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PENNSYLVANIA SPECIAL EDUCATION HEARING OFFICER
FINAL DECISION AND ORDER

Closed Hearing

ODR File Numbers

22640-19-20

22760-19-20

Child's Name

G.B.

Date of Birth

Redacted

Parents

Redacted

Counsel for Parents

Lucas J. Repka, Esquire
Repka Law Offices
108 East Center Street
Nazareth, PA 18064

Local Education Agency

Council Rock School District
The Chancellor Center
30 North Chancellor Street
Newtown, PA 18940

Counsel for LEA

Mark W. Cheramie Walz, Esquire
Sweet, Stevens, Katz & Williams
331 East Butler Avenue
New Britain, PA 18601

Hearing Officer

Cathy A. Skidmore, Esquire

Date of Decision

03/10/2020

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a secondary elementary school-aged student in the Council Rock School District (District). Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² In the fall of 2019, the District filed a Complaint against the Parents seeking to defend its recent evaluation of Student after the Parents sought an independent educational evaluation (IEE). Student's Parents then filed their own Complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,³ as well as the federal and state regulations implementing those statutes.

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

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

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

The cases were consolidated for a due process hearing.⁴ The Parents sought to establish that the District's spring 2019 reevaluation of Student was inadequate, and that the programming did not provide Student with FAPE over the 2017-18 school year and continuing through the present. The District maintained that its reevaluation of, and special education programming for, Student were compliant with its IDEA obligations. Both parties sought relief consistent with their claims.

Following review of the record and for the reasons set forth below, neither party will prevail in all respects.

ISSUES

1. Whether the District's June 2019 completed evaluation, including a speech/language evaluation, was appropriate;
2. If the District's June 2019 evaluation of Student was not appropriate, should Student be provided an IEE at public expense;
3. Whether the District's program provided to Student during the 2017-18 school year and continuing through the present was and is appropriate for Student;
4. If the District's program for Student was inappropriate in any respect, should Student be awarded compensatory education; and
5. If the District's program for Student is currently inappropriate in any respect, should the District be ordered to develop a new IEP?

⁴ The Parents also filed an Amended Complaint during the course of the hearing. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Citations to duplicative exhibits may not be to all. References to Parents in the plural will be made where it appears that one was acting on behalf of both.

FINDINGS OF FACT

1. Student is a secondary elementary school-aged child who resides in the District and is eligible for special education. (N.T. 25-26.)

Early Educational History

2. Student presented with speech/language delays since before age three, particularly with articulation and speech sound production. Student was evaluated and found eligible for early intervention services as an infant/toddler. (N.T. 194-95, 199; P-1; P-2; S-1 at 2; S-6 at 2.)
3. The District conducted a reevaluation in the spring of 2015 in preparation for Student's transition to school-aged programming. A Reevaluation Report (RR) issued in April 2015. At that time, Student was assessed with high average cognitive ability, somewhat variable academic achievement, and some behavioral concerns in the educational environment. Speech/language needs (phonological deficits and articulation weaknesses, receptive and expressive language, and social/pragmatic language) were also documented. (P-2; P-3; P-4; S-1.)
4. The District's April 2015 RR reflected eligibility on the bases of a Specific Learning Disability in basic reading skills and written expression, and a Speech/Language Impairment. Recommendations to address those areas as well as behavioral needs (such as for coping skills) and monitoring of sensory needs were made. (S-1.)
5. Student entered the District in Kindergarten during the 2015-16 school year. (N.T. 196; P-4; P-8; S-3.)

6. Student's Individualized Education Program (IEP) for the 2016-17 school year (first grade) was for learning support at an itinerant level with speech/language as a related service. (S-2.)
7. Student was in a co-taught classroom for first grade. Student at times exhibited some concerning behaviors that school year, such as not raising hand, responding to task demands or directives with frustration and loud negative comments, and failing to demonstrate emotional self-control. By April 2017, when Student's IEP was revised, the special education teacher used a tally sheet to collect data on Student's concerning behaviors. (N.T. 205-06, 286-87, 337-40, 349-51, 375-85; S-4 at 12.)
8. A new IEP was developed in April 2017. Parent input into that IEP included a request for a regular education classroom rather than an inclusion classroom. Needs identified were for social/pragmatic language skills, articulation, appropriate behaviors, and self-control. Annual goals addressed social/pragmatic language skills, emotional regulation, and appropriate responses to direction or redirection, with the latter two goals monitored through data collection charts. The special considerations section did not indicate that behavior impeded learning. (S-4.)
9. Program modifications and items of specially designed instruction in the April 2017 IEP were for social skills instruction; instruction in coping skills; reminders and prompts for speech; a classroom behavior system; use of consistent language across settings; positive reinforcement; availability of choices for motivation; repeated directions; graphic organizers; and chunking of assignments. Student's program was for learning support at an itinerant level with full participation in regular education classes except for speech/language sessions (approximately one thirty minute session each week). The

Parents approved the accompanying Notice of Recommended Educational Placement (NOREP). (S-4.)

