, 1091-94 ; S-10, S-11)
13. The May 2014 IEP summarized Student's present levels of academic and functional performance based on the recent RR and input from the Parents. Student's strengths (including communicative interactions and trunk strength/positioning) and needs (development of gross and fine motor skills, following directions, picture identification, and development of functional communication system) were identified, with annual goals and short term objectives, specially designed instruction, and related services addressing the latter. Specifically, goals related to speech/language skills (demonstrating communicative intent), gross motor skills (maintaining balance without support), fine motor skills (using a switch or touch screen to demonstrate cause and effect awareness), and following directions. Related services included a personal care assistant (PCA) for daily living skills; specialized van transportation; nursing services throughout the school day and for transportation; and occupational, physical, and speech/language therapy (all for 240 minutes per month). Support from a behavior specialist was also included. The proposed placement was full-time multiple disabilities support in the APS. (S-11)
14. An Integrated Care Plan was appended to the May 2014 IEP and approved by the Parents. That Plan addressed physical supports during transportation, use of physical restraint (two person seated hold), and use of mechanical restraint (protective equipment for Student's hands and arms). (S-11 pp. 35-37)

APS Placement

15. Before Student began attending the APS, the Parents toured the school and met with the first nurse assigned to Student. The Parents were able to visit the classroom and other areas of the school at the time. The Parents expressed a wish to send Student to the APS, and believed that the APS placement was appropriate when Student first attended there. (N.T. 495-96, 563-64, 1045, 1082-85, 1087-88, 1090-91)
16. Student began attending the APS in May 2014 continuing through the end of the 2013-14 school year, and the beginning of the 2014-15 school year until November 2014. There were approximately two days that Student could not attend because there was no nurse available. Student also attended an extended school year (ESY) program at the APS in 2014. (N.T. 632-33, 638, 1098-1103, 1106, 1159; S-66, S-68 p. 2)
17. Student's classroom at the APS had a teacher and two classroom aides. Some children were verbal and some were nonverbal. (N.T. 1085-88)
18. The District arranged for full time nursing services for Student through an agency. The agency was provided with all physician's orders for Student by the District, and all nurses

working with Student were given information on Student's specific medical needs. (N.T. 629-30, 1115-17, 1119)

19. The Parents believed and wanted Student to be in an APS classroom with other children who were verbal. They learned after the APS placement began that the majority of children in the classroom were not verbal. (N.T. 492-93, 500-01)
20. A Board Certified Behavior Analyst (BCBA) from the APS provided consultation and support to teachers and staff to prevent and manage children's behaviors and provide interventions, including creation of behavior plans. The BCBA also provided training to staff, both general and specific to individual children. (N.T. 874-76)
21. The BCBA conducted an interview of the Parents in May 2014 to gather information for the FBA. Student's self-injurious behavior was discussed at that time, and the BCBA observed Student demonstrate those. The BCBA's preliminary hypothesis was that Student engaged in self-injurious behavior in order to gain attention. (N.T. 876-78, 893, 1030-31; S-73)
22. The BCBA conducted preference assessments to ascertain items that would be reinforcing for Student. (N.T. 1031-32, 1097-98; S-74)
23. The BCBA collected data on Student's behavior while Student attended the APS, spending approximately two hours per day in that classroom. The data provided information to the team to make decisions on interventions to be used with Student. He concluded that Student lacked many functional skills that Student needed to learn, including communication, to replace the self-injurious behavior. (N.T. 879-83, 886-87, 892, 895-96, 927-28, 1027-30, 1032-33; S-63, S-71, S-72, S-75)
24. Specific to Student, the BCBA provided training to the nurse and classroom teacher on strategies to implement with Student. Those included response blocking to prevent injury from self-injurious behavior while minimizing attention, differential reinforcement, and protective equipment for Student's hands. (N.T. 882-83, 898, 907-08, 921-23, 924, 947, 950, 963; S-70)
25. The BCBA had also developed the Integrated Care Plan to be used to protect Student from injury. The plan was used when necessary but not frequently. The BCBA also developed a reactive plan for addressing the self-injurious behaviors, which was shared with APS staff; it may not have been shared with the Parents. At times, the BCBA was called to the classroom to address Student's behaviors. (N.T. 897-99, 900, 908-09, 922-23, 1023-26; S-11 pp. 35-37, S-70)
26. APS staff assisted the Parents in obtaining a new mobility device for Student. They then worked with Student in developing skills for mobility. Student demonstrated some independence with mobility before attendance at the APS ended. (N.T. 901-04, 937, 1133-34)

