

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: 20345-17-18

Child's Name: T. T. **Date of Birth:** [redacted]

Dates of Hearing:
5/17/2018, 5/23/2018, 5/24/2018, and 6/11/2018

Parent:
[redacted]

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Hearing Officer: Cathy A. Skidmore, M.Ed., J.D. **Date of Decision:** 7/15/2018

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a late elementary school-aged student residing in and attending Pittsburgh Public School District (hereafter District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² on the bases of Autism and a Speech/Language Impairment. Student has been in an autism support classroom for the past three school years, but in the spring of 2018, the District proposed placement in a different type of autism support classroom. The Parents did not agree to the change, and filed a Due Process Complaint against the District. Specifically, they asserted that the District has 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, with respect to past programming as well as the proposed change in placement.

The case proceeded to a due process hearing which convened over four sessions,⁴ at which the parties presented evidence in support of their respective positions. The Parents sought compensatory education, reimbursement for certain expenses, and a prospective placement in a specific private school (hereafter Private School). The District maintained that its special

¹ In the interest of confidentiality and privacy, Student's name, gender, and other personal information are not used in the body of this decision. All potentially 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.

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Joint Exhibits (J-) followed by the exhibit number, Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer exhibits (HO-) followed by the exhibit number. Citations to duplications in the exhibits may be to one or another. References to Parents in the plural will be made where it appears that one was acting on behalf of both, and to the singular Parent to refer to Student's mother who was somewhat more actively involved in the educational program during the time period in question.

education program, as offered and implemented, was appropriate for Student, and that no relief was due.

For the reasons set forth below, the Parents' claims will be granted in part and denied in part, with specific directives made to the IEP team.

ISSUES

1. Whether the District provided an appropriate program to Student between March 2016 and the end of the 2017-18 school year;
2. If the District did not provide an appropriate program to Student in any respect between March 2016 and the end of the 2017-18 school year, whether Student is entitled to compensatory education;
3. Whether the District's proposed program and placement for Student for the 2018-19 school year is appropriate;
4. If the District's proposed placement for Student for the 2018-19 school year is not appropriate, should the District be ordered to place Student in the Private School; and
5. Whether the Parents should be reimbursed fees incurred in this proceeding?

FINDINGS OF FACT

1. Student is a late elementary school-aged child who resides in the District. Student is eligible for special education under the IDEA as a child with Autism and a Speech/Language Impairment. (N.T. 33-34.)
2. Student exhibits slow processing of oral information; and Student benefits from the use of visual supports due to verbal learning weaknesses. (N.T. 251, 268, 388, 561-62, 574-77, 583, 604, 779-90; P-23 p. 9.)
3. Student requires an educational program that integrates language throughout the school day and includes more than speech/language therapy. (N.T. 844, 852-53, 912-13, 924-25; P-11.)
4. Student's Parents believe that Student has made progress toward speech/language goals throughout the time period in question. (N.T. 774.)

5. The District regularly sent home quarterly progress monitoring to the Parents. Sometimes the Parents requested those reports by email and the District complied. (N.T. 742, 808-11, 815, 819.)

EDUCATIONAL AND OTHER HISTORY

6. Student was diagnosed with Autism in July 2009 by [a local hospital for children]. Student was eligible for and received early intervention services including speech/language and occupational therapy. (J-1; S-5.)
7. Student was registered with the District in the spring of 2012 for the 2012-13 school year. (S-5.)
8. Student was evaluated by the District in the fall of 2012 when in Kindergarten. That evaluation reflected significant weaknesses with social and emotional development and language skills, although measures of cognitive ability were deemed to yield only a minimal estimate to be interpreted with caution due to other factors including attention, concentration, and speech/language skill deficits. (J-1.)
9. A Reevaluation Report (RR) followed in December 2012. At the time, Student was provided with learning support services but attended a regular Kindergarten class. That RR determined that Student was eligible for special education under the primary disability category of Autism. (J-2.)
10. Beginning in January 2013 and through the end of the 2012-13 school year, Student was provided with Itinerant Autistic Support with a program addressing receptive and expressive language skills (including answering “wh” questions); fine motor and visual perception skills; attention to tasks and directions/questions; and social skills and interactions. (J-4.)
11. During the 2013-14 school year (first grade), the level of Autistic Support increased to a supplemental level. Student’s Individualized Education Program (IEP) developed in December 2013 included new goals addressing fine motor and speech/language needs (including answering “wh” questions); other goals reflected Student’s participation in a Verbal Behavior classroom that was based on Applied Behavioral Analysis (ABA) principles. (N.T. 184-85; J-5.)
12. Student repeated first grade during the 2014-15 school year and remained in a supplemental level of Autistic Support with participation in the ABA classroom and a regular education mathematics class. The IEP developed in October 2014 continued to contain goals to address fine motor and speech/language needs (including answering “wh” questions), with new goals addressing reading and sound blending. (N.T. 186-87; J-6.)
13. The Parents had concerns about Student not making progress in the ABA classroom during the 2013-14 and 2014-15 school years. (N.T. 185-87, 733-37.)

14. Reading Mastery, first provided to Student during the 2014-15 school year, was an intensive intervention that provided errorless learning with high levels of repetition. The program used orthography as cues for the reader and the materials were focused on decoding, phonological awareness, and blending sounds. Student was at a Kindergarten level in the fall of 2014; in May of 2015, Student remained at the Kindergarten level, exhibiting a need to develop skills for reading including phonological awareness, decoding, and blending sounds. (N.T. 48-50, 53, 88-91; J-8 p. 5; J-10 pp. 1-2.)
15. A District curriculum support teacher made recommendations about Student's reading program in the spring of 2015 after the Parents raised questions about the appropriateness of Student's reading instruction. At that time, Student was able to identify individual sounds and letters, as well as 92% of common sight words at the pre-primer level. (N.T. 39-40, 85-86, 42; J-10.)