2017-18 School Year

10. Student entered second grade at the start of the 2017-18 school year and was in classroom with a regular education teacher. Student began the school year engaging in behavior at times similar to that in first grade. Within the first month, the Parents noticed that Student would arrive home after school upset, and Student began to be resistant to going to school. This type of behavior was not observed at school. (N.T. 219-23, 286-87, 403, 405.)
11. Student's second grade class was instructed on social skills as a group, including peer relationships and inappropriate responses. (N.T. 407, 443.)
12. The special education case manager was on leave for the first few months of the 2017-18 school year and a long-term substitute filled that role until approximately early December 2017. When the special education case manager returned, she noticed that Student's problematic behaviors were exhibited more consistently than in the prior school year, particularly when writing tasks were involved. However, Student was usually able to successfully complete tasks within a short period of time after behaviors occurred. Still, by the end of the 2018-19 school year, a different approach to behavioral intervention was suggested. (N.T. 347, 356, 389, 396-98; S-11 at 10.)
13. The substitute case manager developed a behavior chart for Student that was used before and after the leave for the regular case manager during the 2017-18 school year. With those charts, the special education teacher used tally marks to note problematic behaviors and, at times, Student was asked to make tally marks as well to help

Student be aware of behaviors and discuss what occurred with an adult; this data was used for progress monitoring. Student did not exhibit distress when asked to use the chart. Student was given positive reinforcement when Student responded appropriately in the classroom. (N.T. 357-59, 363-64, 415-17, 422-25, 427-28, 435, 437-38, 440-42, 444, 447; P-23.)

14. Student exhibited anxiety and more emotionality at home after school through the fall and into the winter of 2017, and the Parents had Student evaluated privately. A neurodevelopmental pediatrician conducted an evaluation of Student in February 2018 to determine, among other things, whether Student met diagnostic criteria for Attention-Deficit/Hyperactivity Disorder (ADHD). Notably, the private psychologist utilized select subtests of the NEPSY-II to assess executive functioning skills, yielding average range scores on those that Student did not refuse to complete. Student was diagnosed with ADHD⁵ and medication trials began. This psychologist also recommended direct instruction in some areas of executive functioning weakness (impulse control, planning, organization, and flexibility) together with accommodations. (N.T. 220-22, 224, 226; S-6.)
15. The Parents shared the neurodevelopmental evaluation with the District. (N.T. 226.)
16. The District initiated the reevaluation process in February 2018 with the issuance of a Permission to Reevaluate form. (N.T. 365; S-13 at 43-46.)
17. A District RR issued in April 2018. The District and Parents determined at that time that any new assessments should wait for the start of the

⁵ Rating scales were completed by the Parents but no other raters for this evaluation. (S-6.)

following school year because Student's medication was then being adjusted. (N.T. 31-33, 40-42, 228-29, 288, 291; S-7.)

18. The April 2018 RR summarized available information including previous evaluations and current classroom-based assessments. Teacher input into this RR revealed challenging behaviors described as unpredictable, exhibiting difficulty with redirection, frustration with multi-step tasks, and distractibility; at times Student reacted in an argumentative and disrespectful manner. A continuation of speech/language services was recommended to address pragmatic/social language weaknesses. (S-7 at 8-9.)
19. Recommendations in the April 2018 RR included instruction in social and coping skills, a classroom behavior system with clear expectations, availability of choices, consistent language across settings, positive reinforcement and motivation, repetition of directions, test and assignment accommodations, preferential seating, and graphic organizers. (S-7.)
20. The Parents did not contest the April 2018 RR. (N.T. 37.)
21. One or more meetings convened in April 2018 to review the April 2018 RR and develop a new IEP. (N.T. 230, 391.)
22. The District conducted an informal behavior assessment in early May 2018. That assessment identified the following behaviors: argumentative or disrespectful responses to peers and teachers; calling out during class; verbal or physical reactions to assignments or tasks; and concerning comments about Student's life or emotionality. (N.T. 390-91; S-11 and 12.)
23. Suggested strategies from the informal behavior assessment included use of tally marks for positive behavior to earn reinforcement; school counseling to develop coping skills; direct instruction in social

language (speech/language support); positive affirmations; support for written assignments; signals when Student needed a break; movement breaks and fidget items; wait time; structured choices; chunking of tasks and checks for understanding; preview and re-teaching; and a behavior assessment scale. (S-11 at 12-13.)

24. Student's IEP was not revised over the course of the 2017-18 school year before April, nor did anyone on the team including the Parents request a meeting. (N.T. 23, 237, 296, 408-09, 452-53.)
25. The IEP team convened a meeting in April 2018 to develop a new document but one was not finalized.⁶ Following the meeting, the Parents wrote a letter explaining their disagreement with the document: indication that Student engaged in behavior that impeded learning of Student or others; their view that support for written expression was inadequate; and a need for all to carefully monitor Student's emotions particularly during the medication trials. (S-8; S-9.)
26. The Parents also expressed disagreement with including behavioral goals in the IEP in the spring of 2018, asking instead for better coping strategies, and the team complied their request by removing the goals. (N.T. 366-38, 371, 393-95.)
27. In April 2018, the Parents had Student evaluated by a private psychologist who authored a letter describing Student's emotional presentation. He also referred Student for psychiatric evaluation. The Parents gave consent for the District to communicate with that

⁶ The IEP is at S-8 but does contain references to May and June 2018 events. S-11 is the more complete final IEP in the spring of 2018.

psychologist; but in early May 2018, the Parents revoked that consent. (N.T. 259, 262; P-14; S-10.)