27. Student worked on self-feeding and using a switch or touch screen during ESY in 2014. The BCBA was the APS behavior specialist during ESY 2014. He worked with Student much the same as during the school year. (N.T. 900-01; S-45)
28. A new full time nurse was introduced to Student and the family in June 2014 at their home. The Parents provided explanation and demonstration of some of Student's medical needs at that time. (N.T. 391-92, 414, 427-28, 514-15)
29. The nurse accompanied Student to and from school and was present in Student's classroom, attending only to Student. Student was provided medications by the nurse pursuant to physician's orders. The nurse also monitored Student and attended to any medical needs that Student had during transportation and throughout the school day. (N.T. 393, 394-95, 397, 401-02, 403-04, 418, 425-27, 514-15)
30. The new nurse went into the family home each day as Student was transported to the van, to discuss with the Parents how Student presented that day. At some point after Student started at the APS, when staff and the District learned that the nurse was entering the home, the nurse was no longer permitted by the APS or the nursing staffing agency to do so, including assisting with moving Student onto the van. The Parents objected to this change and did not agree with the alternatives offered to allow for communication about Student's medical conditions: written correspondence with the nurse or APS, a discussion with the nurse on or outside the van as Student was leaving or arriving home, or through a call to the nurse on her cellular phone during the transport. (N.T. 495-97, 517-18, 531-32, 541-43, 550-52, 554, 633-34, 636, 731-32, 1058-60, 1069, 1215-17; S-61 p. 1)
31. The District and APS provided information to the Parents about arranging for nursing services in the home through an outside agency. (N.T. 634, 721, 1064, 1117)
32. The full time nurse resigned in approximately October 2014 shortly after she was informed she could no longer go into the family's home. Several substitute nurses were provided after the resignation. (N.T. 520, 637-38, 1067-68, 1117)
33. The students in Student's classroom used a therapeutic heated swimming pool once or twice per month. The children were divided so that half went to the pool at a time while the others engaged in different activities in the classroom. Student was not permitted to use the pool at the APS because of a chronic medical condition, and missed that activity approximately twice. The APS has a policy not to allow children with that medical condition to use the swimming pool. Nevertheless, for reasons not apparent on the record, Student's progress notes from the APS indicate that Student participated in swimming lessons. (N.T. 494, 514, 1046-47, 1071-72, 1078; S-60)
34. On at least one occasion when Student was attending the APS, the Parents became concerned about Student's self-injurious behavior on the van and asked that Student be provided with some protective equipment to avoid injuring Student's self or others. In July 2014, Student's pediatrician ordered soft wrist restraints for Student to use on the van. (N.T. 522, 539-40, 559, 694 946, 1104-05; S-62)

35. On another occasion, there was an incident involving Student and Student's mobility device on the van used to transport Student. On that date, when the van arrived at the family's home, the driver stepped away from the equipment that assisted Student entering and exiting the van. The nurse and Student's mother intervened to prevent Student from falling. A new van driver took over Student's transportation after that incident. (N.T. 408, 496-97, 520-22, 557-58, 693)
36. In September 2014, the APS sought to conduct a new FBA because Student's most significant behaviors had increased. The Parents provided consent in early October. (N.T. 1108-10; S-46)
37. Student's last day at the APS was November 13, 2014. On that date, the Parents became upset when Student arrived home with an injury to Student's face. Student's pediatrician provided medical excuses for a period of time after the incident, and subsequently recommended that Student return to school only with protective equipment for Student's head and hands. (N.T. 1119-20; S-64)
38. Student made some progress toward IEP goals during the time that Student attended the APS, including mastering the goal for maintaining balance without support. Student's short period of time attending the APS was mentioned in the progress notes for several goals during the 2013-14 school year when limited data could be collected. (S-45, S-59)

