

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

Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 00450-09-10-AS

Child's Name: J.S.

Date of Birth: [redacted]

Dates of Hearing:

January 5, 2010, March 11, 2010, March 12, 2010,
April 15, 2010

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Dr. Margaret Billings-Jones
Superintendent
Lakeland School District
1593 Lakeland Drive
Jermyn, PA 18433

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Drew Christian, Esquire
801 Monroe Avenue
Scranton, PA 18510

Jane Williams, Esquire
Sweet, Stevens, Katz & Williams
P. O. Box 5069
New Britain, PA 18901

May 10, 2010

May 24, 2010

Cathy A. Skidmore, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is currently an elementary school-age student in the Lakeland School District (hereafter District) who is eligible for special education primarily based upon an emotional disturbance. Student's parent filed a due process complaint challenging Student's educational program and placement for the time period beginning November 19, 2008 until such time as an appropriate educational program is implemented. For all of the reasons set forth below, I find that the District did not deny a free, appropriate public education to Student, and that the District's evaluation of Student was proper. Because I find in favor of the parent on the issue of whether the District has complied with its mandate to provide education to Student in the least restrictive environment, I will direct the IEP team to reconvene to address this obligation.

ISSUES

1. Whether the District denied a free, appropriate public education (FAPE) to Student from the fall of 2008 to the present and, if so, whether Student is entitled to compensatory education;
2. Whether the District's psychoeducational evaluations and functional behavioral assessments of Student are adequate and, if not, whether an independent educational evaluation at public expense is warranted;
3. Whether Student's individualized education program (IEP) team should be directed to reconvene to develop an appropriate program for Student.

FINDINGS OF FACT

1. Student, whose date of birth is [redacted], is a resident of the District. (Notes of Testimony (N.T.) 31; Parent Exhibit (P) 1; School District Exhibit (S) 1)
2. Student received early intervention services based upon developmental delays beginning at the age of 3 before entering Kindergarten in the District in the fall of 2005. (N.T. 546; P 1; S 1)

¹ The name and gender of the Student are not used in this decision in order to preserve the Student's privacy.

3. The District conducted an initial evaluation of Student in October 2005 to determine eligibility for special education. Student was referred based upon a reported history of speech and language delay, developmental delays, and behavioral difficulties in the classroom. The parent reported that Student exhibited difficulties with talking excessively, following directions, controlling temper, organization, and motivation, and demonstrated aggression, a poor attention span, frequent tantrums, and tendencies to act without thinking and to give up easily. The parent also related that Student had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Student's kindergarten teacher reported that Student's social behaviors were not age-appropriate and that Student was physically and verbally aggressive, acted impulsively, was defiant, refused to do work or follow directions, and disrupted the class. (N.T. 33, 560-63; P 1; S 1)
4. In conducting its evaluation, the District's school psychologist administered the Stanford-Binet Intelligence Scales: Fifth Edition (SB: V) and the Bracken School Readiness Assessment (BSRA); other assessments were the Social Skills Rating System (SSRS) and the Adaptive Behavior Assessment System: Second Edition (ABAS-II). Student achieved a full scale IQ of 75, which was in the borderline delayed range. On the BSRA, Student achieved a standard score in the 6th percentile which was in the delayed range. Student's teacher provided information about Student's performance in the classroom and also completed the SSRS Teacher form which revealed social skills scores in the percentile rank of <2% and problem behaviors in the percentile rank of >98%. Student's mother completed the ABAS-II Parent form which revealed an overall level of adaptive behavior in the extremely low range. (N.T. 544-57, 565-67; P 1; S 1)
5. The District concluded in the Evaluation Report (ER) that Student was eligible for special education in the category of Emotional Disturbance. (N.T. 33, 547; P 1; S 1)
6. A behavior plan implemented in the kindergarten classroom at the beginning of the school year attempted to address Student's problematic behaviors including aggression, inattention, refusal to do work or follow directions, verbal threats toward others, tantrums, and disruption. The plan set forth replacement behaviors, reinforcement, and consequences, with a long-term intervention in the form of referral to an outside agency.² At some point the parent accepted the recommendation and contacted the mental health agency. (N.T. 34-35, 51-43, 683-84; P 1; S 1)
7. Student repeated kindergarten because the teachers were concerned about the progress Student was making and because Student continued to exhibit problematic behaviors. For the 2006-07 school year, Student was placed in full time emotional support. (N.T. 518; S 2)