28. The Parents became aware of the use of the chart with tally marks by both the teacher and Student at an early May 2018 meeting. (N.T. 242-44; S-11 at 16.)
29. Another IEP meeting convened in June 2018. By that time, the team had agreed to stop using the tally mark charts at the Parents' request. (N.T. 255, 257-58, 430-41, 455.)
30. The June 2018 IEP summarized Student's academic achievement and functional performance. Academically, Student had strengths and weaknesses across subjects, and particularly required prewriting discussion or individualized support in order to complete writing tasks. This IEP noted Student's needs as functional replacement behaviors, following directions, completing tasks, demonstrating self-control and emotional regulation, organizing ideas, and improving reading fluency. (S-11.)
31. Annual goals in the June 2018 IEP addressed assignment/task completion (from a baseline to be determined to a goal of completing the task within allotted time on four of five consecutive trials), and displaying appropriate language skills during conversational exchanges (from a baseline to be determined to a goal of three consecutive opportunities). (S-11 at 25-26.)
32. Program modifications/items of specially designed instruction in the June 2018 IEP were for: direct instruction in social and coping skills; direct instruction in social language (speech/language support); preview and re-teaching; positive reinforcement and motivation; support for written assignments including graphic organizers; previewing activities and events; movement breaks and fidget items;

wait time; a behavior scale; repetition of directions; positive affirmations; verbal reminders and cues for speech; notice of schedule or routine changes; signals of time remaining; consistent language across settings; use of "first...then" language; leadership opportunities; teacher-generated choices; consistent language across settings; test accommodations (extended time, small group tests); preview and chunking of assignments and directions; beginning the school day with a preferred activity; and preferential seating. (S-11 at 27-31.)

33. The June 2018 IEP provided weekly counseling and group speech/language therapy as related services. Student's program was learning support at an itinerant level with participation in all regular education with the exception of the related services. The Parents approved the NOREP accompanying this IEP. (S-11 at 34-35, 41-43.)
34. No indication of behavior impeding learning appeared in the special considerations section of the June 2018 IEP because of the Parents' position on that element. (N.T. 240-41, 292, 455.)
35. Student's final report card for the 2017-18 school year reflected that Student was meeting all academic expectations and was approaching or meeting all expectations of a successful learner. (S-11 at 46-49.)

2018-19 School Year

36. Student was in a third grade regular education classroom for the third grade school year. Student's case manager was in the classroom on a daily basis but not for the full day. (N.T. 458-59.)
37. At times during the 2018-19 school year, Student would go to a quiet area of the classroom or ask to use an outside calming room in the building when Student needed to calm self, such as after directives to perform non-preferred tasks. Student was not always able to identify

and recognize signals that Student was becoming frustrated or anxious in order to self-regulate emotions. If redirection was not successful, a teacher would ask Student to use one of those areas, where an adult was always present. (N.T. 459-60, 463-64, 469-73, 476-79, 487-89, 488-89, 493.)

38. Student's behavior did not interfere with Student's ability to complete all required work during the 2018-19 school year despite behaviors. (N.T. 490-91.)
39. The Parents never asked that the IEP team convene over the course of the 2018-19 school year. (N.T. 304-05.)
40. The District sought consent to reevaluate in February 2019. The form specified the specific types of assessments to be used; at a meeting with the Parents, the District school psychologist discussed the specific assessments to be administered. The Parents did not ask the District to conduct the reevaluation before that time and did provide consent in early March 2019. (N.T. 40-43, 305-06; P-19; S-43 at 43-46.)
41. An April 2019 IEP was developed that summarized Student's levels of academic achievement and functional performance, with reading weaknesses less of a concern than in the past; and performance on writing tasks and in mathematics continued to reflect strengths and weaknesses. Functionally, Student reportedly used areas in and outside of the classroom as needed for calming and self-regulation successfully along with implementation of IEP provisions. (P-18; S-12 at 5-8; S-16.)
42. Student's needs in the April 2019 IEP were for social/pragmatic language skills; functional replacement behaviors; demonstrating self-control and emotional regulation; following directions; organizing ideas; and improving reading fluency. (S-12.)