Program Planning After APS

39. A meeting convened in November 2014 after Student stopped attending the APS. The Parents participated by telephone and shared their concerns with the program and placement: training of the nurse, speech therapy, behavioral support, and protective equipment for Student on the van. (N.T. 638-45)
40. A new RR that included the recent FBA was issued in December 2014. The Parents provided input into this RR. New assessments of Student's adaptive behavior and functional communication were summarized, and progress toward IEP goals was also reported. (N.T. 649, 1109-11; S-13, S-47, S-49)
41. The FBA continued to identify self-injurious behavior and provided information on the success of two interventions: continuous reinforcement with response blocking and protective equipment for Student's hands and arms. The FBA reported inconclusive results due to Student's prolonged absence from the APS. Among other things, a one-on-one behavior aide was recommended by the IEP team. (S-13 pp. 12-14)
42. The APS BCBA developed a Positive Behavior Support Plan [PBSP] beginning in November 2014 as the RR was being conducted. Student's self-injurious behaviors were described as high- and low-magnitude based upon severity. At that time, the hypothesis of the functions of Student's self-injurious behavior was determined to be social positive reinforcement (access and attention), social negative reinforcement (escape), and non-social positive reinforcement (attention and stimulation). Specific interventions were antecedent strategies, differential reinforcement, ignoring of self-injurious behavior and restraint if necessary, and protective gear for Student's hands. (N.T. 904-06, 909; S-12)

43. In January 2015, Student's physician provided a letter stating that Student no longer required a nurse during transportation to and from school, but still needed nursing services while at school. The District determined that Student should have a one-on-one PCA. (N.T. 647-48; S-51)
44. An IEP meeting convened on January 5, 2015; however, the family had an emergency and was unable to attend. The meeting was rescheduled for the end of that month, and the Parents participated by telephone. The team agreed with the physician's recommendation that nursing services were no longer necessary on the van. (N.T. 649-51, 654; S-48)
45. The January 2015 IEP updated the present levels from the RR and included Student's progress toward goals. A new need was identified to increase independent mobility. New goals addressed expressive language, mobility, following directions, and daily living skills. A new provision for nursing services was added to the section on specially designed instruction; and the Integrated Care Plan provided support for Student's chair at school. In other respects, the IEP was unchanged from the May 2014 IEP. (S-50)
46. The protective equipment for Student's head was obtained in April 2015, after time to secure funding and have measurements taken, (N.T. 645-47, 1054-57, 1127-29, 1131-33, 1137; S-53)
47. An IEP meeting convened in June 2015 with the Parents participating by telephone. The teacher's aide who had been hired to assist Student in the classroom as a PCA described her training, which included first aid and cardiopulmonary resuscitation, safety and crisis care, and feeding, as well as a degree in psychology. The team also discussed protective equipment for Student during transportation, Student's needs, and a date for Student to return to school. (N.T. 588-91, 593-96, 601-04, 607-09, 613-14, 657-60, 911, 1141-42; S-17)
48. The Parents raised a number of new concerns at the June IEP meeting: their desire to visit the school without prior arrangements; the qualifications of the PCA; their desire for an increase in speech/language services so that Student could acquire verbal language; a behavior plan during van transportation; whether the APS was appropriate for Student; and the provision of a new mobility device before the protective equipment for Student's head was secured. Shortly after the meeting, the Parents agreed to return Student to the APS for ESY. The team discussed all of the Parents' concerns during that meeting, and those were added to the current IEP. There was no progress on goals reported because Student had not attended school. (N.T. 661-65, 705, 709, 732-34, 1145-46; S-14 pp. 14-15, 26-32, S-20 p. 2, S-54 pp. 14-15)
49. The team discussed the role of the teacher's aide who would be assigned to Student full time to provide behavioral support. (N.T. 596, 604-05)
50. The team also discussed how one of the three APS full-time nurses would address Student's needs. (N.T. 604, 654-55, 1089)