² The outside agency referenced in the ER was the predecessor of the partial hospitalization program which is currently provided to Student. (N.T. 34-35, 370)

8. Student entered first grade in the fall of 2007. An IEP developed in July, August, and October 2007 contained annual goals to address behavior (complying with directions and remaining seated), reading, language arts, mathematics, and speech/language, and also included a Behavior Intervention Plan (BIP). The BIP addressed Student's aggression, defiance, and tantrums based upon the perception that the function of these behaviors was frustration with tasks, and to gain 1:1 attention and stimulation. A number of prevention (antecedent) strategies were set forth including frequent reminders and verbal prompts, visual cues, a reduced workload, and use of a timer. Student's placement was regular education with emotional support and guidance services in a resource room with weekly group social skills training. (N.T. 47-48; P 2, 3)
9. At some point prior to the IEP team meeting held on October 6, 2008, the parent had followed up on the District's recommendation to seek services for Student through the local mental health agency. (N.T. 689-91; P 8; S 7)
10. Student's IEP for the second grade year (2007-08) was developed at the beginning of October 2008. This IEP set forth Student's present levels of academic achievement and functional performance in the areas of reading, language arts, and mathematics, and noted that Student was included in regular education in all classes except reading and language arts. Student's problematic behaviors were described at length to include difficulty following directions, staying on task, and controlling impulsive behaviors; Student would shout out answers, talk out, refuse to do work, walk around the classroom, throw books, take things from other students, fall off the chair, and kick others. Additionally, Student demonstrated difficulty controlling behavior in unstructured settings. (P 5)
11. The October 2008 IEP contained annual goals addressing reading, language arts, assignment completion, and conflict resolution without physical aggression. This IEP also included a Positive Behavior Support Plan (PBSP) as well as guidance/emotional support and speech services as related services. The placement proposed by the District was for resource emotional support and learning support. (N.T. 57-58; P 5, 6; S 6)
12. At the IEP team meeting held October 6, 2008, District was provided with a referral from the mental health agency for Student to attend a partial hospitalization program based upon medical necessity. This recommendation was made by a psychiatrist with the mental health agency. The resulting Notice of Recommended Educational Placement (NOREP)³ proposed a change in Student's placement to a school-based partial hospitalization program provided by the mental health agency. The parent agreed with the placement and approved this NOREP on October 7, 2008. (N.T. 60-62, 64, 115-16, 174-75, 464-65, 689-91; P 7)

³ The NOREP incorrectly stated that the proposed change in placement was for disciplinary reasons. (N.T. 60; P 6, 7)

13. The partial hospitalization program is located in an elementary school in a neighboring district and is a mental health program addressing a student's behavioral and emotional problems. It has both educational and therapeutic components. The therapeutic component of the program is provided by a treatment team which, in Student's case, consists of a psychiatrist and two therapists, as well as the emotional support teacher. The educational component is provided through the local intermediate unit based upon a student's IEP. The focus is on the therapeutic component and the goal is to reintegrate the student back into the home school as quickly as possible. (N.T. 183-85, 318-19, 387, 405-07, 622-26)
14. On October 7, 2008, the District issued a Permission to Evaluate form to which the parent consented. (P 8; S 7)
15. The District conducted a re-evaluation of Student in October 2008. The resulting re-evaluation report (RR) included input from the parent that Student's behavior at home was "out of control," and that Student would hit others, throw things, and sometimes hide. Teachers reported that in the classroom, Student was disobedient, stubborn, and defiant, and seemed unhappy showing signs of sadness and depression. Additionally, teachers reported that Student was disruptive, uncooperative, withdrawn and aggressive; made careless mistakes; showed difficulty with organization and paying attention; failed to follow directions and complete work; failed to stay seated; talked excessively; and often interrupted or intruded on others. (N.T. 547-56, 567-76; P 8; S 7)
16. The District's school psychologist administered the SB: V (abbreviated battery) and obtained an abbreviated IQ score of 82. On the Woodcock-Johnson Tests of Achievement: Third Edition (W-J III), Student achieved scores in the borderline or very low range on all subtests and all clusters except Student achieved a low average score on the math calculation subtest and oral language cluster, and an average score on the oral expression cluster. (P 8; S 7)
17. The RR also included a functional behavior assessment (FBA) based upon data collected during September and October 2008. The behaviors targeted on the FBA were refusal to complete work/comply with requests, and being out of seat. The data showed that Student refused to comply 64% of the time and failed to stay seated 67% of the time. The functions of these behaviors were determined to be symptoms of Student's ADHD and Conduct Disorder, as well as to gain attention and to avoid difficult and less preferred activities. The FBA set forth replacement behaviors, prevention strategies, and consequences to address the two behavior of concern: refusal to complete work or comply with requests, and being out of seat. (P 8; S 7)
18. Information from the psychiatrist with the mental health agency who had seen Student in September 2008 was also included in the RR. The psychiatrist reported impaired judgment and impulse control as well as limited insight, and reflected diagnoses which included ADHD, Conduct Disorder, and Learning