SPRING 2015 RR

16. The District conducted another reevaluation in the spring of 2015 at the request of the Parents. Parent input into that reflected concerns about Student's reading decoding, fluency, and comprehension, as well as mathematics and social skills and regression. The Parents sought more time in regular education but additional speech/language and full-time paraprofessional support. (J-7; J-8.)
17. The June 2015 RR provided a summary of Student's current functioning in reading, writing, and mathematics, as well as occupational and speech/language skills. (J-8.)
18. Cognitive assessment (Wechsler Nonverbal Scale of Ability and Comprehensive Test of Nonverbal Intelligence – Second Edition) for the June 2015 RR reflected results that were considered to be a minimal estimation of Student's abilities due to speech/language deficits. A Full Scale IQ was reported on both, with the former at 68 (extremely low range) and the latter at 80 (below average range). The results suggested a relative strength in nonverbal skills. (J-8 pp. 12-13, 14.)
19. Assessment of academic achievement (select subtests of the Wechsler Individual Achievement Test – Third Edition (WIAT-III)) for the June 2015 RR revealed scores at or below the 1st percentile across reading subtests; in the average range on Numerical Operations (19th percentile) but in the very low range in Math Problem Solving (below 0.1 percentile); and in the below average range on the Written Expression Composite with variability among its subtests. All Composite scores were at or below the 4th percentile. (J-8 pp. 13-15.)
20. Assessment of Student's adaptive behavior for the June 2015 RR was conducted through rating scales (Adaptive Behavior Assessment System – Second Edition) completed by the Parents and a teacher. The Parents' results reflected extremely low functioning across all areas with the exception of self-care (borderline range); the General Adaptive Composite was also in the extremely low range. Ratings by the teacher were higher, with a General Adaptive Composite score in the below average range and generally below average to

borderline functioning across all areas except communication (extremely low range) and school living, self-care, and self-direction (average range). (J-8 pp. 15-16.)

21. Formal speech/language assessment for the June 2015 RR was conducted at the request of the Parents, but deviation from the protocols was necessary. Student attained scores well below same-age peers in both receptive and expressive language skills on all measures. Additional information from the speech/language therapist supported the testing results and reflected continued needs. (J-8 pp. 16-20.)
22. The June 2015 RR identified Student was eligible for special education under the primary disability category of Autism. Recommendations to the IEP team included a picture schedule, prompts and cues outside of individual instruction, social skills/peer interactions, specially designed instruction for reading and mathematics, and test and assignment accommodations and modifications. (J-8 pp. 20-21.)
23. By the end of the 2014-15 school year, Student was demonstrating an ability to answer “who, what, where” questions with 80% accuracy using pictures and with other supports (verbal or visual prompts, choices of answers, rephrasing), and “how many” questions with support with 71% accuracy. Student exhibited slight improvement in sight word reading and sound blending but was far from mastering those goals. Student mastered the occupational therapy goal; and exhibited growth on goals for the ABA classroom and in speech/language. (J-9.)
24. An IEP developed in July 2015 identified needs for answering “wh” questions; retelling a story read to Student; understanding concepts such as more/less/same; improving mathematics computation and problem solving skills; and initiating interactions with peers. (J-12.)
25. The July 2015 IEP contained goals for sight word reading through a second grade level; sound blending; speech/language (mathematics language concepts, answering “who, what, where” questions, and social skills/interactions), and mathematics computation. (J-12.)
26. Program modifications/items of specially designed instruction in the July 2015 IEP included multisensory instruction; assignment and test accommodations and modifications; direct reading and mathematics instruction; computer instruction for phonemic awareness and decoding skills; visual schedule; visual and graphic organizers; breaks as needed; and prompts and cuing. (J-12.)
27. Individual and group speech/language therapy (60 and 120 minutes/ month, respectively) was a related service in the July 2015 IEP. Student’s program was for Autistic Support at a supplemental level and Student qualified for extended school year (ESY) services. The Notice of Recommended Educational Placement (NOREP) accompanying the July 2015 IEP specified the ABA classroom. (J-12, J-13.)
28. The Parents did not approve the July 2015 NOREP, indicating concerns with Student exhibiting regression of skills. They asked for Student to move outside of the ABA classroom to the neighborhood school. (J-13.)

29. After the Parents rejected the ABA program for the 2015-16 school year, the District arranged for Student to attend a different elementary where a regional Autistic Support classroom was located. The District team members did not agree that the ABA program was inappropriate but deferred to the Parents' position. (N.T. 146-47, 188-91, 708, 912-13.)

2015-16 SCHOOL YEAR (SECOND GRADE)

30. During the summer of 2015, the Parents with the help of their advocate provided a list of recommendations for Student. (N.T. 650, 737-38; P-3.)
31. Student was provided the District's core reading program during the 2015-16 school year. The Parents became concerned with Student's difficulties with reading comprehension at some point during that school year. (N.T. 40, 62, 104-05, 744-46.)
32. Student participated in regular education classes for related arts/specials (one 45 minute period per day) in addition to lunch and recess, as well as mathematics. (N.T. 147-48, 221; J-12.)
33. The curriculum support teacher observed Student again in May 2016 due to continued concerns with reading comprehension. She did not conduct any assessments but made recommendations for instruction, including the Visualizing and Verbalizing program⁵ instead of the core reading curriculum, for reading comprehension. ((N.T. 57, 60, 62, 747-48.; J-10 p. 3; P-9 pp. 3-5; S-26 pp. 4-5.)
34. The Visualizing and Verbalizing program is a language-based intervention program for improving reading comprehension that also targets oral language comprehension, written expression, and critical thinking skills. The program focuses on visualization (imagery) and descriptions, with the latter helping to develop vocabulary. This intervention is provided through direct, explicit, and systematic instruction with clear examples. (N.T. 98-100; S-29.)
35. The curriculum support teacher conducted research about the Visualizing and Verbalizing program and provided training to Student's special education teacher. (N.T. 64.)
36. Progress monitoring in the spring of 2016 reflected some growth on the reading goal for sight word reading through a second grade level (mastery of sight words at the second grade level); some progress on sound blending (long vowels); mastery of the goal for mathematics language concepts; growth in answering "what" and "where" questions with support; progress in mathematics computation; and some progress in social skill interactions. (J-14.)

⁵ There are several erroneous references in the transcript to "VB" rather than the program actually recommended at the time (e.g., N.T. 62 L-10, N.T. 63 L-16 (referencing P-9 pp. 4-5)).