43. The single annual goal in the April 2019 IEP addressed self-regulation (using a behavioral scale when frustrated or anxious to remain in the mild category, with a goal for three moderate and no severe behaviors each week from a baseline to be determined). (S-12 at 14.)
44. Program modifications/items of specially designed instruction in the April 2019 were for direct instruction in social and coping skills; direct instruction in social pragmatic language (speech/language support); preview and review of vocabulary and mathematics word problems; positive reinforcement and motivation; support for written assignments including graphic organizers; previewing activities and events; availability of areas for calming and self-regulation; movement breaks and fidget items; wait time; repetition of directions; positive affirmations; verbal reminders and cues for speech; notice of schedule or routine changes; signals of time remaining; consistent language across settings; use of "first...then" language; leadership opportunities; teacher-generated choices; consistent language across settings; and preview and chunking of assignments and directions. (S-12 at 15-17.)
45. At the April 2019 IEP meeting, the team determined that Student should not work on the speech/language pragmatic language goal, so the therapist thereafter worked with Student on self-regulation. (N.T. 140-41; S-12 at 9.)
46. The April 2019 IEP provided weekly group speech/language therapy as a related service. Student's program was learning support at an itinerant level with participation in all regular education with the exception of the group speech/language therapy. The Parents did not approve the accompanying NOREP. (S-11 at 17-19, 22-23.)

47. Progress monitoring reports for the 2018-19 school year reflected that Student at times met the assignment/task completion goal but the quality of writing assignments usually suffered. Student required prompting for the social language goal over the four quarters. (S-11 at 50-51.)

Spring 2019 District Reevaluation

48. The May 2019 RR summarized available information including previous evaluations and current classroom-based assessments. Teacher input into this RR was consistent with that in the spring 2019 IEPs: Student reportedly used areas in and outside of the classroom as needed for calming and self-regulation successfully along with implementation of IEP provisions, was generally prepared, and followed expectations. The speech/language therapist reflected gains in social/pragmatic language skills but deficits remained. Teacher recommendations were for continuation of the IEP provisions for specially designed instruction. (S-13 at 1-12.)
49. Parent input into the May 2019 RR reflected an overall better impression of the 2018-19 school year compared to second grade, but continued concerns with vocabulary, support for writing tasks, impulsivity, coping skills, and anxiety. (S-13 at 2-4.)
50. The District school psychologist observed Student on one occasion for the May 2019 RR, during which he used the Behavioral Observation of Students in Schools to compare Student to peers. Student's presentation reflected difficulty with sustaining on-task behavior. (N.T. 51, 103-04; S-13 at 40-41.)
51. The District school psychologist observed Student's demeanor and presentation at the time of assessments for the May 2019 RR, and noted that Student completed all tasks presented. Student did exhibit

some frustration and off-task and impulsive behavior during the testing, but was successfully redirected and also was provided breaks as needed. (S-13 at 14.)

52. Cognitive assessment for the May 2019 RR (Wechsler Intelligence Scale for Children – Fifth Edition) reflected an overall high average Full Scale IQ score for Student, with Composite scores ranging from the average to high average ranges. (S-13 at 14-16.)
53. Assessment of Student’s academic achievement for the May 2019 RR (Wechsler Individual Achievement Test – Third Edition) yielded scores in the average to above average ranges for all Composites and subtests, with no discrepancies from expected performance noted. (S-13 at 16-19.)
54. Social/emotional/behavioral functioning was obtained for the May 2019 RR (Behavior Assessment System for Children – Third Edition (BASC-3) and Conners’ Third Edition). BASC-3 results reflected that the teacher had a clinically significant concern with hyperactivity, and at-risk concerns for aggression, depression, atypicality, withdrawal, and adaptability. Rating scales of the Parents were only with anxiety in the clinically significant range. Student’s Self-Report on the BASC-3 revealed at-risk concerns with attitude toward school and anxiety. (S-13 at 19-22.)
55. Students of Student’s age at the time of the spring 2019 reevaluation typically exhibit at least emerging executive functioning abilities. (N.T. 65.)
56. Results of the Conners’ rating scales revealed some differences between the home and school for the May 2019 RR. The Parents’ results were in the very elevated range for inattention and peer relations, and in the elevated range for hyperactivity/impulsivity.

Teacher ratings were in the very elevated range for hyperactivity/impulsivity, defiance/aggression, and peer relations; and had no elevated ratings. (S-13 at 23-25.)

57. The Parents and teacher also completed the Autism Spectrum Rating Scales (ASRS) for the May 2019 RR. The Parents did not reflected any behavioral characteristics of autism, whereas the teacher endorsed only at-risk concerns with self-regulation, peer socialization, adult socialization, and sensory sensitivity. Neither of the raters' results were indicative of autism. (S-15 at 22-23.)
58. Speech/language assessment of Student for the May 2019 RR utilized a variety of instruments (Clinical Evaluation of Language Fundamentals - Fifth Edition, Social Language Development Test – Elementary, Expressive One-Word Picture Vocabulary Test – Fourth Edition) as well as informal speech samples. Results reflected continued social pragmatic language deficits particularly in the school setting, but no needs with respect to receptive and expressive language or articulation, voice, and fluency. Speech/language services were recommended. (S-13 at 25-29.)
59. Occupational therapy assessment of Student for the May 2019 RR included select subtests of the Beery-Buktenica Developmental Test of Visual-Motor Integration and a Sensory Processing Measure. Direct occupational therapy services were not recommended, although some suggestions were made for handwriting and other writing-related weaknesses. (S-13 at 30-32.)
60. The District's school psychologist who conducted the May 2019 RR is a doctoral level school psychologist with a number of years of experience conducting psychoeducational evaluations in the school setting. (N.T. 28-30.)