Disorder Not Otherwise Specified (NOS). Medical interventions were specified as medication management, psychotherapy, and a school-based partial hospitalization program. (P 8; S 7)

19. The IEP team concluded in the RR that Student was eligible for special education in the primary disability category of emotional disturbance and the secondary disability category of speech and language impairment. The team determined also that, while Student demonstrated a severe discrepancy between intellectual ability and achievement, Student did not meet the criteria for a specific learning disability. (N.T. 580; P 8; S 7)
20. Student was placed into the partial hospitalization program in late October or November 2008. An IEP meeting to revise the program based upon Student's change of placement was scheduled for November 19, 2008. However, because the parent was unavailable and further to permit the providers of the partial hospitalization program to gather information on Student, the meeting was rescheduled for January 13, 2009. Student's therapist from the mental health agency which provided the partial hospitalization program attended this IEP meeting. (N.T. 65-66, 73, 180-81, 237-38, 406; P 9; S 8)
21. This IEP reflected information from the RR, and set forth the following behavioral concerns: following directions, staying on task, shouting out answers, staying seated, talking out, and controlling impulsive behaviors. Annual goals addressed reading, mathematics, speech/language, and included two behavior goals for staying seated and following directions. The behavior goals are essentially the same as in the prior IEP although social skills were removed because the team believed this need would be addressed in the partial hospitalization program. (N.T. 70-71, 75-76; P 9; S 8)
22. Modifications and specially designed instruction (SDI) specified in the January 2009 IEP were small group instruction, a classroom behavior plan, a time-out area, a de-escalation plan, direct instruction on Student's levels, and a communication log. Related services included weekly therapy and individual and group counseling. (N.T. 96-97; P 9; S 8)
23. The January 2009 IEP had a PBSP attached which identified the two behaviors of concern (staying seated and following directions) and provided antecedent strategies, replacement behavior, and consequences (both positive for performing the replacement behavior and negative for performing the targeted behavior). (P 9; S 8) There is also a classroom behavior management plan, implemented for every student in the partial hospitalization program, which includes daily reporting of a student's specific behaviors⁴ on point sheets. The point sheet

⁴ The specific behaviors are listed in the Classroom Behavior Management Plan for the classroom and are the same for all students: follow directions, pay attention, do work, follow rules, stay quiet, raise hand, stay in seat, face front, hands and feet to self, only talk about self, be responsible, use manners, use positive talk, ignore negative behavior, say O.K., be honest, sit appropriately, and be kind to property. (P 12 p. 26; S 12 p. 32)