MAY 2016 IEP

37. An IEP developed in May 2016 reflected parental concerns with Student's understanding of vocabulary; reading comprehension; functioning in the regular education environment (special classes and recess); amount and type of speech/language therapy; and plans to address needs in writing and mathematics word problems and computation. They also raised questions regarding home-school communication in addition to the District's provision of sufficient information to them about Student's educational program including curricula, teaching strategies, modifications, and progress monitoring. The Parents additionally sought regular observations at school by a behavioral specialist consultant because of behavior exhibited at home. (J-14 pp. 17-19.)
38. Needs identified in the May 2016 IEP were for answering "wh" questions; improving language comprehension and social communication skills; retelling a story read to Student; improving mathematics computation and problem solving skills including word problems; conversing with peers; and remediating skill deficits in reading, writing, mathematics, and social skills, as well as increasing independence and addressing sensory needs. (J-14.)
39. The May 2016 IEP contained goals and short term objectives for sight word reading at a third grade level; identifying the sequence of events in a story read to Student or independently read; speech/language (identifying quantitative, qualitative, and positional language concepts; answering "who, where, why/how" questions; social skills/peer conversational turns; use of pronouns); solving mathematics word problems; written expression (writing a short story); and navigating the school building independently. (J-14.)
40. Program modifications/items of specially designed instruction included multisensory instruction; assignment and test accommodations and modifications; direct reading and mathematics instruction; computer instruction for phonemic awareness and decoding skills; visual schedule; visual and graphic organizers; the Visualizing and Verbalizing program; breaks as needed; and prompts and cuing. (J-14.)
41. Individual and group speech/language therapy (thirty minutes/week for each) and consultative occupational therapy were related services in the May 2016 IEP. Student's program was for Autistic Support at a supplemental level and Student qualified for ESY services. (J-14, J-15.)

2016-17 SCHOOL YEAR (THIRD GRADE)

42. The curriculum support teacher conducted testing of Student's reading readiness and achievement in the fall 2016. At that time, Student exhibited difficulty with all but the most basic questions in both listening and passage comprehension. She recommended continuation of the Visualizing and Verbalizing program as well as monthly monitoring of reading comprehension (curriculum-based measures or CBM). (N.T. 65; J-10 p. 4)

43. Student was provided the Visualizing and Verbalizing program at the start of and throughout the third grade year. (N.T. 105, 472-74.)
44. The District stopped using the monthly CBM passages at the Parents' request. They were concerned that passages were too lengthy for Student, but did not realize that their request meant no such monthly monitoring would take place. (N.T. 130, 476-77, 750-51; P-5 pp. 5-6.)
45. In November 2016, some of Student's IEP goals were revised because Student reached mastery of certain goals and objectives. The sight word goal changed to a fourth grade level, and new goals for spelling second grade high frequency words and multiplication were added. Student was making progress on other goals and objectives (mathematics computation and mathematics concepts; solving word problems; answering "who" and "where" questions with support; using pronouns; mastery of goal for navigating the building); but progress was variable or limited in other areas (sequencing events of story read; answering "when" and "why/how" questions; conversational turns with prompting; writing short stories). (J-14; J-17; J-21.)
46. Student's speech/language goals and objectives were revised and updated in January 2017. At that time, Student's goals were to describe pictures/stories/objects with sentences; to answer "wh" questions; to increase conversational turns with peers; and to properly use pronouns. (J-21 pp. 21-23.)
47. In the spring of 2017, the Parents asked that a reading specialist work with Student; they also asked about tutoring. The District declined those requests at least until after a reevaluation in the fall. (N.T. 502-03, 676, 784-85, 813-14, 858-59; J-21.)
48. The Parents asked about placement options, including private schools, in the spring of 2017. (N.T. 675.)
49. Progress monitoring reported in the spring of 2017 reflected significant progress on the sight word goal at a fourth grade level. Progress was also reported on spelling second grade high frequency words; on mathematics computation and solving word problems; conversational turns; and answering "who," "what," and "where" questions with support. Progress reportedly was variable or limited in other areas: the new objective for retelling a 3-sentence story; the new objective for independently writing a 3-sentence story based on Visualizing and Verbalizing images; functional communication; and using pronouns. (J-21.)
50. Additional assessment of Student's reading comprehension in May 2017 by the District curriculum support teacher reflected some sound blending ability. Listening and passage comprehension on the same instrument used in the fall of 2016 revealed less than expected growth in listening comprehension but some growth in passage comprehension compared to same-age peers. An intervention for developing word knowledge and related activities were recommended. (J-10 pp. 6-8.)
51. An IEP developed in May 2017 detailed parental concerns for Student's progress in reading comprehension, including vocabulary and the ability to generalize skills; they

also shared concerns with Student's language and social skills, peer bullying, and perceptions of understaffing in the classroom. They requested more information about Student's educational program and progress, additional interventions for reading comprehension, additional speech/language services, one-on-one support, and regular education support. (J-21 pp. 26-33.)

52. Needs identified for the May 2017 IEP were for improving reading comprehension; improving written expression; improving mathematics computation and problem solving skills including word problems; answering "wh" questions; improving language comprehension and vocabulary; conversing with peers; and using pronouns. (J-21 pp. 37-38.)
53. The May 2017 IEP contained goals and short term objectives for independently answering comprehension questions after independently reading second grade text (short stories); written expression (writing a short story independently); improving mathematics computation (addition, subtraction, multiplication) mathematics problem solving skills (word problems); and speech/language (social skills/conversations with descriptions and proper sentence structure; conversational turns; answering "who, what, where, when, why/how" questions; and use of pronouns). There was also a goal for developing word knowledge as recommended by the curriculum support teacher. (J-21.)
54. Program modifications/items of specially designed instruction in the May 2017 IEP included multisensory instruction; assignment and test accommodations and modifications; direct reading and mathematics instruction; strategies and visual aids for reading and mathematics; scheduled breaks; highlighting; and anti-bullying and related skill building. (J-21.)
55. Individual and group speech/language therapy (a total of 270 minutes/month in a combination of small group and individual sessions, both pull-out and push-in services) addressing functional communication and consultative occupational therapy were related services in the May 2017 IEP. Student's program was for Autistic Support at a supplemental level, and Student qualified for extended school year (ESY) services. (N.T. 392-94, 423-25; J-21.)

