

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.

SPECIAL EDUCATION HEARING OFFICER

DECISION

Child's Name: A. F.

Date of Birth: [redacted]

ODR File No. 15605-14-15KE

Dates of Hearing: January 16, 2015; January 20, 2015

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Jeni Hergenreder, Esquire
Andrew Favini, Esquire
Disability Rights Network of PA
429 Fourth Avenue, Suite 701
Pittsburgh, PA 15219

Penn-Trafford School District
1006 Harrison City-Export Road
Harrison City, PA 15636

Judy Shopp, Esquire
Maiello, Brungo & Maiello
1 Churchill Park
3301 McCrady Road
Pittsburgh, PA 15235

Date Record Closed:

January 27, 2015

Date of Decision:

January 31, 2015

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

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

The case proceeded to a due process hearing convening over two sessions, at which the parties presented evidence in support of their respective positions.⁴ The Parents sought to establish that the District's proposed special education program for Student did not offer FAPE in the least restrictive environment (LRE), while the District maintained that its recommended program and placement were appropriate for Student.

For the reasons set forth below, I find in favor of the Parents, and will grant the requested relief with respect to appropriate consideration of LRE mandates as well as award compensatory education.

ISSUES

1. Whether the District adequately considered Student's placement in a regular education environment with appropriate supplementary aids and services;

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

² 20 U.S.C. §§ 1400-1482.

³ 29 U.S.C. § 794.

⁴ The parties, through counsel, presented a set of Joint Exhibits (J-) as well as a limited number of Parent Exhibits (P-) and School District Exhibits (S-). This hearing officer greatly appreciates the streamlined record.

2. If it did not, whether the District should be ordered to place Student in a regular education setting with appropriate supplementary aids and services; and
3. If it did not, whether Student is entitled to compensatory education?

FINDINGS OF FACT

General Background/Pre-Transition

1. Student is a kindergarten-aged resident of the District who is eligible for special education under federal and state law. (Notes of Testimony (N.T.) 24-25)
2. Student began to experience seizures at the age of fifteen months and was diagnosed with epilepsy. Student takes two medications to control that condition and those have been successful. (N.T. 29, 206; Joint Exhibit (J-) 8)
3. Student demonstrated speech/language delays at an early age and was identified as having a speech/language impairment at approximately three years of age. Student is not non-verbal but has a limited vocabulary and can be difficult to understand. Student has received private speech/language therapy since the identification of this disability. (N.T. 29-30, 212, 277; J-2 p. 5, J-5 p. 3, J-10)
4. The local Intermediate Unit (IU) conducted an initial evaluation and issued an Evaluation Report (ER) in February 2012. That evaluation was conducted at the request of the family due to Student's communication deficits and resulting frustration. The ER noted delays in the cognitive, communication, social and emotional, and adaptive developmental domains; fine motor skills were also a weakness but gross motor skills were age-appropriate. Student was identified as eligible for Early Intervention (EI) services. (J-1 pp. 1, 3-4, 7-8, 10)
5. An Individualized Family Service Plan (IFSP)/Individualized Education Program (IEP) was developed for Student in the spring of 2012 by the EI program and reviewed and updated in May 2013. The IFSP/IEP included outcomes/goals addressing attention to task, peer interaction and reciprocal conversation development, speech/language and fine motor skill development, pre-math skills, and skills for successful transition to a school-age program including completion of multi-step directions. The IFSP/IEP provided for specialized instruction and occupational and speech therapy in the IU preschool program. (J-2)
6. The IFSP/IEP also included a transition plan in the spring of 2014 for Student to begin a school-age program, for which Student would be eligible at the start of the 2014-15 school year. (J-2 p. 29)
7. Student attended preschool at the local IU for approximately two years (through the spring of 2014) after the initial ER. There were approximately eleven students in

Student's classroom, with one teacher and a paraprofessional for the class. (N.T. 31-32, 35, 82-83)