51. The team discussed the BCBA's role, which was not to act as a one-on-one support person for Student. (N.T. 911, 919)
52. The BCBA provided training to the PCA on Student's PBSP, including how to collect data and to implement the interventions. The PCA would provide full time, one-on-one behavior support to Student. (N.T. 912-13, 958-60)
53. Despite the Parents' expressed desire for Student to have protective equipment for Student's head, the BCBA and other APS staff did not believe Student needed that equipment other than possibly on the van. This protective equipment was made part of the IEP in the event it became necessary at school. (N.T. 913-14. 919, 920-21, 1053, 1127)
54. Student did not return to the APS for the remainder of the 2014-15 school year or for ESY in 2015. Student's ability to be moved from the home to the van remained a concern; the District provided information to the Parents for assistance by an outside agency in this regard. (N.T. 666-71)
55. The District conducted another reevaluation in the summer of 2015 due to concerns with Student's lack of attendance, and issued a Reevaluation Report dated July 13, 2015 based on existing data. Student's attendance from the kindergarten 2010-11 school year when Student attended for approximately one half of the school year, through attendance at the APS on 35 days during the 2013-14 school year and on 38 days during the 2014-15 school year, was set forth. The December 2014 RR was also summarized. This new RR continued to consider Student eligible for special education as a child with Multiple Disabilities. (N.T. 672-74; S-18, S-20, S-55, S-65)
56. The District attempted to convene another IEP meeting after the RR in August, September, and October 2015. The meeting was held in October with the Parents participating by telephone. That meeting was ended when District representatives viewed the discussions as nonproductive. (N.T. 674-77, 705-07, 765-66, 769-70, 806, 1193-98; S-21, S-24, S-25, S-61 pp. 78-86)
57. The IEP that followed the October meeting summarized Student's attendance and present levels from the most recent RR, as well as existing progress monitoring from when Student was attending school. Needs were similar to the previous IEP with the addition of increasing appropriate behaviors. Goals were unchanged but a new goal for discriminating among pictures was added. The specially designed instruction and related services were largely identical to the previous IEP except that nursing services, transportation, and the PCA were removed. The District proposed Instruction in the Home because of the difficulties to that point with attendance and Student's ability to access transportation. The Parents disagreed, believing that Student should be at school, and disapproved the NOREP. (N.T. 686-87, 689; S-22, S-23, S-57)
58. Student was provided with instruction in the home, including related services, while this due process hearing convened. Student was available only two days per week, for two

hours on each of those days. There were days when instruction was cancelled by the Parents or teacher, one due to a snow day. (N.T. 565-67, 688-92, 973; S-76)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that 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). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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). This hearing officer found each of the witnesses to be generally credible, and the minor discrepancies may be attributed to differences in perspectives and memory rather than intentional untruthfulness. Credibility is discussed further below as necessary. It merits mention, however, that the parties in this matter have a long and complicated history with a relationship that currently appears to have broken down. The Parents are clearly devoted and loving parents and advocates who want the best for Student. The District representatives, as well as the APS staff who testified, all presented as

qualified and dedicated individuals committed to their fields and to Student.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as were the parties' closing arguments made on the record.

IDEA Principles

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). Local education agencies (LEAs) meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is "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).

An LEA "need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by IDEA represents only a 'basic floor of opportunity.'" *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 533-534 (3d Cir. 1995) (quoting *Rowley*, *supra*, at 201). In other words, the IEP need not "incorporate every program requested by the child's parents...or thought [to be] desirable[.]" *Ridley School District v. M.R.*,

680 F.3d 260, 269 (3d Cir. 2012). Importantly, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993); *see also D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010) (same).