2017-18 SCHOOL YEAR (FOURTH GRADE)

SEPTEMBER 2017 PRIVATE EVALUATION

56. The Parents obtained a private evaluation by a certified school psychologist in September 2017 due to their concerns about Student's reading comprehension. (P-11.)
57. Cognitive ability for the September 2017 private evaluation reflected low to very low scores on all Clusters of the Differential Abilities Scale – Second Edition, and an overall cognitive ability score (with verbal comprehension removed) at the 3rd percentile (SS 71, low range). (P-11 pp. 7-11.)

58. Achievement in reading (Kaufman Test of Educational Achievement – Third Edition, (KTEA-3) and Feifer Assessment of Reading subtests) was assessed for the September 2017 private evaluation. Student attained scores ranging from the very low to average range, with a relative strength in nonsense word decoding (SS 92, average range) and word recognition (SS 81, low average range) and all other subtests in the very low to low range (3rd percentile and below). (P-11 pp. 11-17.)
59. On written language subtests of the KTEA-3 for the September 2017 private evaluation, Student demonstrated poor written expression skills (SS 49, below the 0.1 percentile) but average spelling skills (SS 95 based on grade-based norms). (P-11 pp. 13-14.)
60. Student’s expressive and receptive language skills were also assessed for the September 2017 (Oral and Written Language Scales – Second Edition), with Student scoring in the very low range (below the 0.1 percentile) in both areas. (P-11 pp. 14-15.)
61. The September 2017 private evaluation revealed significant language deficits, including phonological awareness, vocabulary and semantic concepts, reading fluency, reading comprehension, and expressive and receptive language skills. Recommendations included “instruction designed to increase [] language knowledge and comprehension” (P-11 p. 15) and specifically vocabulary; a highly structured curriculum for language; visual supports for reading skills; and multisensory instruction. A precursor to the Visualizing and Verbalizing program that focuses on language and vocabulary was also suggested. (P-11.)

FALL 2017 PROGRAM, IEP, AND RR

62. In the fourth grade autistic support classroom, Student participated in a community time in the school auditorium; a regular education homeroom; morning meeting in an inclusive classroom; independent work (the TEACCH model); science or social skills; individual mathematics instruction with the teacher; language and thinking; individual reading instruction with the teacher; general education special classes accompanied by a classroom paraprofessional; and writing and other end of day activities. Student also participated with regular education peers for lunch and recess. There were two paraprofessionals in addition to the teacher for nine students.⁶ (N.T. 205, 464-67, 530-31, 913, 931-32.)
63. At a meeting in the fall of 2017, the team discussed the Parents’ request to stop using the Visualizing and Verbalizing program and change to the program recommended by the private evaluator. The Visualizing and Verbalizing program had already been discontinued at the start of that school year and replaced with two different direct instruction programs for reading comprehension; however, the Parents were aware only of the new programs, not the discontinued program, until later in the school year. (N.T. 71-72, 100-01, 103-04, 109-10, 112-15, 125, 517, 669, 683, 763-64; P-14; S-13; S-30.)

⁶ This hearing officer concludes that it is reasonable to infer that the classroom and schedule for the 2016-17 school year was sufficiently similar (N.T. 463-64).

64. Student's IEP was revised in October 2017 to provide updated information on Student's levels of performance and functioning including baselines on goals and objectives. Parental input was also updated to reflect continuing concerns with reading and other academic performance and progress; they also reiterated their request for a reading specialist. (J-21.)
65. A reevaluation was conducted in the fall of 2017 with a report issued in October 2017 that was discussed at a meeting that same month. The Parents requested the reevaluation because of continued concerns with reading comprehension, and the District also recommended reevaluation at that time. (N.T. 677, 760; J-25, J-27.)
66. Portions of the RR were completed near the end of the 2016-17 school year prior to issuance of the Permission to Evaluate form. Those portions included a description of use of the Visualizing and Verbalizing program. (N.T. 509-10, 539-40; J-29.)
67. Parent input into the October 2017 RR reiterated a majority of the concerns raised at the time of the May 2017 IEP. (J-29 pp. 4-6.)
68. The District school psychologist observed Student on three occasions for the October 2017 RR. (N.T. 241-42; J-29 pp. 13-14.)
69. The October 2017 RR provided a summary of Student's current functioning in reading, writing, and mathematics, as well as special classes and speech/language skills. (J-29.)
70. Cognitive assessment (Wechsler Intelligence Scale for Children – Fifth Edition) for the October 2017 RR reflected a Nonverbal Index score of 82 (low average range) and a Full Scale IQ was not reported because of the variability across Indices. The District school psychologist considered that an understanding of the pattern of Student's relative strengths (visual spatial and processing speed) and weaknesses (verbal comprehension and working memory) provided better information about Student's cognitive potential than a Full Scale or Nonverbal Index score. (N.T. 230-31; J-29 pp. 14-16, 23.)
71. On the WIAT-III administered for the October 2017 RR, Student attained scores ranging from the very low range (listening comprehension at below the 0.1 percentile and reading comprehension subtests at the 0.1 percentile) to the average range (Basic Reading Composite at the 25th percentile and pseudoword decoding subtest at the 55th percentile), with most subtest and Composite scores in the low to below average range. On select subtests of the Woodcock-Johnson Tests of Achievement - Fourth Edition (WJ-ACH-IV), Student scored in the very low range on the Reading Comprehension and Written Language Clusters (at or below the 1st percentile), but the score on the spelling subtest was in the low average range (11th percentile). (J-29 pp. 16-18.)
72. Discrepancies between Student's ability and achievement in listening comprehension, reading comprehension, and math problem solving were attributed to Student's significant language deficits and autism rather than a specific learning disability for the October 2017 RR. (N.T. 233, 249; J-29 p. 18.)