- reflects an overall level for each day which is classified as green, yellow, or red. (N.T. 200-01, 278-89, 608-09; P 11) Each student receives warnings each day on the specified behaviors before consequences are imposed. After three warnings, the number of additional prompts are recorded as falling within the green (fewest number of prompts), yellow, or red (most prompts) level. After 12 prompts, additional consequences are imposed. Certain behaviors such as causing harm to others and destroying property result in an automatic red level for the day. (P 12 p. 26; S 12 p. 32)
24. Student's treatment team reviews Student's progress on all of the therapeutic goals every 15 days. Student's therapy goals are part of the treatment plan and are reviewed by the treatment team every three months. The special education teacher, who is a member of the treatment team, is aware of the treatment goals for the students and works with the treatment team, communicating with them on a daily basis and meeting with them as often as necessary. (N.T. 346-48, 489-90, 605, 625-26, 652)
 25. The IEP team discussed Student's participation in the general education setting with the use of supplementary aids and services, i.e., education in the least restrictive environment or LRE). Nevertheless, the team determined that Student would not participate in regular education classes "until the team determines it appropriate or [Student] receives 25/30 days on the green level of the Behavior Management Program. Inclusion will be reviewed every 30 days or if any problems occur." (N.T. 89-92, 258-68, 310-11; P 9 at p. 17; S 8 at p. 21)
 26. When a student enters this particular partial hospitalization program, he or she is placed into full-time emotional support in addition to the therapeutic component of the program, and is not included with regular education students for any classes. After this initial 30-day intake period, a meeting of the treatment team is held to determine whether the student may be included. Additionally, the treatment team conducts a review every 30 days to determine whether the student has received 25 or more "green" days which would indicate consideration for additional inclusion. Attaining 25 of 30 green days does not necessarily lead to more inclusion; the treatment team also considers other factors such as consistency of behaviors and time spent in therapy rather than in the classroom. The District is informed of these inclusion decisions but does not participate in making them, although the IEP team might reconvene to revise the IEP to reflect additional inclusion. (N.T. 114, 143-46, 264-71, 280-89, 359-62, 450-53, 491-92, 642-44; P 12 p. 26; S 12 p. 32)
 27. The parent approved the NOREP on January 27, 2009. (N.T. 84-92, 258-64; P 10; S 12)
 28. At the time Student began the partial hospitalization program, Student was included for lunch and recess. At some point Student was also included for gym, a class which Student enjoyed. (N.T. 89, 92-93, 228, 238, 277, 312, 407) Student would spend the majority of the school day in the emotional support

- classroom, except for time in individual or group therapy, included classes and lunch. Additionally, Student was able to use a time-out area or go to see one of the therapists when needed, for example when Student would have a tantrum. (N.T. 407, 413, 435-38, 495-98)
29. Student's IEP team developed another IEP on November 20, 2009 during Student's third grade year. The IEP included a recent administration of the Test of Language Development which revealed below average scores in oral vocabulary and grammatic understanding. Speech/language needs were identified for expanding Student's vocabulary and understanding verb tense. This IEP included information on Student's present levels of academic achievement and functional performance related to reading, mathematics, spelling, and behavior. Annual goals addressed reading, mathematics, and speech/language. Additionally, there were two behavior goals: following directions (as in the prior IEP) and "be kind to property," which is one of the behaviors specified in the classroom behavior management plan. Program modifications and SDI were the same as in the prior IEP but also added an individual PBSP. (P 12; S 12)
 30. The individual PBSP targeted the two goals of following directions and being kind to property, and included antecedent strategies, replacement behaviors, and consequences (which included charting on the daily point sheets described above). This IEP also included a description of the Classroom Behavior Management Plan and samples of the charts used for tracking the targeted behaviors in that plan. (P 12; S 12)
 31. The IEP team did discuss including Student in more regular classes at the November 20, 2009 meeting. The IEP team relied exclusively on the treatment team's recommendations for additional inclusion. Student was still only included for lunch, recess, and gym. (N.T. 141-48)
 32. The parent approved the NOREP accompanying the November 20, 2009 IEP. (P 13; S 12)
 33. In October of the 2009-10 school year, Student's PBSP was revised to add that Student's behavior on the van was a concern (slapping and pushing others, kicking seats, and using profanity). Additional antecedent strategies, replacement behavior, and consequences were developed to address this concern. (N.T. 202, 520-26; P 12; S 11,12)
 34. The IEP team only included two behavioral goals in the IEPs developed in January 2009 and November 2009 so as not to overwhelm Student with behavior expectations. The team focused on the two behaviors which it believed were the most significant in the classroom. Additionally, the IEP team understood that the therapeutic component of Student's partial hospitalization program was addressing most of Student's behavioral needs. (N.T. 98-105, 132-33, 420-26, 515)