Further, a child’s educational placement must be determined by the IEP team based upon the child’s IEP, as well as other relevant factors. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.116. Thus, the placement follows IEP development, rather than dictate the content of the program. It is also crucial to recognize that parents play “a significant role in the IEP process.” *Schaffer, supra*, at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b); *see also Letter to Veazey*, 37 IDELR 10 OSEP 2001) (confirming the position of OSEP that local education agencies cannot unilaterally make placement decisions about eligible children to the exclusion of their parents). Indeed, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

The IEP proceedings entitle parents to participate not only in the implementation of IDEA’s procedures but also in the substantive formulation of their child’s educational program. Among other things, IDEA requires the IEP Team, which includes the parents as members, to take into account any “concerns” parents have “for enhancing the education of their child” when it formulates the IEP.

Winkelman v. Parma City School District, 550 U.S. 516, 530 (2007). Full participation in the IEP process does not mean, however, that parents have the right to control it. *See, e.g., Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) (noting that IDEA “does not require school districts simply to accede to parents’ demands without considering any suitable alternatives” and that failure to agree on placement does not constitute a procedural violation of the IDEA); *see also Yates v. Charles County Board of Education*, 212

F.Supp.2d 470, 472 (D.Md.2002) (explaining that “parents who seek public funding for their child's special education possess no automatic veto over a school board's decision”).

Also crucial is the IDEA obligation for eligible students to be educated in the “least restrictive environment” (LRE) which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). Importantly, LRE principles “do not contemplate an all-or-nothing educational system” of regular education versus special education. *Id.* at 1218 (quoting *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1050 (5th Cir. 1989)). All local education agencies are required to make available a “continuum of alternative placements” to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa. Code 14.145. LRE consideration must begin with the neighborhood school the child would attend if he or she did not have a disability. 34 C.F.R. § 300.116(b); *Carlisle, supra*, at 535. FAPE and LRE are related, but separate, concepts. *A.G. v. Wissahickon School District*, 374 Fed. App'x 330 (3d Cir. 2010) (citing *T.R., supra*, at 575, 578); *see also L.G. v. Fair Lawn Board of Education*, 486 Fed. Appx. 967, 973 (3d Cir. 2012).

Section 504 Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii). Relevant to this matter, the obligation to provide FAPE to a child with a disability is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v.*

Doe, 878 A.2d 925 (Pa. Commw. 2005). Thus, the IDEA and Section 504 claims will be addressed together.

The Parents' Claims

Before setting forth the Parents' specific assertions, this hearing officer observes that the remedy sought by the Parents, should the decision go in their favor, is a directive to the District to provide a program that includes all necessary appropriate supports to Student. (N.T. 375-76, 386-87) This discussion is necessarily limited to the evidence presented on the programming proposed and implemented prior to the parties' agreement to Instruction in the Home during the pendency of these proceedings, a placement that no one suggested was suited to Student's unique and complex needs but instead provided a means of ensuring that some educational programming could take place.

Review of the record as a whole compels the conclusion that the District's special education programming for Student during the relevant time period was appropriately responsive to Student's identified educational needs, and reasonably calculated to provide meaningful educational benefit to Student. Each of the IEPs proposed and implemented addressed Student's skill deficits and delays as identified by the team, including the Parents, through annual goals and short term objectives, specially designed instruction, and related services. (Findings of Fact (FF) 13, 14, 42, 45, 57) An FBA was completed on targeted concerning behaviors, addressed through an Integrated Care Plan and subsequent PBSP, with data collection guiding interventions. (FF 14 21, 22, 23, 24, 25, 40, 41, 42)

The APS was an appropriate placement in terms of staffing and environment as well as implementing Student's program, and appeared to be quite successful for the time Student attended from the perspective of everyone on the IEP team, save for the concerns of the Parents

discussed more fully below. It is also essential to note that, while the Parents expressed surprise at the hearing that the APS was proposed by the District without any advance notice that it was considered (N.T. 1202-03), the District's deliberate efforts to delay discussions of potential placement until an IEP had been developed for Student was in compliance with and required by the law, since placement must be based on, and follow, that IEP. The Parents' related objection to the District's consideration of placement in the school where the 2011 incident occurred, while perhaps understandable from their perspective, similarly fails because LRE principles mandate that students with disabilities be educated in the school he or she would attend absent the need for special education services where possible; and, in any event, no NOREP was proposed during the relevant time period for placement at that particular building.

