

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

Final Decision and Order

CLOSED HEARING

ODR File Number: 21279-18-19

Child's Name: A. M.

Date of Birth: [redacted]

Parent:

[redacted]

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Hearing Officer: Cathy A. Skidmore, M.Ed., J.D.

Date of Decision: 03/09/19

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a mid-teenaged 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 currently attends a District school, but previously was placed by the District in a private school placement with full-time emotional support. In the fall of 2018, Student transitioned to a District program of full-time emotional support by agreement of the parties.

In October 2018, Student's Parent filed a due process complaint against the District asserting that Student was denied a free, appropriate public education (FAPE) under the IDEA, Section 504 of the Rehabilitation Act of 1973,³ and the Americans with Disabilities Act (ADA),⁴ as well as the federal and state regulations implementing those statutes. The basis for the Complaint was an asserted failure to comply with the IDEA mandates for educating students in the least restrictive environment; the Parent did not challenge the educational programming on any other grounds. The District denied the assertions; and, the case proceeded to an efficient due process hearing.⁵

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

⁴ 42 U.S.C. §§ 12101-12213.

⁵ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Joint Exhibits (J-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. The parties' participation in the electronic exhibit pilot program is greatly appreciated, as is their collaboration on a comprehensive set of Joint Exhibits.

For the reasons set forth below, the claims of the Parent will be sustained in part and denied in part.

ISSUES

1. Whether the program and placement for the 2016-17 and 2017-18 school years were appropriate for Student based on compliance with least restrictive environment requirements;
2. If the District's program and placement for Student during 2016-17 and 2017-18 school years were inappropriate, should Student should be awarded compensatory education?

FINDINGS OF FACT

1. Student is a mid-teenaged student who is a resident of the District. Student is eligible for special education under the IDEA based on a classification of Emotional Disturbance. (N.T. 32-33.)
2. Student was diagnosed with Bipolar Disorder and Attention Deficit Hyperactivity Disorder in August 2010, and has treated with a private psychiatrist since at least that time. Student has also been provided with wraparound services. (N.T. 418-19, 496; J-1 at 14.)
3. The District has a full time emotional support program available at one of its school buildings. It is a center-based program specifically for students in need of full-time emotional support; prior to the 2017-18 school year, however, it offered a less-intensive level of mental health support than is currently available. Students who attend there are able to participate in extracurricular activities. (N.T. 323, 328, 336, 340, 344, 346-47, 364-65, 392.)

PREVIOUS EDUCATIONAL HISTORY AND THE PRIVATE SCHOOL

4. Student was evaluated in the fall of 2010 during first grade, and determined to be eligible for special education based on a primary classification of Emotional Disturbance and a secondary classification of Other Health Impairment. At that time, Student was provided with therapeutic staff support at school. (J-1.)
5. Student attended a District elementary school until October of the 2014-15 school year (fifth grade), at which time Student began attending a private school (Private School). (N.T. 415, 417-18, 470; J-5.)

6. The program and placement change occurred following a reevaluation in the fall of 2014, with a reevaluation report (RR) issued in October. This RR summarized previous evaluations (including average range cognitive ability and achievement), and a recent diagnosis of Anxiety Disorder was noted. At that time, because of Student's significant difficulties in the then-current placement, a highly structured environment with consistent academic and behavioral expectations and adaptations/modifications to the curriculum were recommended. Student's eligibility classifications remained unchanged from 2010. (J-4; J-5.)
7. The Private School services special education students in kindergarten through eighth grade. There is a separate private school in the same geographic area that serves students in high school with similar needs. (N.T. 348, 353-54.)
8. Students at the Private School are generally able to participate in extracurricular activities in their home school district. (N.T. 366.)
9. The Private School has full time emotional support in both a partial hospitalization program and in a non-partial hospitalization program. (N.T. 184-85.)
10. Emotional support in the partial hospitalization program at the Private School requires a specific level of mental health therapy services through individual and group sessions. Emotional support outside of the partial hospitalization program (called therapeutic support) requires only check-ins with the mental health therapist. (N.T. 185, 189-91, 226-27, 529-30, 575-76.)
11. In the emotional support classroom outside of the partial hospitalization program at the Private School, in addition to the special education teacher, an educational therapeutic support staff person is present throughout the day in place of a behavioral health worker. (Nt. 229-30, 266-67, 527-28.)
12. A treatment team meeting at the Private School convenes every twenty days to discuss all students in the partial hospitalization program. That team is comprised of the special education teacher, behavioral health worker, mental health worker, and a clinical supervisor, and potentially others including parents. One of the topics at every meeting was readiness to return to a public school. (N.T. 182-83, 188, 485, 528, 533-37, 590-91, 616, 623-24; S-3.)
13. Review meetings by the treatment team for students outside of the partial hospitalization program also convene every twenty days. (N.T. 549, 570.)
14. The Private School developed a Public School Readiness Assessment (PSRA) to be used as one consideration for returning students to their home school districts. The PSRA was designed to be completed three times each school year for all students at the Private School, including completion by the student himself or herself. The PSRA is to be considered along with other relevant information such as treatment team progress and recommendations. Scores range from "not a good candidate" (0-10 points) to "excellent candidate" (18-20 points). (N.T. 583-88, 590-91; J-10 at 20.)