61. The speech/language evaluation conducted in the spring of 2019 was by the therapist who had begun providing those services to Student approximately one month prior to the evaluation. She has the relevant educational degrees and certifications as a speech/language pathologist with extensive experience in the field. (N.T. 127-30.)
62. The May 2019 RR reached the conclusion that Student was eligible for special education on the bases of an Other Health Impairment and a Speech/Language Impairment. The RR expressly considered but did not identify Student under an Emotional Disturbance classification. Identified needs were for: sustained on-task behavior; emotional regulation; reduction of anxiety; coping and self-advocacy skills; social/pragmatic language; and potential for depression and withdrawal. (S-13 at 33-36.)
63. The May 2019 RR was reviewed at meeting in the spring of 2019. (N.T. 139.)
64. A Functional Behavior Assessment (FBA) was conducted in May 2019 by a doctoral-level Board Certified Behavior Analyst. In a student interview, Student related that Student did not care for school but did not find the demands too easy or too difficult. Parent input reflected their concern that Student needed to learn to recognize when a break is needed. Teacher input identified two behaviors of concern: inappropriate interactions (raising voice, negative tone), and making verbal statements out of turn or inappropriate comments. Student reportedly was not using self-calming interventions and strategies consistently and teachers suggested that Student learn skills to manage feelings. The FBA made recommendations for a behavior intervention plan. (S-22.)

65. Student's final report card for the 2018-19 school year reflected that Student was meeting nearly all academic expectations and the expectations of a successful learner. (S-14.)
66. Student's IEP was revised in June 2019. Information from the recent RR and more recent classroom performance were added to the document, and Student's needs were revised to reflect those in the May 2019 RR (sustained on-task behavior; emotional regulation; reduction of anxiety; coping and self-advocacy skills; social/pragmatic language and peer interactions; and potential for depression and withdrawal). (S-15.)
67. Annual goals in the June 2019 IEP were for reducing inappropriate interactions (to a goal of an average of one or fewer per week from a baseline of three) and improved nonverbal communication, perspective taking, and flexible thinking (with a goal of scoring nine of twelve on a rubric with a baseline to be determined). A data sheet to be used to track Student's progress on the interactions goal was also added to this IEP. In all other respects, the June 2019 IEP mirrored that in April 2019. (S-15.)
68. The District revised the RR in June 2019 to add the content of the FBA. A conclusory paragraph of parental feedback regarding previously unsuccessful interventions was also added after they voiced concerns that their input was not part of the conclusions. (N.T. 67-68; S-17)
69. The Parents did not approve the June 2019 IEP and NOREP. (N.T. 266-67.)

2019-20 School Year

70. During the 2019-20 school year, the speech/language therapist worked with Student on social pragmatic language. By October 2019, Student was reportedly earning four of twelve on the social rubric

targeting nonverbal communication, perspective taking, and flexible thinking all of which required modeling, verbal cues, and/or verbal prompting. (N.T. 142; S-23 at 7.)

71. The BCBA who conducted the FBA developed a draft PBSP for Student in the fall of 2019 to address appropriate interactions (to include self-regulation), appropriate participation, and working with others. These behaviors were operationally defined. The draft provided antecedents and consequences of a number of observed behaviors and proposed goals for the three targeted defined behaviors; Student was reportedly already using a number of strategies and interventions independently. He suggested that Student not self-monitor behaviors or even be made aware of data collected on behavior. (S-22 at 9-20.)
72. A meeting convened in October 2019 but the IEP was not revised substantively except to reference the draft PBSP. Discussions included Student's needs for use of the calming areas inside and outside of the classroom and a period of time after exhibiting frustration before discussing with an adult. At the time, the Parents were concerned with a negative tone in the goals and the manner of monitoring them, as well as an overall challenge to the spring 2019 RR. (NT. 272; P-26; S-23.)
73. Another IEP meeting convened in November 2019. The IEP was revised to include additional support in writing tasks, including direct instruction prior to and during graded writing assignments; and an increase in speech/language services. Student's behavior was noted in the special considerations section to impede learning of Student or others. New annual goals were developed for this IEP to address a need for increasing appropriate interactions (words, tone of voice, volume, and body language) (from a baseline to be determined); taking perspective of others (from a baseline to be determined to 80%

accuracy over three consecutive sessions); using flexible thinking to solve social problems (from a baseline to be determined to 80% accuracy over three consecutive sessions); increased ability to work with others (from a baseline to be determined to 90% success); and accepting feedback on writing assignments (from a baseline to be determined). (N.T. 275; S-23.)

74. Program modifications/items of specially designed instruction in the November 2019 IEP were substantively similar with a few minor changes, so that the following were identified: direct instruction in social pragmatic language (speech/language support); preview and review of vocabulary and mathematics word problems; positive reinforcement and motivation; support for written assignments including graphic organizers; previewing activities and events; availability of areas for calming and self-regulation; movement breaks and fidget items; wait time; repetition of directions; verbal reminders and cues for speech; notice of schedule or routine changes; signals of time remaining; consistent language across settings; leadership opportunities; teacher-generated choices; consistent language across settings; and preview and chunking of assignments and directions. (S-23 at 27-28.)
75. Related services in the November 2019 IEP were for weekly individual and group speech/language therapy and counseling. Student's program was learning support at an itinerant level with full participation in regular education classes except for related services. The Parents approved the accompanying NOREP with some express reservations on whether it would meet Student's needs. (S-23 at 29-36.)
76. Another meeting convened in December 2019 to discuss some IEP revisions including where the counseling services would take place.