73. Social/emotional/behavioral functioning was assessed for the October 2017 RR using a variety of instruments. (J-29 pp. 18-22.)
- a. On the Behavior Assessment System for Children – Second Edition, the majority of the Parents’ rating scales revealed no concerns. The exceptions were withdrawal (clinically significant range) and adaptive skill concerns in the areas of leadership and functional communication (clinically significant range) and social skills (at-risk concerns). Student’s teacher reported clinically significant concerns with atypicality, withdrawal, learning problems, and functional communication; he also endorsed at-risk concerns with respect to anxiety, depression, and attention problems, as well as adaptability, social skills, and leadership. (J-29 pp. 19.)
 - b. Autism Spectrum Rating Scales by the Parents and special education teacher were consistent with that diagnosis. (J-29 p. 20.)
 - c. On the Behavior Rating Inventory of Executive Function – Second Edition, the Parents reported at-risk concerns only with self-monitoring and initiating. The teacher endorsed clinically significant concerns in the areas of shifting and on the Emotional Regulation Index, and at-risk concerns in self-monitoring, emotional control, initiating, working memory, planning/organizing, and on the other Indices and the Global Composite. (J-29 pp. 21-22.)
74. Evaluation of Student’s speech/language functioning was conducted for the October 2017 RR at the request of the Parents. (N.T. 427; J-29.)
- a. On the pragmatic language portion of the Comprehensive Assessment of Spoken Language, Student did not answer a sufficient number of questions to obtain a score. (N.T. 427-28; J-29 p. 24.)
 - b. Student attained scores well below same-age peers in both receptive and expressive language skills (1st percentile) and results were consistent with the same measure in June 2015. (J-29 p. 24.)
 - c. Higher level language skills assessed (Test of Language Development – Intermediate Fourth Edition) yielded scores in the very poor range (at or below the 4th percentile) on all subtests. Additional non-standardized assessments reflected deficits in understanding basic concepts and expressive language skills. (J-29 pp. 25-26.)
75. A Verbal Behavior Milestones Assessment Placement Program (VB-MAPP) was completed for the October 2017 RR. The VB-MAPP is a criterion-based assessment of language and pre-academic skills as well as social skill development, assessing 170 learning and language milestones that follow a sequence of three developmental levels (ages 0-18 mo., 18-30 mo., and 30-48 mo.). (N.T. 287, 297-99, 340; J-29 p. 27.)
76. Student exhibited growth on many of the milestones when the October 2017 VB-MAPP is compared to previous administrations in the 2014-15 school year. However, Student

lacked many of the skills at the second and third levels that relate to reading comprehension in October 2017, and lost ground on one milestone over that time period. (N.T. 296-302, 340-44, 375-76; S-32.⁷)

77. A barriers assessment and transition assessment could have been completed as part of the VB-MAPP but was not for Student. (N.T. 298.)
78. The results of the fall 2017 administration of the VB-MAPP were reported in the October 2017 RR. Student exhibited difficulty with most “wh” questions on the VB-MAPP in October 2017. Student also demonstrated a lack of understanding of prepositions within those questions. (N.T. 349-50; J-29 pp. 27-28.)
79. The October 2017 RR added a secondary eligibility category, Speech/Language Impairment, to the primary Autism category. Recommendations included a highly structured environment with consistent routines; adaptations and modifications to the curriculum across subject areas; and continuation of the IEP program modifications and specially designed instruction in addition to interventions/strategies to address reading, social skills, attention, independence, and speech/language needs. (J-29 pp. 29, 31-33)
80. At a meeting to discuss the October 2017 RR, an ABA program was mentioned by District team members, but the Parents quickly rejected it as a consideration because they did not believe Student made progress in that program in earlier years. (N.T. 73, 294, 433.)
81. A draft IEP was developed in November 2017. That IEP incorporated results of the October 2017 RR and provided other updated information. The reading comprehension goal was revised to reflect first grade level text (instead of second grade); the speech/language goal for answering “wh” questions removed the “why/how” type of questions; and graphic organizers and specific reading strategies were added as specially designed instruction. In all other respects, this draft IEP was consistent with that as revised in October 2017, but the November 2017 IEP was never finalized. (N.T. 170-71; J-34; J-35.)
82. The District created a NOREP in November 2017 refusing the Parents’ request for placement at the Private School. There is no evidence that this NOREP was sent to or received by the Parents. (N.T. 864, 950-51; S-50)
83. Progress monitoring over the 2017-18 school year reflected that Student had not met most of the objectives toward the reading comprehension goal for independent reading and understanding first grade level text; exhibited growth in the written expression goal (writing a three-sentence story independently responding to a prompt with details); made progress on the word knowledge/vocabulary goal; made significant progress on the mathematics goals for improving mathematics computation and solving word problems

⁷ The witness testified that S-32 is a more accurate version of the VB-MAPP compared to J-37 (N.T.339-40, 374-75).

(with support); and made significant progress on speech/language goals with the exception of inconsistent performance answering “wh” questions. (J.35.)

84. The District recommended an ABA classroom at the January 2018 IEP meeting and issued a NOREP for that recommendation in February 2018. That decision was made because the District team members believed that they had exhausted all other possibilities for Student. The Parents did not approve the NOREP. (N.T. 80, 117, 183-84, 199-200, 307, 769, 906, 946; J-36.)

PROPOSED ABA PROGRAM

85. The proposed ABA classroom provides an intensive program in a language-rich environment. Students’ language skills are continually analyzed to identify deficits requiring intervention and to individualize programming to meet each student’s needs. (N.T. 121-22, 307-08, 315-16, 325-26.)
86. Generalization of skills is a focus in the ABA program and classroom to avoid rote learning. Natural environment teaching is part of the ABA program. (N.T. 321-22, 352, 361.)
87. The ABA classroom focuses on language and skill deficits identified by the VB-MAPP, with a goal of student generalization of those skills into other environments and other individuals. Intensive teaching sessions are conducted for review of skills previously acquired and new skills yet to be learned. Skills are tracked to ensure progress and, if needed, to implement different interventions. (N.T. 325-30, 332-35, 358-61.)
88. Students in the ABA classroom participate in regular education special classes as well as breakfast, lunch, and recess. Staff facilitate social interactions especially during recess. (N.T. 335-36, 371.)
89. The ABA classroom provides visual supports. (N.T. 321, 909.)
90. The ABA classroom has access to behavioral specialist consultants. (N.T. 909.)
91. Students in the ABA classroom are provided with iPads. (N.T. 908.)
92. The ABA classroom had eight students during the 2017-18 school year with nine possible. There were one teacher and two paraprofessionals in the classroom. (N.T. 331, 911-12.)
93. The level and type of speech/language therapy in the most recent agreed IEP can be provided in the building where the District recommended the ABA classroom. (N.T. 829-31, 849-50.)
94. The ABA classroom recommended for Student was reviewed by the Pennsylvania Training and Technical Assistance Network, an arm of the Bureau of Special Education, in April 2018, and was conferred a total score of 100%. (S-43.)