15. Students also complete the PSRA but the self-assessment is not typically included in the IEP at Private School and not available to the team. The results can be included if a student completes the form. (N.T. 213-14, 259-60, 269-71, 586-87, 610.)

STUDENT AND THE PRIVATE SCHOOL IN GENERAL

16. The Parent approved a Notice of Recommended Educational Placement (NOREP) in October 2014 for full-time emotional support, and Student transitioned to the Private School in its partial hospitalization program. The Private School had been identified by the Parent as a setting where Student's mental health and academic needs could be met. (N.T. 349, 417-18; J-5; J-6 at 6; J-14 at 3.)⁶
17. When Student entered the Private School, its staff participated in an online training program specific to Student's identified mental health disability. They also reviewed other pertinent information provided by the Parent. (N.T. 178-79, 246-47, 524-25, 556; S-6.)
18. Student was in a full-time emotional support classroom at the Private School for all content area classes except reading during the 2016-17 and 2017-18 school years. (N.T. 139-40, 150, 169, 194-95.)
19. The emotional support classroom to which Student was assigned through December of the 2017-18 school year was a partial hospitalization program. There were no more than twelve students in the class, with a special education teacher and a behavioral health worker present all day, and a mental health therapist also present for a portion of the day. (N.T. 180-81, 183, 257-58, 526-27.)
20. Students in the emotional support classrooms at the Private School were provided with individual and group counseling. (N.T. 139.)
21. Student was not provided psychiatric services through the Private School. However, Student's private psychiatrist did participate in Student's IEP meetings while Student was attending the Private School. (N.T. 140-41, 203-04, 388-89, 391, 534.)
22. A reading specialist worked with Student beginning in January 2015 through the end of the 2017-18 school year consistent with recommendations. That instruction was provided individually outside of Student's classroom with a focus on reading fluency and reading comprehension. In the fall of 2017, the reading specialist recommended that Student continue individual instruction but using grade level literature rather than the direct instruction program, and the IEP team agreed. (N.T. 36, 38, 48, 51, 56, 60, 65-66, 70-74, 76-77, 104-05; S-4.)

⁶ There was also a short period of acute partial hospitalization in the fall of 2014. (N.T. 475-77; J-4 at 2, 24.)

23. Student's behavior including performance on those goals in the IEP was inconsistent throughout the 2016-17 and 2017-18 school years. Student's progress toward academic and related service IEP goals similarly fluctuated. (J-11; J-17; J-25; S-7D; S-8.)⁷
24. Student required frequent prompts and redirection while in the Private School emotional support program, especially when in a group setting. Student was sometimes verbally aggressive against staff and peers, with occasional physical aggression against persons or property. Student at times refused to go to the reading classroom; and at other times, Student would sleep instead of participating in instruction. (N.T. 86-91, 192, 195-96, 197-98, 209-10. 530-31; S-4; S-5.)
25. The Parent and the Private School teachers and therapists were in frequent and ongoing communication throughout the time Student attended there. (N.T. 233-34; S-6; S-7D.)
26. The special education teacher in the partial hospitalization program used Individual Safety Assessments (ISAs) with students as needed to address behaviors that did not rise to the level of a crisis. The ISA was to inform staff to try to avoid such situations from occurring again. (N.T. 193-94.)
27. The behavioral health therapist met with Student weekly as well as at any time Student needed additional support. Those additional times included a crisis situation of aggression toward others or toward property. (N.T. 183-84, 190, 210-11, 529-31, 550-51.)
28. The mental health treatment team developed a plan for Student with its own goals. Student's progress toward those goals was reflected in notes from the treatment team meetings, and the Parent participated in a majority of those team meetings for Student. (N.T. 533, 614; S-3.)
29. Prior to the start of the 2016-17 school year, the Parent was informed of various extracurricular activities available at the neighborhood school. (S-8 at 1.)
30. Student's commute to the Private School took approximately one hour. The length of the commute impeded Student's ability to participate in extracurricular activities at the neighborhood school. Student was only able to do so on a few occasions before missed sessions rendered continuation not practical. (N.T. 459-61, 499, 506.)
31. The Parent did not understand any discussions during the IEP meetings during the 2016-17 school year or in the fall of 2017 to include consideration of a less restrictive setting that was not the Private School. (N.T. 427-28, 438-39, 442-43, 468-69.)