The Parents raised a number of concerns with the provision of the nurses at the APS. First, they contend that those individuals provided by an outside agency were not adequately trained to work with Student. The record does not support this assertion, however. There was no evidence that any nurse who worked with Student lacked the necessary qualifications, or was untrained by District and/or APS staff on Student's needs. It is true that the Parents provided some assistance and instruction to the nurse who worked with Student for the longest period of time when she was first assigned to Student; the family's willingness to share critical information with her is commendable, and evidences their caring approach to addressing Student's complex needs. However, one must expect that any individual working with Student for the first time would need some period of adjustment to get to know Student and Student's needs. Thus, the fact that there may have been some form of a learning curve for the nurses does not establish a lack of appropriate training or credentials.

The Parents' other concern with the nursing services, that she was directed not to go into

the family's home, has two different aspects. One frustration they expressed was that the IEP team did not discuss or consider any need for the nurse to go into the home to provide assistance and discuss Student's condition each day. The IEPs themselves, however, state clearly that the nursing services were to be provided during transportation and at the APS; no mention is made of home nursing services in the educational program. Once those were broached, information on outside agencies who could provide such support was provided to the Parents. In addition, the District and APS staff were initially unaware that a nurse was entering the family home, and directed that practice to cease when they learned of its occurrence. Thus, it is quite reasonable that the IEP team would not discuss nursing services that were not included in the IEP and about which most of its participants were uninformed. The other aspect of this concern is the inability of the nurse and Parents to engage in a private discussion in the morning prior to Student leaving for school. This hearing officer shares the Parents' discomfort with the suggestions to have that conversation involving Student's sensitive medical needs within earshot of the van driver, or over the telephone while the nurse was responsible for monitoring Student's safe transport. However, there does not appear to be any reason that the Parents and nurse could not have had the conversation some distance away from the van while the driver was assisting Student's entry; and email communication could serve as an appropriate backup plan on days when that arrangement was not practical. In sum, none of these concerns regarding the nurses provided for Student establish that the program was inappropriate in any respect.

Next, the Parents challenge the adequacy of the behavioral support provided, and further contend that they were not but should have been advised of the use of the response blocking technique. The APS BCBA conducted an FBA and preference assessments and interviewed the Parents in order to understand Student's self-injurious behaviors; developed a plan for staff to

follow when Student engaged in those behaviors, as well as a PBSP; provided consultation with and training to all staff who worked with Student; collected data on Student's behaviors; and revised interventions as needed. (FF 20 – 27, 42, 52) The BCBA testified, quite credibly, that Student's behaviors were appropriately managed, and that a trained one-on-one PCA could provide the requisite behavioral support. In short, no evidence exists in the record to support a claim that the program was deficient due to behavioral programming. With respect to the related concern regarding their knowledge of response blocking, there was testimony by one of the Parents that they did know while Student attended the APS that this intervention was used (N.T. 985, 992). Moreover, the Parents agreed to use of physical restraint for Student as needed (FF 14), and the response blocking intervention was one such technique that the BCBA convincingly explained was necessary to prevent Student from engaging in self-injurious behaviors while minimizing attention given to that behavior. That the Parents disagree with response blocking is now a matter that the IEP team should be prepared to discuss going forward, but Student was not denied FAPE on the basis of the behavioral support services.

The Parents raised two additional areas of concern during the hearing: provision of the mobility device prior to the protective equipment for Student's head, and Student's inability to use the pool at the APS. Each of these decisions was explained in detail, with credible testimony establishing the important health reasons that Student was not able to use the pool, a circumstance that occurred only twice (N.T. 1046-47, 1070-79), and equally persuasive testimony about why the protective equipment for Student's head was not obtained until the spring of 2015 (N.T. 1049-53), specifically that APS staff did not perceive a need for it in the school environment. (FF 53) Neither of these concerns establish any deficiency in Student's educational program.