INDEPENDENT EDUCATIONAL EVALUATION

95. The Parents obtained a second private psychological evaluation of Student in the spring of 2018 by a second private psychologist. That second private evaluation was completed in May 2018 with a report referenced as an Independent Educational Evaluation (IEE). (N.T. 553-54; P-23.)
96. The Parents' second private psychologist observed Student at school as part of the IEE. (N.T. 558-59; P-23 p. 3.)
97. The Parents' second private psychologist observed the ABA classroom as part of the IEE. (N.T. 565-66; P-23 pp. 3-4.)
98. The Parents' second private psychologist observed the Private School as part of the IEE. (N.T. 568-70; P-23 p. 4.)
99. Achievement assessment for the IEE (KTEA-3 and select subtests of the WJ-IV-ACH), yielded standard scores well below the average range on both measures in reading comprehension and on the listening comprehension subtest of the KTEA-3. Student exhibited a relative strength on letter-word identification (low average range) on the WJ-IV-ACH but lower scores on a comparable measure on the KTEA-3. This second private psychologist noted Student's language processing deficits and delays in vocabulary and basic concepts that are necessary to succeed in school. (P-23 pp. 5-6.)
100. The second private psychologist agreed that Student's severe language deficits are the cause of Student's limited reading comprehension skills. (N.T. 579-80.)
101. A measure of Student's social skills through parent- and teacher-rating scales for the IEE confirmed significant deficits. (P-23 p. 7.)
102. The second private psychologist made recommendations in the IEE for an intensive, highly individualized program with one-on-one and small group instruction that focuses on verbal language deficits. Social skills intervention and instruction, accommodations for Student's need for time to process oral information (ensuring Student's attention to directions, chunking verbal information, wait time, visual cues, written expectations and directions), errorless learning, and strategies for promoting independence were also made. (P-23.)
103. The District's October 2017 RR was consistent with previous evaluations as well as the IEE. (N.T. 247, 263, 574-76; J-29; P-23.)
104. The Parents and their advocate visited the Private School. (N.T. 684-85, 775-76.)
105. The Parents and their advocate visited the ABA classroom proposed by the District. (N.T. 688-89, 771, 786, 786-87.)
106. All of the recommendations in the IEE can be implemented in the proposed ABA classroom. (N.T. 355-59.)

PRIVATE SCHOOL

107. The District contacted representatives of the Private School to identify the services it could offer to Student. (N.T. 863-64, 900.)
108. The Private School only accepts students who are placed there by school districts, not private placements arranged by parents. There are no children without disabilities at the Private School. There can be up to ten students in the classroom Student would likely attend. (N.T. 790, 908, 910.)
109. The Private School does not provide language-based programming. (N.T. 905-06.)

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 Parents 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 to be credible, testifying to the best of his or her

recollection from his or her perspective; and the testimony as a whole was essentially quite consistent to the extent necessary to decide the issues presented. With the exception of portions of the testimony of the private psychologist and District professionals discussed further below, no witness' testimony was accorded significantly greater weight than others.

In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit⁸ were thoroughly considered in issuing this decision, as were the parties' closing statements.

GENERAL IDEA PRINCIPLES: FREE APPROPRIATE PUBLIC EDUCATION

The IDEA and the implementing state and federal regulations obligate local educational agencies (LEAs) to provide a “free appropriate public education” (FAPE) to children who are eligible for special education. 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 that are reasonably calculated to permit the child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” as requiring “significant learning” and “meaningful benefit” under the IDEA, based upon the child’s individual needs and abilities. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999)(citing *Polk v. Central Susquehanna Intermediate Unit*, 853 F.2d 171 (3d Cir. 1988)). An LEA complies with this FAPE obligation through development and implementation of an IEP that is “‘reasonably calculated’ to enable the child to

⁸ HO-1, a series of email communications on May 20, 2018, regarding who would call certain District witnesses, was inadvertently not included in the list of admitted exhibits (N.T. 963), and it is hereby admitted. The objections to P-20, P-21, S-20, and S-25 that were taken under advisement (N.T. 960-63) are hereby sustained. The exhibits marked P-20, P-21, and S-25 are excerpts of progress monitoring available elsewhere in the record; and S-20 was not referenced in the record and its relevance was not established.

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) (citing, among others, *Polk, supra*).

Quite recently, the U.S. Supreme Court was called upon to consider once again the application of the *Rowley* standard, and it there observed that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew 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.

Endrew F., ___ U.S. ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017)(citing *Rowley* at 206-09)(other citations omitted). 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.” 137 S. Ct. at 1001, 197 L.Ed.2d at 352. This standard is not inconsistent with the above longstanding interpretations of *Rowley* by the Third Circuit.

As *Endrew*, *Rowley*, and the IDEA make abundantly 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 law does not demand that LEAs provide services beyond those that are appropriate in light of a child's unique circumstances, such as those that "loving parents" might desire. *Andrew F.*, *supra*; *Ridley School District. v. M.R.*, 680 F.3d 260, (3d Cir. 2012); *see also Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). In addition, an IEP must be judged "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). Nevertheless, educational professionals must monitor whether or not a child's program is providing FAPE, and make changes to the program as needed.

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 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 LEAs must defer to parents' wishes. *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” an LEA’s decision).

As has previously been explained by the U.S. Department of Education,

The IEP team should work towards a general agreement, but the public agency is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE)... If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint.

Letter to Richards, 55 IDELR 107 (OSEP 2010); *see also* 64 Fed. Reg. 12406, 12597 (1999) (same).

GENERAL 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).

An LEA’s obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood, supra*, 172 F.3d at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Accordingly, the FAPE claims under both the IDEA and Section 504 shall be addressed together.