2016-17 SCHOOL YEAR

32. In a new RR at the start of the 2016-17 school year (September 2016 RR), teachers recommended continuation of emotional support with a therapeutic component, but not a less restrictive environment. Needs were identified in the areas of following directions,

⁷ The record as a whole supports this finding.

problem solving, organizational skills, social skills, pragmatic language skills, and maintaining focus and remaining on task. In addition, specific academic needs were noted for reading fluency and comprehension, written expression, and mathematics calculation; with specific behavioral needs relating to managing frustration, using coping skills, and accepting responsibility for Student’s actions. (J-9.)

- 33. An IEP was developed in September 2016. Teacher input into that IEP reflected that Student exhibited off-task behavior throughout the school day requiring significant prompting, and some verbal and physical aggression. (J-10.)
- 34. Results of the PSRA in September 2016 were included in the September 2016 IEP and were generally lower than in the 2015-16 school year:

Behavior	Rating Score 2015-16	Rating Score 2016-17
Follow school/class rules and routines	2	1
Express anger and emotions appropriately	1	0
Attend class	2	2
Follow teacher instructions/directions	[2] ⁸	0
Respect property and others’ rights	2	1
Complete in-class assignments	2	2
Accept positive/negative feedback	1	1
Display good work habits	1	0
Accept not getting own way	1	1
Complete homework	1	2

Student’s total score in the fall of 2016 was 10, in the “not a good candidate” range, with specific needs identified to improve coping skills and on-task behavior. The team did discuss these results in September 2016. (N.T. 152-54; J-10 at 19-20.)

- 35. Except for completing homework, Student’s performance on the academic section of a School Functioning Checklist in the fall of 2016 reflected needs in all other areas of competency (following directions, completing work accurately, participating in class, asking for assistance, being prepared, and accepting feedback). (J-10 at 32-33.⁹)
- 36. Student’s performance on the behavioral section of the School Functioning Checklist in the fall of 2016 reflected needs across all of the areas of competency (following directions and school-wide expectations, coping with failure, accepting consequences,

⁸ The reported score of “1” appears to be erroneous in this IEP based on the reported total score and a separate reporting of the same scores at J-16 at 19-20. However, the PSRA scores are not entirely consistent across documents. (Compare, e.g., J-10 at 19-20 with J-16 at 19-20.)

⁹ The School Functioning Checklist summary sections in the September 2016 IEP purport to compare scores across school years, but those results are difficult to follow and appear to be inconsistent. (Compare, e.g., the color-coding key on J-10 at 21-22 (where red is the prior school year, 2015-16) with that on J-17 at 19-20 (where italicized red is the prior school year, 2016-17).)

expressing emotions, interacting with peers, behaving appropriately, accepting feedback, and listening to and respecting others). (J-10 at 32.)

37. Needs identified in the September 2016 IEP mirrored those in the September 2016 RR. Annual goals addressed reading comprehension, reading fluency, written expression (paragraph writing), mathematics skill weaknesses, social skills, and pragmatic language skills, in addition to behavior. (J-10 at 50-69.)
38. The September 2016 IEP included a Positive Behavior Support Plan (PBSP) targeting off-task behaviors that were determined to serve the function of escaping from difficult or non-preferred tasks or gaining adult attention. Specific behavioral supports were included in the PBSP. (J-10 at 40-42, 70-71.)
39. Other program modifications and items of specially designed instruction (SDI) in the September 2016 IEP included instruction in coping and social skills, test modifications and accommodations, scheduled breaks, and individual therapeutic counseling (thirty minutes per week). Individual and group therapeutic support was also listed as a related service throughout the school day. (J-10 at 72-73.)
40. The section of the September 2016 with specific questions relating to supplementary aids and services and participation in extracurricular activities merely reflects that, “The IEP team has discussed and agreed upon that the outside placement is appropriate at this time.” (J-10 at 77.) Full-time emotional support was specified in the September 2016 IEP, with Student participating in general education for the entire school day at the Private School. (J-10.)
41. The IEP team discussed whether the Private School was an appropriate placement for Student in the fall of 2016. The team did not review the specific questions relating to supplementary aids and services and participation in extracurricular activities in detail and in sequence, but did conclude that Student should remain at the Private School. (N.T. 154-55, 170, 214, 321-22, 361, 364, 367, 424-27, 449-50, 594-95.)
42. The team met and revised Student’s IEP in November 2016 to indicate ongoing data collection on behaviors and communication with the Parents. (J-11.)
43. Another IEP meeting convened in March 2017 to review and discuss Student’s progress; Student’s eligibility for Extended School Year (ESY) services and its programming were also confirmed at that time. The team agreed to collect data on Student’s inconsistent behaviors and provide that to the Parent each week. Minor changes were also made to the SDI with respect to preferential seating and to available rewards for the PBSP. (J-10.)
44. The Parent did not ask the IEP team to consider transitioning Student from the Private School during the 2016-17 school year. (N.T. 369-70, 374.)