35. Student achieved 25 out of 30 green days on several occasions during the 2008-09 school year but the treatment team did not decide to include Student in any additional regular education classes. (N.T. 611-19; P 11) However, by the time of the March 12, 2010 hearing session, the treatment team had determined that Student would also be included for art class but that had not yet been accomplished. (N.T. 407, 479)
36. Student's behavior is not consistent from day to day. On some days Student is compliant and on other days, Student requires significant therapeutic intervention. On average, Student spends approximately 1 ½ hours each day with a therapist. At times, the therapist goes into the emotional support classroom to help Student with emotional difficulties. (N.T. 601, 620, 650, 669, 686-88)
37. The psychiatrist from the mental health agency recommended Student for the partial hospitalization program, prompting the fall 2008 placement, and the District supported the recommendation. The program is voluntary and the parent may withdraw Student from the partial hospitalization program at any time, although she did not initially understand she had the ability to do so. By the date of the last hearing session, the parent was aware that she could withdraw Student from the program. The District cannot unilaterally withdraw Student from that program. (N.T. 115-16, 175-77, 684-86)
38. The District does not have an emotional support classroom at the elementary level. (N.T. 198)
39. During the time Student has been placed in the partial hospitalization program beginning in November 2008 to the present, Student has made reasonable educational progress with respect to reading, mathematics, and other academic subjects. (N.T. 373-76, 494-99; S 9)
40. Due process hearing sessions were conducted on January 5, March 11, March 12, and April 15, 2010 to address the issues set forth above.

DISCUSSION AND CONCLUSIONS OF LAW

At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden in this case rests with the parents who requested the hearing in this case. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.⁵

⁵ Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. See generally *David G. v. Council Rock School District*, 2009 WL 3064732

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Bd. of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. However, procedural violations can support a claim for relief only if those violations impeded a child’s right to receive FAPE, or significantly impeded the parents’ opportunity to participate in the decision-making process concerning provision of FAPE to the child, or caused a deprivation of educational benefit. 20 U.S.C. §1415(f)(3)(E)(ii); 34 C.F.R. §300.513(a)(2).

The *Rowley* standard is met when a child’s program provides him or her with more than a trivial or *de minimis* educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988). The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child’s progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). First and foremost, of course, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324.

The parent’s first argument is that the IEPs in question fail to address Student’s behavioral, social, emotional, and adaptive needs, that the goals therein were not measurable, and that the District failed to provide sufficient progress monitoring on those goals.⁶ Relying on the decision in *In re N.B.*, No. 9044/08-09 (December 9, 2008), the parent argues that there was insufficient coordination between the behavioral aspects of Student’s IEP and the behavioral/therapeutic component of the partial hospitalization program. (Parent’s closing statement at 8-10)

(E.D.Pa. 2009). This hearing officer found each of the witnesses to be generally credible, and the testimony overall was essentially consistent with the testimony of other witnesses, except as specifically noted in this decision. It was very apparent that the witnesses who know and have worked with Student genuinely care about Student and Student’s educational success and emotional well-being.

⁶ The parent does not appear to challenge the IEPs and provision of FAPE with respect to any aspect of Student’s IEPs other than behavior. To the extent that such a claim has been raised, the evidence supports a finding that Student made meaningful educational progress in all academic areas and that the District did not deny FAPE to Student in academic subject areas. (FF 39)

I find *N.B.* is distinguishable and cannot reach the same conclusions as did the hearing officer in that case. Here, as is discussed more fully below and unlike in *N.B.*, the District conducted a comprehensive evaluation of Student in October 2008 which included an FBA. (Finding of Fact (FF) 14, 15, 16, 17, 18) Based upon that RR, the District was prepared to offer a program of emotional support to Student within the District before it received the referral to the partial hospitalization program. (FF 10, 11) Significantly, and also contrary to *N.B.*, the emotional support teacher in this case was and is a part of Student's treatment team and has been in continuous communication with Student's therapists and psychiatrist. (FF 13, 24) The specific behavioral goals in the January and November 2009 IEPs were determined based upon the two most significant behaviors exhibited by Student which impacted performance in the classroom, and furthermore were derived from the FBA. (FF 17, 23) The goals in each of these IEPs identify the particular behavior as well as the expected level of achievement, and make specific reference to the PBSP portion of the IEP. (FF 17, 23) Each IEP includes a detailed PBSP individualized for Student. (FF 17, 23, P 9, P 12, S 8, S 12) While the progress monitoring section of the January 2009 IEP provides limited information on those two behavioral goals, it is attached to the then-current point sheets which reflect Student's behavior with respect to all 18 behaviors targeted by the classroom behavior plan, which included the two goals in the IEP. (P 11, S 9). The treatment team, which includes the special education teacher, meets regularly (every 15 days) to evaluate Student's progress toward all 18 of the program's therapeutic goals including the two behavior goals in the current IEP. (FF 13, 24, P12, S12)

The parent appears to suggest that the District abdicated its responsibility for addressing Student's behavior in the IEPs and expected the partial hospitalization program to assume responsibility for most, if not all, of Student's behavioral needs. However, one cannot ignore the fact that Student was attending a partial hospitalization program which had and has a very intensive therapeutic focus. The parent does not suggest that the partial hospitalization program failed to address Student's behavioral and emotional needs (Parent's closing statement at 10), and indeed the evidence in this case overwhelmingly establishes that Student's behavioral and emotional needs were and are thoroughly and systematically addressed in the therapeutic component of the partial hospitalization program. I cannot conclude that the District denied its obligations to Student by supporting the psychiatrist and therapists, as well as Student, in this intensive program.