PROVISION OF FAPE MARCH 2016 THROUGH END OF 2017-18 SCHOOL YEAR

The first issue is whether the District failed in its obligation to provide appropriate programming to Student during the relevant time period, March 2016 through the end of the 2017-18 school year. The Parents have limited this issue to the program designed to address Student's deficits in reading comprehension. (Parents' Closing at 1-5, 7, 12.) Although as more fully discussed below the contentions regarding reading comprehension are intertwined with and a result of significant language deficits, this hearing officer cannot disagree on this record that Student derived meaningful educational benefit in all other areas of programming throughout the time period in question.

The record reflects that Student participated in an ABA program through the end of the second first grade year and the Parents objected to continuation in that program and placement before the start of the 2015-16 school year. The District, whose representatives did not agree that a change in program and placement was warranted, nonetheless elected to accede to the Parents' wishes and provide a different program in another school building. That decision to continue to work collaboratively with the Parents, while certainly laudable, understandable, and consistent with the IDEA principles focused on collaboration with parents who are critical members of the IEP team, was not without some risk. After all, the duty to ensure a student's right to FAPE lies with the LEA, not the Parents. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996) (explaining that, "a child's entitlement to special education should not depend upon the vigilance of the parents[.]").

The evidence in the record about the 2015-16 school year is relatively sparse. Student entered a different program of Autistic Support at a supplemental level that was not an ABA-based classroom, and had daily opportunities for participating in the regular education

environment for mathematics, specials, lunch, and recess. It was of course necessary to allow some period of time to elapse after Student's transition to a new school and different program in order for any effective evaluation of that program to be validly made. Student was receiving the District's core reading program, but by the end of that school year, Student continued to exhibit significant language deficits, and the Parents raised concerns about Student's reading comprehension. Although Student was demonstrating some growth in answering certain "wh" questions with supports, improvement in those skills was clearly needed, and the District recommended a different reading program for the fall of 2016 and the special education teacher was trained in its use. This hearing officer cannot conclude that the District's ongoing efforts to address Student's language-based needs through the end of the 2015-16 school year were inappropriate under all of the circumstances, including Student's unique presentation and abilities.

At the start of the 2016-17 school year, assessment of reading readiness and achievement revealed the severity of Student's deficits in reading and listening comprehension. The Visualizing and Verbalizing program was implemented, but the District again acceded to the Parents' concerns with the type of monthly monitoring of reading comprehension by eliminating its use without moving to an alternative. Although Student exhibited growth with sight words and spelling, Student's progress on goals and objectives relating to answering "wh" questions was not consistent over time and supported the District's belief that Student's real need was for developing basic language skills. By May 2017, the District recognized needs, and suggested intervention, for developing word knowledge and vocabulary, and different reading programs were attempted in the 2017-18 school year. To its credit, the District was open to ongoing changes in reading interventions as the Parents renewed their concerns, and a number of

programs were tried and discarded, again due to Student's significant language deficits that prevented meaningful growth in precursor skills to reading comprehension. This hearing officer concludes that by the start of the second semester of the 2016-17 school year, the District had sufficient notice that Student's language deficits were not appropriately addressed and that continued revisions to Student's reading program was not reasonably calculated to enable Student to derive meaningful educational benefit in the area of language-based delays that were manifested in, among other things, reading comprehension activities. In this respect, Student was denied FAPE.

The District contends that Student's slow progress in language skill development must be evaluated in the context of Student's unique abilities and disabilities, citing, among others, *Andrew, supra*, and *Brandywine Heights Area School District v. B.M.*, 248 F.Supp.3d 618, 636 (E.D. Pa. 2017). (District Closing at 1-4, 7-8.) While that principle is certainly true, the lack of progress in Student's development of basic language skills was clear at least as of the start of the second half of the 2016-17 school year, and the District further had previously concluded that intensive language-infused programming was necessary in order for Student to make educational gains. Allowing for a reasonable period of time to assess whether the different Autistic Support program was meeting Student's needs, the requisite notice of a need for change was apparent by that point in time.

The Parents also posit that they were not provided with timely and important information at certain points during the relevant time period, such as progress monitoring reports and sufficiently measurable reading comprehension goals. (N.T. 158-59, 201-02; Parents' Closing at 4, 12.) The Parents' love for and devotion to Student and their involvement in educational programming decisions cannot be disputed. Yet, there were at least two instances where the

Parents were unaware of certain actions by the District: removal of the Visualizing and Verbalizing intervention and denial of their request for the Private School in the fall of 2017. Any arguable deficiencies in the reading goals are encompassed within the above determination that FAPE was denied on substantive grounds regarding Student's fundamental language deficits. To the extent that any omissions of information resulted in a significant impediment to the Parents' meaningful decision-making such that a procedural denial of FAPE may be found, the compensatory education remedy addressed below is intended to address both substantive and procedural flaws in this area together.

DISTRICT PROPOSED PROGRAM AND PLACEMENT FOR FALL 2018

The next issue is whether the District's proposed program and placement for the start of the 2018-19 school year is reasonably calculated to provide meaningful educational benefit to Student. The evidence is preponderant that it is.

The District proposes an ABA program in a different building than Student previously attended. That program provides intensive, language-based, individualized programming that will be based upon Student's unique fundamental language deficits, allowing for intensive teaching of new skills and repetition of those previously acquired. Skills are continuously monitored to ensure progress, and additional interventions would be considered if necessary. The proposed program and placement allows for participation with non-disabled peers, and Student will have access to the same level and forms of speech/language therapy as is set forth in the most recent IEPs. All of the District witnesses who know and have worked with or assessed Student testified, quite compellingly, that Student needs the proposed ABA program and placement proposed to address Student's severe language deficits (N.T. 101-02, 116-17, 210, 261, 355-39, 444-45, 534-35.) Additional District witnesses with understanding of Student's

needs and the program proposed testified similarly and persuasively (N.T. 838-39, 907, 924-25). The fact that Student continues to demonstrate severe language deficits after several years in alternative but intensive, and ever-increasing level of, Autistic Support further reinforces that conclusion.