2017-18 SCHOOL YEAR

45. In the fall of 2017, the Parent expressed an interest to the IEP team in transitioning Student from the partial hospitalization program. That transition was also discussed with Student's treatment team who was involved in planning the timing of that transition. (N.T. 225-26, 445; S-3 at 49-61.)
46. Student exhibited an increase in behavior at the start of the 2017-18 school year when compared to the 2016-17 school year. (NT. 202.)

REEVALUATION SEPTEMBER 2017

47. Student was reevaluated in 2017 at the request of the Parent, and an RR was issued in September. (N.T. 276; J-12.)
48. Teacher recommendations in the September 2017 RR were for emotional support with a therapeutic component, and they did not consider Student to be ready to transition to a less restrictive environment due to "difficulties with social interactions, reactions to different situations, and utilizing coping skills appropriately." (J-14 at 16.) Teachers also reported concerns with Student's inconsistent performance, tendency to be off-task, need for prompting, peer interactions, and failure to comply with directives. (J-14 at 16.)
49. The September 2017 RR incorporated the results of previous evaluations and current school performance, and reported on a new administration of the Wechsler Individual Achievement Test – Third Edition (WIAT-III). Student earned scores in the low average to average range in Oral Language; in the below average to average range in Reading; and in the extremely low to below average range in Mathematics. Student engaged in behaviors that invalidated the Written Expression testing in the WIAT-III. (J-14.)
50. The District school psychologist observed Student at the Private School for the September 2017 RR, but the students in the classroom were participating in a movie as part of a reward at the end of the school year; and, Student was upset about missing the movie due to completing assessments for that RR. (N.T. 280-81.)
51. Social/emotional/behavioral functioning was assessed through the Behavior Assessment System for Children – Third Edition (BASC-3) for the September 2017 RR. The teacher's and Parent's rating scales reflected concerns by both in the areas of hyperactivity, aggression, conduct problems, anxiety, depression, attention problems, atypicality, withdrawal, and adaptability; additionally, learning problems (teacher) and activities of daily living (Parent) were further noted by the only rater to whom those areas applied. The teacher indicated additional concerns with somatization, while the Parent indicated additional concerns with social skills, functional communication, and leadership. Overall, the teacher's rating scales reflected more significant concerns than those of the Parent. The results of the BASC-3 were consistent with previous evaluations and Student's mental health diagnosis. (N.T. 286-87; J-14 at 21-24.)

52. On the Behavior Rating of Executive Functioning – Second Edition for the September 2017 RR, both raters endorsed concerns across the scales as well as overall, with the exceptions of task monitoring and organization of materials. (J-14 at 24-29.)
53. An FBA conducted at the time of and included in the September 2017 RR identified verbal aggression and off-task behaviors as problematic. The perceived functions of those behaviors were to gain attention and rewards, but academic and social skill deficits were contributing factors. A number of suggestions for the PBSP were also provided. (J-14 at 30-35; J-15.)
54. A determination that Student remained eligible for special education was made in the September 2017 RR based on Emotional Disturbance. Needs were specified for following directions, remaining on task and focused, using coping skills, managing frustration, improving problem solving skills and social skills, and pragmatic language; academic deficits were noted in reading fluency and comprehension, mathematics calculation, and written expression. (J-10 at 35-36.)
55. A meeting convened to review the September 2017 RR. (N.T. 278; J-16 at 1, 3.)

FALL 2017 IEP

56. An IEP was developed in September and October 2017 following review of the September 2017 RR. This IEP incorporated the teacher input from the recent RR. (J-16)
57. Results of the PSRA in September 2017 were provided in addition to those results from the 2015-16 and 2016-17 school years:¹⁰

Behavior	Rating Score 9/15	Rating Score 5/16	Rating Score 9/16	Rating Score 2/17	Rating Score 5/17	Rating Score 9/17
Follow school/class rules and routines	2	2	1	2	2	1
Express anger and emotions appropriately	1	1	1	0	1	0
Attend class	2	2	2	2	2	2
Follow teacher instructions/directions	2	2	1	1	1	0
Respect property and others' rights	2	1	1	2	2	1
Complete in-class assignments	2	2	2	2	2	2
Accept positive/negative feedback	1	1	0	1	1	1
Display good work habits	1	1	0	0	1	0
Accept not getting own way	1	0	0	0	0	0
Complete homework	2	1	2	2	2	2

¹⁰ As noted, there is variability in the reported PSRA scores across the various IEPs; in addition, some of those scores do not match the actual PSRA forms (J-28; n.8, *supra*). For purposes of the issues presented, however, the discrepancies are immaterial.