Goals were revised as follows to address: need for increasing appropriate interactions (tone of voice, volume, and body language) (with a goal of 60% of intervals from a baseline of 0%); taking perspective of others (from a baseline of 73% to a goal of 80% accuracy over three consecutive sessions); using flexible thinking to solve social problems (from a baseline of 25% to 75% accuracy over three consecutive sessions); increased ability to work with others (from a baseline of 50% to 75% success); and accepting feedback on writing assignments (from a baseline of 50% to a goal of 90% of intervals). (N.T. 276; S-25.)

77. Another meeting convened in January 2020 and a few revisions were made to the IEP. The goals were revised as follows to address: increasing appropriate interactions (tone of voice, volume, and body language) (with a goal of an average of 5 of 6 on a rubric from a baseline 3.25 of 6); taking perspective of others (from a baseline of 3 of 5 scenarios to a goal of 4 of 5); using flexible thinking to solve social problems (from a baseline of to 4 of 5 scenarios from a baseline of 1.67 of 5); increased ability to self-regulate in working with others (from a baseline to be determined using partial interval observations); and accepting feedback on writing assignments (from a baseline of 50% to a goal of 90% of intervals). (N.T. 280; S-27.)
78. Program modifications/items of specially designed instruction remained virtually the same in the January 2020 IEP, with the addition of visual reminders for appropriate interactions, check of assignment book, study guides, weekly check-ins with the teacher, and small group social skills club. The IEP otherwise was identical to the December 2019 IEP. (S-27.)

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 this 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 was split, with the District having the burden to establish the appropriateness of its evaluation, and the Parents bearing the burden to establish a denial of FAPE. 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.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible, without evidencing any intention to deceive. Where recall was not consistent with the documentary evidence, the exhibits were given greater weight due to understandable lapses in memory. The testimony of the District professionals who worked with Student at school and had direct experience with what occurred in the school setting is credited over those who testified based on something other than first-hand knowledge. Nonetheless, in reviewing the record, the testimony of all

witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties' closing statements.

General IDEA Principles: Substantive FAPE

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Many years ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with the procedural obligations in the Act.

The state, through its local educational agencies (LEAs), meet the obligation of providing FAPE to eligible students through development and implementation of an IEP which is "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." " *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009) (citations omitted). Fairly recently, the U.S. Supreme Court 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). "A focus on the particular child is at the core of the IDEA." *Id.*, ___ U.S. at ___, 137 S. Ct. at 999, 197 L.Ed.2d at 349-50 (2017) (citing *Rowley* at 206-09) (other citations omitted).

Individualization is the central consideration for purposes of the IDEA. In other words, the crucial and primary focus of a child's IEP is to respond appropriately to the identified educational needs. 20 U.S.C. § 1414(d);

34 C.F.R. § 300.324. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands services are reasonable and appropriate in light of a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Andrew F., supra; Ridley, supra; see also Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *see also Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993) (same). However, issues surrounding implementation of an existing program involve ongoing monitoring of the student’s individual responsiveness to the IEP, including progress toward IEP goals, in order to make appropriate revisions as may be necessary. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320, 324.

Evaluation Requirements

Substantively, an IEP follows and is based on an evaluation. The IDEA sets forth two purposes of a special education evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1)(C)(i).

Certain procedural requirements are set forth in the IDEA and its implementing regulations that are designed to ensure that all of the child’s individual needs are examined.

b) Conduct of evaluation. In conducting the evaluation, the local educational agency shall—

1) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining—

- i) whether the child is a child with a disability; and*
- ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;*

2) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

20 U.S.C. § 1414(b)(2); see also 34 C.F.R. §§ 300.303(a), 304(b).

The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); see also 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and

strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); see also 20 U.S.C. § 1414(b)(3). Any evaluation or reevaluation must also include a review of existing data including that provided by the parents in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a). Reports of evaluations and reevaluations must be provided within sixty calendar days of consent that must be sought promptly. 22 Pa. Code §§ 14.123(b), 14.124(b).

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family including parents have “a significant role in the IEP process.” *Schaffer, supra*, at 53. Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). Procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E).

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). If the parties are not able to reach a consensus, it is the LEA that must make a determination, with parents afforded procedural safeguards if they do not agree. *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).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995); see also *Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Thus, in this case, the coextensive Section 504 claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

The District's Claim

The District's Complaint seeks to establish that its evaluation of Student in the spring of 2019 met all requirements of the IDEA and that the Parents not entitled to an IEE at public expense. The hearing focused on the content of the June 2019 RR and particularly the assessments of speech/language and executive functioning skills.