The Parents, their second private psychologist, and their advocate conveyed concerns with the typical rapid pace of the ABA program that would not permit the wait time that Student needs to understand verbal information and demands, potential distractions in a busy and noisy classroom, and the perceived lack of sufficient visual supports (N.T. 586, 592-93, 596, 614-15, 620-21, 690-93, 771-72). The majority of those concerns, however, were based solely on one or two observations of the ABA classroom and generalized understanding of this specific form of ABA programming. There is no reason that Student's specific educational program cannot be provided in a manner that limits distractions, provides for the wait time that Student frequently needs, and includes sufficient visual support. Indeed, the evidence reflects that all of the recommendations in the IEE are available in the District's proposed ABA program.

Nevertheless, and while this hearing officer does not doubt that the District possesses the resources to ensure the fidelity of the programming based upon Student's specific unique needs, the attached order will require engagement of an experienced consultant to assist the parties with ensuring that Student's program will be devised to address those and any other concerns and to monitor the efficacy of the program. That provision is intended to foster a continued collaborative and trusting relationship between the parties.

The Parents also expressed their ongoing request and belief to the District and at the hearing that Student would benefit from services of a reading specialist. It is unclear why the Parents believe that a reading specialist would be able to address Student's underlying language-

based deficits; indeed, several District witnesses convincingly opined that one could not (N.T. 118, 860, 904-05). The record is preponderant that Student lacks many of the basic language skills that relate to, and are a precursor for, reading comprehension. The underlying language weaknesses must be developed before Student will be able to demonstrate comprehension of reading materials, and the proposed ABA program is reasonably calculated to enable Student to develop those skills. The evidence simply does not support a conclusion that services of a reading specialist is necessary for Student to be provided with FAPE, nor even that one would be of benefit at this time.

Finally, while it may well be possible that there are other programs that would successfully meet Student's language-based needs, the District is only obligated to offer **an** appropriate program. This hearing officer concludes that the District has done so in this case.

REMEDIES

COMPENSATORY EDUCATION

As a remedy for the FAPE denial, found above, the Parents seek compensatory education, which 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 may 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 designed "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. 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 had taken the position in the fall of 2015 that Student required continued ABA programming to address all of the language-based skill deficits, yet yielded to the Parents’ request for a change; and that no later than the start of the second semester of the 2016-17 school year, it had knowledge that those needs were not sufficiently being met. This hearing officer finds that date to be the appropriate start of a compensatory education remedy. The Parents suggest one hour per day which appears to approximate the amount of time that Student was provided reading instruction together with some of the time of speech/language therapy services were attempting to address related skills. Equitably, then, one hour per day is an appropriate amount of compensatory education from the start of the second semester of the 2016-17 school year through the end of the 2017-18 school year.

The award of compensatory education is subject to the following conditions and limitations. Student’s Parents 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 Parents. The hours of compensatory education may be used at any time from the present until Student turns age sixteen (16).

EXPERT WITNESS FEES

The Parents also request reimbursement for the fees incurred by them for the private psychologist who conducted the IEE and their advocate, who were qualified as experts, to testify at the hearing. The testimony of the second private psychologist was certainly knowledgeable, and provided valuable information about Student's current needs. The testimony of the advocate similarly provided insight and understanding of the events over the relevant time period, especially given the Parents' limited proficiency with the English language. However, the basis for this requested remedy is Section 504, which provides in relevant part that, "*the court*, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs." 42 U.S.C. § 2000e-5(k)(emphasis added). Similar language in the IDEA has been construed as not applying to administrative hearing officers. *B. ex rel. M.B. v. East Granby Board of Education*, 201 Fed. Appx. 834, 837, 2006 U.S. App. LEXIS 27014, *6 (2d Cir. 2006)(concluding that an attorney fee award "is a district court function" under 20 U.S.C. § 1415(i)(3)(B), which provides district courts with discretion to "award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party").

Accordingly, while the issue has been preserved, this hearing officer declines to order that remedy.

DICTA

Finally, while it is not necessary to address whether the Private School is appropriate, it should be noted that the evidence supporting that placement for Student is far from convincing. Even the Parents' advocate, who was qualified as an expert in autism, conceded that its ability to meet Student's needs was uncertain (N.T. 696-98). Even had this hearing officer concluded that the District's proposed program and placement was not appropriate, she was not inclined to order the prospective placement in an environment that may well be unable to meet Student's significant language deficits that are paramount, particularly as Student advances to grades where students are expected to read to learn rather than learn to read. Student must be provided with the opportunity to remediate those language skill weaknesses promptly in order to have the foundation to understand and comprehend what is conveyed both orally and in writing. It is the sincere hope of this hearing officer that the parties are able to put this disagreement behind them, to continue to meet collaboratively as a team, and to focus on Student's needs going forward. The inclusion of an outside consultant is designed to assist the parties in doing so.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District did deprive Student of FAPE with respect to language-based needs; that Student is entitled to compensatory education as a result; and that the District's proposed program for the 2018-19 school year is appropriate.

ORDER

AND NOW, this 15th day of July, 2018, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's proposed program for the 2018-19 school year as set forth in the February 2018 NOREP is appropriate.
2. Within ten calendar days of the date of this Order, the District shall convene a meeting of Student's IEP team to discuss individualized implementation of the November 2017 IEP (including any revisions the team deems necessary) and February 2018 NOREP in the ABA classroom specified by that NOREP. That discussion shall include a plan for monitoring the efficacy of the program for Student.
3. Prior to the date of the IEP meeting described above, the District shall engage the services of a consultant from PaTTAN with expertise in ABA programming, or another otherwise qualified professional, to work with the IEP team on individualizing Student's program, including the need for any additional assessments.
4. The District denied Student FAPE in its development and implementation of special education programming to Student related to language-based needs during the 2016-17 and 2017-18 school years.
5. Student is entitled to compensatory education in the amount of one hour per day for each day that the District was in session from the first day of the second semester of and through the end of the 2016-17 school year, and for each day the District was in session during the 2017-18 school year. The compensatory education is also subject to the following conditions.
 - a. Student's Parents 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 Parents. The hours of compensatory education may be used at any time from the present until Student turns age sixteen (16).
 - c. The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market

rate for private providers of those services in the county where the District is located.

6. 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.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
ODR File No. 20345-1718KE