Student's score in the fall of 2017 remained in the "not a good candidate" range, and these results were discussed at a fall 2017 IEP meeting. (N.T. 164-65; J-16 at 19-20.)

58. Student's performance on the academic section of the School Functioning Checklist in the fall of 2017 reflected continued needs in the areas assessed with the exception of completing homework. (J-16 at 21-22.)
59. Student's performance on the behavioral section of the School Functioning Checklist in the fall of 2017 reflected needs across the areas of competency. (J-16 at 32-33.)
60. Needs from the September 2017 RR were also incorporated into the September 2017 IEP. Annual goals addressed reading fluency, reading comprehension, written expression, mathematics skill weaknesses, problem solving skills, social skills, and pragmatic language skills, as well as behavior. (J-16 at 60-70.)
61. The September 2017 IEP included a PBSP targeting the behaviors from the recent FBA. A number of modifications and SDI for behavior were also included. (J-16 at 71-42.)
62. Other program modifications and SDI in the September 2017 IEP included checks for understanding, clear and concise directions, a visual schedule, prompts and reminders, test and assignment accommodations, and a mood chart. Individual and group therapeutic support were listed (thirty minute minimum weekly) as a related service. (J-16 at 73-74.)
63. The section of the September 2017 with specific questions relating to supplementary aids and services and participation in extracurricular activities merely reflects that, "The IEP team has discussed and agreed upon that the outside placement is appropriate at this time." (J-16 at 78.) Full-time emotional support was specified in the September 2017 IEP, with Student participating in general education for the entire school day at the Private School. (J-16.)
64. The IEP team discussed whether the Private School was an appropriate placement for Student in the fall of 2017. The team did not discuss the questions relating to supplementary aids and services and participation in extracurricular activities in sequence or in detail, or whether Student might move to a different placement than the Private School. The team did discuss a transition from the partial hospitalization program. (N.T. 167-69, 170, 327-30, 333, 377-81, 438, 442, 449-50, 598.)

DECEMBER 2017 TO END OF 2017-18 SCHOOL YEAR

65. Student transitioned to the non-partial hospitalization emotional support program at the Private School in December 2017. However, Student continued to receive therapy with the behavioral health worker at the same level as before. (N.T. 169, 172-73, 335-36, 447, 456, 486, 532, 570-71.)
66. The team met in December 2017 to revise the IEP to reflect Student's transition to the non-partial hospitalization emotional support at the Private School. Specific steps for Student and the staff were noted to facilitate that transition. In January 2018, two new

items of SDI were added to monitor Student's vision and to provide for an additional testing accommodation. (J-17;J-20.)

67. Student's IEP was again revised in February 2018 to reflect Student's eligibility and programming for ESY in 2018. (J-20.)
68. In the spring of 2018, the IEP team began to discuss Student's transition in the fall because Student would age out of the Private School. Student's treatment team was involved in discussions about a transition to a placement with less intensive mental health supports. (N.T. 383-84, 407, 439; S-8.)
69. The District made referrals to several potential placements for Student for the fall of 2018, to continue with full time emotional support. The Parent agreed to the District center-based program and approved a NOREP. (N.T. 384-87, 394-95, 450-52, 488-92, 495; J-21.)
70. A new RR was issued in May 2018 following assessment of Student's need for vision services at the request of the Parent. That RR concluded that Student did not have a need for school-based vision support services. (J-21; J-23.)
71. Results of the PSRA in the spring of 2018 reflected that Student was still not a good candidate; notably, Student's score had decreased significantly since September 2017. (J-23 at 18.)

2018-19 SCHOOL YEAR

72. Student's IEP team met in June 2018 to discuss Student's program for the 2018-19 school year. The IEP was revised to reflect that Student would attend an unspecified school in the District. (J-25.)
73. Student transitioned to the District center-based full time emotional support program in the fall of 2018. That transition was successful for Student and Student remained there as of the due process hearing. (N.T. 341-42, 403-04, 412, 415, 457-58, 496-97, 504; J-26; J-27.)
74. Student's commute to the District center-based program takes twenty minutes or less. (N.T. 459.)
75. Student participates in extracurricular activities available through the District center-based program. (N.T. 462-63, 499-500.)
76. Student's IEP team reconvened in October 2018. A new IEP provided the results of a number of assessments completed during the first few weeks of the school year. New annual goals and program modifications/SDI addressed behavior, written expression, mathematics, and speech/language needs with a PBSP and speech/language therapy. (J-26.)