The District's final June 2019 RR utilized a variety of assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student, all relating to areas of suspected disability. Specifically, the District conducted assessment of Student's current cognitive ability and academic achievement; summarized available classroom- and curriculum-based assessment data; obtained and reported input from the teacher; incorporated results of available information from previous evaluations including those from outside providers; compiled and summarized parental input; and provided a variety of rating scales to evaluate Student's social/emotional/behavioral functioning, supplemented by a formal FBA. The rating scales included assessment of autism-related characteristics and executive functioning. The District school psychologist responsible for administering the cognitive ability, academic achievement, and related assessments is well qualified and experienced in the assessments administered. The testimony of the District school psychologist as to the psychometric properties and value of the instruments used to gather information about executive functioning and autism characteristics (N.T. 62-65, 83) was persuasive and accordingly credited with significant weight. It is also relevant to reiterate that the District school psychologist conducted a classroom observation of Student utilizing a tool to gauge off-task behavior, and a doctoral-level BCBA also undertook a data-supported FBA process targeting identified problem behavior. These components in

addition to the testing observations by the District school psychologist and other evaluators provided a wealth of information about Student.

With respect to related services, speech/language and occupational therapy needs were also assessed. Here, the District's evaluating speech/language pathologist is similarly well qualified, and also knew Student. Her assessments encompassed all relevant language-based areas through formal and informal testing.

The District's June 2019 RR synthesized all data gathered, and determined Student's eligibility for special education under several possible classifications; and made recommendations to address Student's identified needs. All of this evidence overwhelmingly supports the conclusion that the District's June 2019 RR was sufficiently comprehensive to identify Student's special education and related service needs in all areas related to suspected disability and unquestionably met IDEA criteria.

The Parents expressly raised two concerns with the June 2019 RR that broadly suggested that the District failed to conduct adequate assessment of Student's executive functioning skills and pragmatic speech/language skills. It is, of course, always true that any evaluation could include more testing instruments. The District did identify needs in those two areas, and this hearing officer concludes that the record evidence as a whole does not support the contentions of the Parents that further investigation was necessary. Although it is somewhat puzzling and perhaps troubling that completion of the RR was not begun until the spring of 2019, this delay does not render the document substantively inappropriate. Thus, while the Parents are free to obtain an IEE at their own expense, they are not entitled to one through District funding.

The Parents' Claims

The Parents challenge the District's provision of special education programming to Student from the start of the 2017-18 school year through the present. The focus of their complaint is on the behavioral programming and even more specifically the tally sheet used during the 2017-18 school year. They emphasize their disagreement as based in part on the District having "withheld" the use of this chart from them, and argue that the District's failure to include them in decisions such as this amounts to a denial of meaningful parental participation.

LEAs must make programming decisions based on the information known at the time. This hearing officer cannot conclude that the District professionals working with Student during the 2017-18 school year used an intervention that they should have known was inappropriate and would be unsuccessful. Moreover, LEAs cannot and should not be expected to involve parents in the day to day programming decisions that they are entrusted to make. The tally sheets were used for data collection and, at times, as a tool to help Student be aware of concerning behaviors and discuss them with an adult. The testimony of the teacher at the hearing as to how Student reacted to the tally sheet (N.T. 440-42), as well as that recognizing that any student exhibiting difficult behavior in the classroom would need to be redirected (N.T. 439-42), is expressly credited here. That this specific intervention approach was not ultimately successful does not mean that the District must automatically be faulted for using this tool.

In this hearing officer's view, the main flaw in the District's behavioral programming for Student was its failure to note that Student's behaviors impeded Student's learning over the course of the 2017-18 and 2018-19 school years. That the District team members wanted to and did work cooperatively with the Parents when they disagreed with that indication is

understandable, and certainly not inconsistent with the IDEA emphasis on collaborative decision making. But parents do not have the authority to control the process or to dictate the content of an IEP when such disputes arise. 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[.]"). Thus, it is the LEA that has the obligation to develop and implement special education programming to an eligible student in light of his or her needs, and a parent who disputes decisions of the LEA in that regard has options through the IDEA procedural safeguards.

Had the District explicitly recognized that Student's behavior impeded learning before November 2019, which was clearly the case with Student more than occasionally engaging in behavior such that Student was not always attending to tasks and was at times removing self from the instructional area or at times from the classroom,⁷ use of a formal program of individual positive behavioral support based on an FBA would have been considered if not required. 20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.324(a)(2); 22 Pa. Code § 14.133. The IEP would then also have systematic behavioral data to monitor PBSP implementation and make revision as needed. The District did undertake some measures such as the informal FBA in the spring of 2018; nonetheless, even in the spring of 2017 Student's behavioral challenges were not rare or insignificant and the formal FBA in May 2019 was thus long overdue. It is quite possible that had the June 2019 RR been initiated in the fall of 2018, the programmatic response to needs would have occurred sooner. In any event, record evidence

⁷ The Parents' disagreement with or dislike of the term "impede" notwithstanding, the language in the District's IEPs tracks that in the IDEA and its implementing regulations.

preponderantly supports a conclusion that the failure to propose, and ultimately with the consent of the Parents implement, a formal individualized behavioral support plan constitutes a denial of FAPE over the course of the 2017-18 and 2018-19 school years.