The parent's major contention throughout this case has been that the District failed in its obligation to provide Student's education in the least restrictive environment. (Parent's closing argument at 10) The parent argues that the partial hospitalization placement was urged by the District and, once Student began the program, Student was automatically excluded from regular education and was unable to earn additional inclusion. She challenges the percent of time Student was included and the reasons for Student's exclusion. (*Id.*)

The IDEA requires that eligible students be educated in the "least restrictive environment" which permits them to derive meaningful educational benefit. 20 U.S.C. §

1412(a); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1205 (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, successfully 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 school has included the child with non-exceptional children to the maximum extent possible. *Id.* In evaluating the first consideration, we must look at the efforts the school district has made to include the child, a comparison of the benefits to the child of placement in a regular classroom versus a separate special education classroom, and the effect on the other students. *Id.*

The evidence establishes that while the District and the IEP team did discuss LRE in developing the January and November 2009, they deferred to the recommendations of the treatment team on whether Student would be included in any classes. (FF 25, 26, 31) Although there clearly are very valid reasons for giving due consideration to the recommendations of the treatment team on when Student is ready for additional inclusion, the IDEA does demand that students are educated in the LRE, and the District unquestionably retains the obligation to ensure compliance with that requirement. Additionally, there has been no suggestion that the District cannot or should not participate in those decisions. I also find of significant concern in this case that Student's eligibility for educational inclusion appears to be dependent in large part upon the ability to earn the way into additional classes by achieving 25 out of 30 green days. (FF 26) In a related contention, the parent characterized this requirement as a moving target (N.T. 289) because there were instances where Student did reach that 25 of 30 threshold, yet the treatment team did not determine Student could be more fully included in each of these instances. (FF 35)

The record, however, does establish that decisions regarding inclusion are based upon more than Student achieving 25 out of 30 green days. (FF 26) It is also apparent that the treatment team here continually assesses Student's progress toward therapeutic goals and in doing so, gives consideration to whether Student can be more fully included. (FF 24, 25) Nevertheless, I cannot ignore the fact that inclusion is an educational obligation and that it is the IEP team which must retain the authority to make, or at the very least meaningfully participate in, those decisions. Additionally, the undisputed fact that in nearly 1 ½ years in the partial hospitalization program, Student has only been included in one class⁷ beyond that when Student first started the program is striking. In this case, I find that the District's nearly wholesale deference to the treatment team on what if any academic classes Student could attend with non-disabled peers constitutes a violation of the requirement in the IDEA that Student be included to the "maximum extent possible." *Oberti* at 1215.

⁷ As noted, the final determination regarding art class had not been made by the March 12, 2010 hearing session. The order will require the IEP team to ensure that Student is included for art class.

That conclusion leads to a question of what relief is warranted for the LRE violation. Although the parent requests compensatory education for the District's failure to provide Student's education in the LRE, such a remedy does not necessarily follow such a determination, despite the highly serious nature of this violation. The Third Circuit has very recently reiterated that "FAPE and LRE are distinguishable" and that the right to compensatory education follows a denial of FAPE, and not necessarily a violation of the LRE obligation. *A.G. ex rel. S.G. v. Wissahickon School District*, 2010 WL 1173017, * 3 (3d Cir. March 29, 2010) (citing *T.R. v. Kingwood Township Board of Education*, 172 F.3d 238, 250 (3d Cir. 1999)). In this case, the parent did not contend, or present any evidence that, the special education provided to Student in the non-inclusive setting was in any way inappropriate. Absent any basis from which to conclude that Student was denied FAPE by reason of the lack of inclusion, compensatory education is not warranted. *Id.* Rather, prospective relief in the form of a directive that the IEP team, including the parent, convene within 15 days and, in consultation with Student's treatment team, give full consideration to the relevant factors for determining the extent of Student's participation with non-disabled peers, including the full range of supplementary aids and services, will be ordered. See *Girty v. School District of Valley Grove*, 163 F.Supp.2d 257 (W.D. Pa. 2001), *aff'd mem.*, 60 Fed. Appx. 389 (3d Cir. 2002). The IEP team must also ensure that Student is included for art class if that has not yet been accomplished.