77. The section of the IEP with questions about supplementary aids and services and participation with nondisabled peers including extracurricular activities has a response to each discrete question. Student's program was one of full time emotional and speech/language support in the District center-based school. (J-26 at 50-51.)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized 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 must rest with the Parent who requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

Special education hearing officers, in the role of 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 who testified in this case to be credible, and their testimony was essentially not inconsistent for purposes of addressing the issues presented. In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties' closing statements.

GENERAL IDEA PRINCIPLES: SUBSTANTIVE FAPE

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to its students who qualify for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that the FAPE 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.

Local educational agencies (LEAs) meet the obligation of providing FAPE to eligible students through development and implementation of an 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). Fairly recently, the U.S. Supreme Court considered once again the application of the *Rowley* standard, observing that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Andrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA[.] * * * A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child's circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. * * * As we observed in *Rowley*, the IDEA "requires participating States to educate a wide spectrum of handicapped children," and "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between."

Endrew F., ___ U.S. ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017)(italics in original)(citing *Rowley* at 206-09)(other citations omitted). The Court explained that, "an educational program must be appropriately ambitious in light of [the child's] circumstances... [and] every child should have the chance to meet challenging objectives." *Id.*, 137 S. Ct. at 1000, 197 L.Ed.2d at 351. This is especially critical where the child is not "fully integrated into the regular classroom." *Id.* The Court thus concluded that "the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.*, 137 S. Ct. at 1001, 197 L.Ed.2d 352. This standard is not inconsistent with the above interpretations of *Rowley* by the Third Circuit. *See Dunn v. Downingtown Area School District*, 904 F.3d 248, 254 (3d Cir. 2018).

As *Endrew*, *Rowley*, and the IDEA make extraordinarily clear, the IEP must be responsive to the child's identified educational needs. *See* 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, the LEA is not obligated to "provide 'the optimal level of services,' or incorporate every program requested by the child's parents." *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Critically, "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). The IEP must be reviewed at least annually and revised as needed. 20 U.S.C. § 1414(d)(4)(A). Finally, a child's educational

placement must be determined by the IEP team based upon the child's IEP, as well as other relevant factors. 34 C.F.R. § 300.116.

GENERAL SECTION 504 AND ADA 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).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Further, the substantive standards for evaluating claims under Section 504 and the ADA are essentially identical. *See, e.g., Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those two statutes, particularly when considered together with claims under the IDEA. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

GENERAL IDEA PRINCIPLES: PROCEDURAL FAPE

From a procedural standpoint, the family plays “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 LEAs cannot unilaterally make placement decisions about eligible children to the exclusion of their parents). Consistent with these principles, 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).

LEAST RESTRICTIVE ENVIRONMENT

A critical and rather paramount premise in the IDEA is the obligation that eligible students 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).

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 USCS § 1412(a)(5)(A). The federal Office of Special Education Programs has explained this principle as requiring "first consideration" of the regular education classroom with supplementary aids and services. *Letter to Cohen*, 25 IDELR 516 (OSEP August 6, 1996).

In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993), the Third Circuit adopted a two-part test for determining whether a student has been

placed into the least restrictive environment as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, be educated successfully within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the child has been included with non-exceptional children to the maximum extent possible. *Id.* In evaluating the first prong, the efforts the LEA has made to include the child (which must be more than “token gestures” and include modification of the regular education program); a comparison of the benefits to the child of placement in a regular classroom versus a separate special education setting; and “possible negative effects” of inclusion on the other students, must all be considered. *Id.* at 1215-18. Regarding this third consideration, the reflection on potential negative consequences of inclusion such as disruptions must also contemplate that an appropriate IEP with supplementary aids and services and other necessary supports can diminish or prevent their impact on the classroom. *Oberti* at 1217. With respect to the second *Oberti* prong, it is helpful to keep in mind that the “ ‘regular educational environment’ encompasses regular classrooms and other settings in schools such as lunchrooms and playgrounds in which children without disabilities participate.” 71 Fed. Reg. 156 at 46,585 (2006).