With respect to the 2019-20 school year, the Parents contend that the District has yet to develop and offer a program that addresses all of Student's identified needs. It is concerning to this hearing officer that the various documents do not explicitly include the draft PBSP from the fall of 2019. The team must, at a minimum, finalize the PBSP and either make it a part of the current IEP or exist as a standalone document. The June 2019 IEP did not overcome the absence of a PBSP by substantively incorporating its provisions. Still, the Parents presented little evidence about what programming was actually provided to Student in the fall of 2019, or how Student's needs were or were not met, or how Student was or was not accessing the curriculum, or how Student was or was not progressing. One can easily conclude that the behavioral manifestations from the prior two school years continued into the fall of 2019 without a formal PBSP, but the record is insufficient to reach any other substantive conclusions for the first approximately twelve weeks of the 2019-20 school year.

On the other hand, the November 2019 and January 2020 IEPs reflect a coordinated and all-compassing special education program that is responsive to Student's needs. The identified skill deficits track those reflected in the June 2019 RR, which was determined above to be appropriately comprehensive, and behavior was finally noted to impede learning. Annual goals as of January 2020 target social pragmatic language (verbal interactions, perspective-taking, flexible thinking); self-regulation in interacting and working with others; and accepting feedback on writing assignments; and the record supports a conclusion that all of these collectively address Student's disability-related needs. There is also a

thorough set of wide-ranging yet specific program modifications/items of specially designed instruction to support Student's emotional regulation deficits, executive functioning weaknesses (including impulse control, planning, organization, and flexibility), attention, and need for support with respect to anxiety and coping skills, written expression, and attention, along with related services. As of approximately December 1, 2019, the educational program was clearly designed to provide Student with meaningful educational benefit.

The Parents' additional concerns about the 2019-20 program merit some additional discussion. First, they make repeated references to the District's failure to specify matters such as the curriculum to be used for counseling sessions and instruction. Simply put, there is no requirement or need for that level of specificity to be explicitly stated in a child's IEP, nor does the failure to do so amount to an impediment to meaningful parental participation. They also challenge the IEPs for the 2019-20 school year as lacking adequate support for written expression, attention and behavior, executive functioning, and social skills and coping skills. The IEP document must be reviewed and considered as a whole, and as set forth above, the November 2019 and January 2020 IEPs meet all requisite criteria based on Student's needs. While the Parents clearly have genuine and understandable concerns, wanting what is best for Student, an IEP need not be ideal, nor contain the level of detail that they suggest is necessary and which this hearing officer respectfully suggests is not subject to their approval.

Compensatory Education

As a remedy for the FAPE denial found above, the Parents seek compensatory education, 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. This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has also endorsed an alternate approach, sometimes described as a “make whole” remedy, where the award of compensatory education is crafted “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014) (accepting the *Reid* Court’s more equitable, discretionary, and individually tailored calculation of this remedy). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

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

As discussed above, this hearing officer concludes that the District denied Student FAPE with respect to the failure to consider and develop a formal plan of individualized behavioral support. The next question then becomes the amount of the remedy. Here, the record as a whole preponderantly demonstrates that one teacher’s approximation that Student’s behavior impacted Student’s ability to access the curriculum for an average of ten minutes each week during the 2017-18 school year is an underestimation; however, the behaviors were not occurring daily or for extended periods of time, and evidently did not obstruct Student’s ability to

complete all assigned work. Thus, this hearing officer equitably estimates that Student is entitled to one hour of compensatory education per week for each of the thirty-six weeks of the school year for both 2017-18 and 2018-19, and continuing through the first twelve weeks of the 2019-20 school year, for a total of eighty-four hours.

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 may not be used for services, products, or devices that are primarily for leisure or recreation. 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 IEPs 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 fourteen (14). 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.

CONCLUSION

The District's evaluation of Student in June 2019 was appropriate under the applicable law and there is no entitlement to an IEE at public expense. The District denied Student FAPE with respect to behavioral

programming over the 2017-18 and 2018-19 school years and the first part of the 2019-20 school year; and, Student must be awarded compensatory education. The program for the 2019-20 school year is appropriate except that the IEP team must meet to finalize Student's PBSP.

ORDER

AND NOW, this 10th day of March, 2020, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows.

1. The District's June 2019 RR of Student was appropriate in all respects, and there is no basis for an IEE at public expense.
2. The District denied Student FAPE with respect to behavioral programming during the 2017-18 and 2018-19 school years and the first part of the 2019-20 school year through the end of November 2019.
3. The District did not preclude the Parents from meaningful participation in Student's educational programming decisions.
4. Student is awarded eighty-four (84) hours of compensatory education to remedy the FAPE deprivation. All of the conditions and limitations on that award set forth in the above Discussion are expressly made a part hereof as if set forth at length.
5. Within ten calendar days of the date of this order, the District shall convene a meeting of Student's IEP team to finalize a PBSP consistent with the draft proposed in the fall of 2019 subject to any agreed revisions.
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, M.Ed., J.D., C.H.O.

HEARING OFFICER

ODR File Nos. 22640-19-20

22760-19-20