The next issue is whether the District's October 2008 psychoeducational evaluation, including the FBA, was adequate and, if not, whether an independent evaluation should be ordered. As is relevant here, a public agency must conduct its evaluation that includes (1) a variety of assessment tools and strategies for gathering relevant functional, developmental, and academic information about the child, including information provided by the parent; (2) sufficient information which is not limited to a single measure or assessment as the sole criterion for determining an appropriate educational program for the child; and (3) use of technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 34 C.F.R. § 300.304. The evaluation must be sufficiently comprehensive to identify all special education and related services needs and assess all areas of suspected disability. *Id.* If a District's evaluation does not meet all of these criteria, an independent educational evaluation (IEE) at public expense may be ordered. See generally *id.*

The parent does not point specifically to any particular deficiency in the RR and instead argues that the remedy of an IEE in this case derives from the hearing officer's authority to order equitable relief rather than from the typical IEE analysis based upon the appropriateness of the District's evaluation. (Parent's closing statement at 11) However, the District's evaluation in October 2008 is relatively recent. The RR includes pertinent developmental and educational history, input from the parents and teachers, current classroom assessments, cognitive and achievement testing, and a thorough FBA, as well as information from the treating psychiatrist. (FF 15, 16, 17, 18) After careful review, this hearing officer concludes that the District's October 2008 RR includes a variety of assessment tools and technically sound instruments as well as ample

functional, developmental, and academic information about the child which is sufficient for determining an appropriate educational program. (P 8, S 7) Accordingly, I find no basis on which to conclude that an IEE is necessary or warranted in this case under either the traditional IEE analysis or based on general equitable principles.

Lastly, the District argues that the parent's Section 504 claims should also be dismissed. (District's closing statement at 13-14) The Eastern District of Pennsylvania recently addressed a Section 504 claim which asserted discrimination for failure to provide FAPE including the responsibility to educate the child in the LRE in *Greenwood v. Wissahickon School District*, 571 F.Supp.2d 654 (E.D. Pa. 2008), *aff'd mem.*, *A.G. ex rel. S.G. v. Wissahickon School District*, 2010 WL 1173017 (3d Cir. March 29, 2010):

Section 504 of the Rehabilitation Act bars all federally funded entities from discriminating on the basis of disability. 29 U.S.C. § 794; *Jeremy H [v. Mount Lebanon School District]*, 95 F.3d [272,] 279 [(3d Cir. 1996)]. In relevant part, Section 504 states that “[n]o otherwise qualified individual with a disability in the United States ... shall, solely by reason of his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” * * * * The Third Circuit has confirmed that “there are few differences, if any, between IDEA's affirmative duty” to provide a free appropriate public education and Section 504's prohibition of discrimination. *Ridgewood*, 172 F.3d at 253. Therefore, because the School District *did* provide a free appropriate public education in compliance with IDEA, it did not violate Section 504.

Greenwood, 571 F. Supp. 2d at 667-68.

I find that this reasoning is equally applicable to the instant case. Accordingly, as I have found no denial of FAPE under the IDEA, the parent's related claim under Section 504 merits no relief.

CONCLUSION

The District did not deny FAPE to Student for the time period in question, specifically November 2008 to the present. An independent educational evaluation is not warranted based on the evidence and will not be ordered.

The District will be directed to convene the IEP team, including the parent, within 15 days of the date of this decision and, in consultation with Student's treatment team, must assess Student's inclusion beyond that for lunch, recess, and gym class, and shall ensure Student is included for art class.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby **ORDERED** to take the following actions:

1. Convene Student's IEP team within 15 days of the date of this decision to consider and assess, in consultation with Student's treatment team, the Student's inclusion in regular education beyond lunch, recess, and gym class, and shall ensure that Student is included for art class.
2. The parent's claim for compensatory education is denied.
3. The parent's claim for an independent psychoeducational evaluation and functional behavior assessment is denied.

Cathy A. Skidmore

Cathy A. Skidmore, Esq.
HEARING OFFICER

May 24, 2010