Importantly, LRE principles “do not contemplate an all-or-nothing educational system” of regular education versus special education. *Oberti, supra*, 995 F.2d at 1218 (quoting *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1050 (5th Cir. 1989)). All LEAs 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. Indeed, the “continuum” of placements in the law enumerates settings that grow progressively more restrictive, beginning with regular education classes, moving then toward special classes

and then toward special schools and beyond. 34 C.F.R. § 300.115; *see also* 22 Pa. Code § 171.16(c)(specifying an order of priority for educational placements from the regular classroom in a public school through an approved private school).

However, as set forth above, the least restrictive environment mandate does not contemplate a mere comparison of lesser and more restrictive settings; on the contrary, it begins with the premise that a child can be educated in the regular education classroom with appropriate supplementary aids and services. Furthermore, FAPE and LRE are related, but separate, concepts; indeed, an LEA can be in noncompliance with the LRE mandate but still provide FAPE. *A.G. v. Wissahickon School District*, 374 Fed. App'x 330 (3d Cir. 2010) (citing *T.R.*, *supra*, at 575, 578); *see also H.L. v. Downingtown Area School District*, 624 Fed. App'x 64 (3d Cir. 2015).

THE PARENT'S LRE CLAIM

The primary issue presented is whether the District complied with its LRE obligations during the 2016-17 and 2017-18 school years. Pursuant to the *Oberti* test, the IEP team was required to consider, first, whether Student could be educated successfully within the regular classroom with supplementary aids and services. As set forth above, the factors applicable here are (a) the efforts made to include the child; (b), a comparison of the benefits of the regular and separate placement; and (c) the possible negative impact on other students.

Before turning to the merits of this issue, it is necessary to address two related arguments. One is the Parent's contention that the hearing officer may not consider testimony about the discussion by the IEP team but, instead, must limit review of this claim to the four corners of the IEPs (citing, *inter alia*, *R.E. v. New York City Department of Education*, 694 F.3d 167 (2d Cir. 2012))(rejecting retrospective testimony about services beyond those contained in the IEP or that

would suggest an alteration to its terms, but accepting evidence that explains or justifies its provisions)). This “four corners” principle cannot be construed so narrowly in a case such as this where the law dictates a discussion, but does not also impose a requirement that a verbatim recitation of the entire conversation be reflected in the IEP. Indeed, while not binding, the annotated IEP form available through the Pennsylvania Department of Education, Bureau of Special Education’s Pennsylvania Training and Technical Assistance Network¹¹ provides guidance suggesting that the rationale of those discussions should be inserted into the IEP, but does not even imply that a word-for-word recapitulation is expected. Accordingly, the nature of that particular discussion at the meeting, beyond the IEP content itself, cannot be disregarded.

The other related argument, posited by the District, is that the annotated IEP requires memorialization of the LRE discussion only before the initial removal from the regular education setting. This language, too, cannot be interpreted so strictly. As noted above, placement determinations must be made “based on” an IEP, and are necessarily part of the process that is conducted at least annually.

Turning to the merits of the first *Oberti* prong, consideration of whether Student could be educated successfully in a regular education program, was at least from the Parent’s perspective nonexistent. It does appear that the District members of the IEP team understood the placement discussion to encompass consideration of the regular education environment. Nonetheless, the Parent, who is a vital member of the IEP team, did not. She was therefore not able to meaningfully engage in discussion of efforts to consider including Student in the regular education setting or any setting other than the Private School; or in comparing the benefits of the

¹¹ Available at www.pattan.net/forms (last visited March 8, 2019).

Private School emotional support programs with any other setting; or in evaluating whether other students might be impacted by Student's return to a regular education environment.

However, the record is also clear that Student's discharge from the intensive partial hospitalization program at the Private School was not realistic option before the fall of 2017. Thus, while the District may have technically committed a procedural violation of the IDEA by failing to engage the Parent in a substantial conversation about Student returning to a regular education environment during the relevant period of time, doing so would not have, in this hearing officer's estimation, ultimately resulted in Student transitioning from that program or setting. As set forth above, a special education program must be evaluated based on information that was known at the time and not in hindsight. Throughout the 2016-17 school year and into the fall of 2017, Student's treatment team was not recommending discharge from the partial hospitalization program, and all teachers and other professionals continued to propose continued emotional support with a therapeutic component but not a lesser restrictive setting. Those considerations together with Student's scores on various tools such as the PSRA and School Functioning Checklists supported maintaining Student in full time emotional support at the Private School. The Parent, though perhaps uninformed about other options may have been available, did not disagree. Once Student did transition out of the partial hospitalization program, Student continued with full time emotional support at the Private School with the same level of mental health therapy as had been provided before the move. And, even with the intensive programming in both of the Private School settings, Student struggled with maintaining consistent academic and behavioral progress toward mastery of IEP goals.