Lastly on the substantive issues, the Parents raise (1) the incident regarding the van when Student was in danger of falling, (2) the APS classroom was inappropriately including nonverbal children, and (3) the fact that some information in Student's IEPs is erroneous. The van incident was an isolated occurrence that was addressed immediately, and merits no further discussion. Student's classroom did include verbal children, and Student was exposed to peers using a variety of means of communication including spoken language; this hearing officer finds nothing inappropriate in the makeup of the class. And, the references to unspecified IEP errors can amount to nothing more than potential procedural irregularities that would best be addressed by the IEP team. The attached Order with a directive for the IEP team to convene will provide the opportunity for any errors to be corrected or explained.

The remaining issue is whether the Parents were afforded the opportunity to participate meaningfully in the development and implementation of Student's educational program. The evidence overwhelmingly establishes that the District invited the Parents to IEP meetings, rescheduled meetings when they weren't available, and arranged for their participation by means other than personal attendance. At each meeting described in the hearing, the Parents' concerns were heard and addressed in detail. The facts that not all of the Parents' requests were implemented and that a nonproductive meeting ended abruptly simply fail to indicate a lack of parental participation; rather, the record demonstrates that the Parents were important members of the IEP team throughout the time period in question. This hearing officer concludes that the Parents' concerns were duly considered by the IEP team, and that they were provided with opportunities to participate meaningfully in the development of Student's IEPs and placement decisions.

In conclusion, the Parents' claims and concerns, as sincere as they clearly are, do not

render Student's educational programming inappropriate or amount to a denial of FAPE. Nevertheless, the parties appear to be in agreement that Student should attend school rather than be instructed in the home environment where Student is isolated from peers. For this reason, the IEP team will be directed to convene to consider any necessary revisions to Student's IEP, including ESY for 2016, and make a placement decision no later than the fall of the 2016-17 school year based on the finalized document, with a plan for Student to transition to the new placement.⁸ The team should also consider whether ESY programming might serve as a natural transition to a new program and placement in the fall.

Finally, this hearing officer offers the following observations. It is clear that the parties' relationship is less than fully trusting, which is extremely unfortunate, particularly in light of Student's young age. The IDEA is premised upon a collaborative decision making process, and the parties may wish to consider including a facilitator at future IEP meetings as they continue working together to address how to meet Student's needs. It is respectfully suggested that the parties look ahead toward the future so that they may return to a level of mutual cooperation focused on Student.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District's special education program, as offered and implemented, was appropriate for Student during the time period at issue.

⁸ This hearing officer further suggests that the Parents avail themselves of all available outside resources that can assist them in providing Student with the means to access an educational program outside of the home.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's special education program for Student, as offered and implemented, was appropriate throughout the time period at issue.
2. The IEP team is directed to convene within 30 calendar days of the date of this decision to consider whether Student's IEP requires revision, including ESY services for 2016; and then determine a new placement for Student. The team shall also consider and develop a plan for Student to transition to that placement no later than the start of the 2016-17 school year.
 - a. Within seven calendar days of the date of this Order, the District shall offer to the Parents no less than three dates for the IEP meeting, at least one of which shall fall on a Monday. The Parents shall provide their availability on the given dates as soon as possible and state whether they will attend in person or otherwise.
 - b. Should the Parents be unable to attend the ordered IEP meeting in person or other means, the District may convene the meeting without the Parents. In such case, the District shall within seven calendar days following the meeting afford the Parents the opportunity to provide written input into the IEP, placement determination, and transition plan.
3. Within fourteen calendar days of the IEP meeting described in ¶ 2, the District shall provide the Parents with a new NOREP specifying the placement, or the steps to be taken to secure such placement, together with a written plan to assist Student's transition.
4. Nothing in this decision should be read to prevent the parties from mutually agreeing to alter the terms of how and when to schedule an IEP meeting to determine ESY services, programming and placement for Student, and the plan for Student's transition to that placement.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are **DENIED** and **DISMISSED**.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: May 16, 2016