The second factor to be considered, the impact on other students if Student returned to regular education setting, is unknown where Student has been outside of that environment since

the fall of 2014. Student continued to demonstrate difficulty with peer interactions during the relevant time period, including engaging in verbal and occasional physical aggression toward them, despite a PBSP and other mental health support. Thus, it is reasonable to infer there would have been some negative effect on other students even with behavioral support in a regular education setting.

Regarding the comparison of the Private School with a less restrictive setting, the Parent points to the District's own full time center-based program where Student currently attends as a viable and less restrictive alternative. Even assuming that Student was ready to transition back to public school before the fall of 2018, a conclusion that this hearing officer does not reach, the level of mental health services available in that District placement were not the same as they exist today until sometime during the 2017-18 school year. Student's undeniably significant mental health needs render it speculative at best that the IEP team should have truly considered such a move before the fall of 2018. For purposes of the first *Oberti* prong, a comparison of the benefits of the Private School with the center-based District program are decidedly in favor of the former for Student. Taken together, the factors do not weigh in favor of a conclusion that returning Student to the regular education environment or to the specialized program that Student is now attending during the 2016-17 or 2017-18 school years would have been appropriate and the least restrictive environment for Student. Accordingly, the District's failure to do so under all of the attendant circumstances do not amount to a substantive denial of FAPE.

Turning next to the second *Oberti* prong, where a placement outside of the regular education environment was necessary, there must be a determination of whether Student was included with typical peers to the maximum extent possible. Given the level of support that Student required as discussed above, this prong must assess opportunities for extracurricular

activities that were the focus of the Parent's contentions in this regard, since lunch and other routine daily activities at the Private School did not involve children without disabilities. Though activities were available at the neighborhood school, the main impediment to Student's ability to participate with nondisabled peers was the length of Student's commute to the Private School. While the District cannot be faulted for this geographic challenge, such activities were the only practical opportunity for Student to engage with those peers and enjoy the inherent benefits that result from regular involvement in unstructured interactions with other children of Student's age. Indeed, the importance of such participation is one of the questions on the annotated IEP form, and in this particular case should have been made part of the structured IEP process throughout the school years at issue. For these reasons, this hearing officer concludes that Student was not included with typical peers to the maximum extent possible and was, therefore, denied FAPE in this limited respect.

Finally on this issue, the FAPE arguments have been fully addressed under the IDEA and there need be no further discussion of these claims under Section 504 or the ADA.

REMEDY: COMPENSATORY EDUCATION

As a remedy for the FAPE denial found above, the Parent seeks compensatory education, Such is an appropriate form of relief where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C., supra*, 81 F.3d at 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has more recently also endorsed an alternate approach, sometimes described as a "make whole"

remedy, where the award of compensatory education is crafted “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014) (accepting the *Reid* Court’s more equitable, discretionary, and individually tailored calculation of this remedy). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

There was no evidence presented in this case that would guide or support a “make whole” compensatory education award; and, the denial of FAPE was quite limited in this matter. The standard method of providing an award equal to the amount of the deprivation shall therefore be utilized.

As discussed above, this hearing officer concludes that the District denied Student FAPE with respect to failing to maximize Student’s participation with typical peers in extracurricular activities. Equitably estimating that one hour per week is a reasonable amount of time that Student should have been, but was not, able to so participate on a regular basis, Student shall be awarded 72 hours of compensatory education for the 2016-17 and 2017-18 school years (180 days in a school year = 36 weeks). There shall be no reasonable rectification adjustment because Student had already been in the Private School pursuant to a NOREP well before the time period in question.

The award of compensatory education is subject to the following conditions and limitations. Student’s Parent may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial or

enriching educational service, product or device that furthers Student's educational and related services needs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age eighteen (18). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent. It is respectfully suggested, however, that with Student currently attending a full-time center-based emotional support program in a segregated public school, that the compensatory education services provide for additional opportunities to engage with non-disabled peers beyond those extracurricular activities in which Student currently participates.

ORDER

AND NOW, this 9th day of March, 2019, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Student was denied FAPE during the 2016-17 and 2017-18 school years by failing to ensure maximum participation with typical peers for extracurricular activities. Student was not substantively denied FAPE in any other respect.
2. Student is entitled to compensatory education in the amount of seventy two hours, representing one hour per week for each of the 2016-17 and 2017-18 school years. This award of compensatory education is also subject to the following conditions.
 - a. Student's Parent may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers Student's educational and related services needs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress.
 - b. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age eighteen (18).
 - c. The compensatory services shall be provided by appropriately qualified professionals selected by the Parent.
3. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
ODR File No. 21279-1819KE