8. Student also attended a regular preschool in addition to the IU program for one semester. (N.T. 118, 123-24)
9. Student attends an activity on a weekly basis that includes approximately ten children, most of whom are typically developing peers. (N.T. 65-66)
10. Since December 2013, Student has been provided with behavioral services in the home for six to ten hours per week through a Therapeutic Staff Support (TSS) worker and a Behavioral Services Consultant (BSC). The TSS worker provides services in two hour sessions with Student working on various activities such as word puzzles and using fine motor skills. (N.T. 30-31, 66-67, 76-77)
11. In February of 2014, one of the Parents and a District Director of Student Learning Supports attended a meeting to discuss whether Student would transition to kindergarten the following school year. The Parent⁵ participated in this meeting by telephone. (N.T. 26-27, 37-38, 84, 336-37)
12. The Parents believed that Student could successfully transition to kindergarten if Student were provided with a full-time aide or personal care assistant (PCA) by the District. Because the District indicated at the transition meeting that it could not provide Student with an aide, the Parents decided not to enroll Student in kindergarten for the 2014-15 school year. (N.T. 37-39, 92-93, 124-25)
13. The IU conducted a reevaluation of Student and issued a Reevaluation Report (RR) in April 2014. The RR provided updates to the initial ER, including family concerns again focusing on Student's communication skills. Student continued to demonstrate delays in the cognitive, communication, social and emotional, physical, and adaptive developmental domains as well as fine motor skill weaknesses. Student remained eligible for EI services. (J-4)
14. Student was evaluated by a behavioral resource agency in May 2014. At the time, problematic behaviors that Student exhibited at home included eloping, hitting and kicking, and spitting to express frustration. These behaviors were not reported by the preschool for this evaluation. The mother's completion of the Child Behavior Checklist yielded scores in the normal range in all areas. Student's communication difficulties were noted as significant and a source of Student's frustration, and a deficit in the preschool environment. (N.T. 70-72, 120-21; J-5)
15. The May 2014 behavioral resource agency evaluation included a Functional Behavioral Assessment (FBA) by a BSC. The identified behaviors were spitting and eloping, whose

⁵ Student's mother was the more active participant in the circumstances leading up to Student's entry into the District. The plural Parents is used when it appears she was acting on behalf of both; and the singular Parent refers to Student's mother.

functions were hypothesized to relate to obtaining attention or preferred items/activities. The BSC provided an intervention plan across environments to address the identified behaviors. (J-5 pp. 16-27)

16. The report of the behavioral resource agency evaluation indicated continued eligibility for those services on the basis of Expressive-Receptive Language Disorder and Disruptive Behavior Disorder, with a recommendation for further evaluation for possible Attention-Deficit/Hyperactivity Disorder and Autism Spectrum Disorder. (J-5 pp. 11-13)
17. The behaviors reported for the behavioral resource agency evaluation (hitting, kicking, spitting, eloping) decreased significantly after BSC and TSS services began. By the summer of 2014, Student was exhibiting some impulsivity and tantrums when Student did not want to do something Student was asked to do. (N.T. 71, 119)
18. The Parents met with IU representatives in May 2014 to discuss Student's upcoming program for 2014-15. The Parents learned that the IU would be changing the grouping of students in the classrooms to a more random selection rather than according to age. IU staff recommended to the Parents that Student not remain in its preschool for the 2014-15 school year. (N.T. 39-40, 83-84; J-6)
19. Student's IFSP/IEP was also revised and updated at that time to include current information. Student had continued to work on the outcomes/goals from the May 2013 program; the related services also remained in place. This document indicated that Student would remain in the EI program for the fall of 2014. (J-6)

Transition to School-Age Programming

20. After exploring several options for Student, the Parents decided to enroll Student in kindergarten at the District in September 2014 after the 2014-15 school year began. (N.T. 40-41, 89-90, 92, 337-38, 344-45)
21. The Parents contacted the District to ask how to register Student and were advised to enroll Student at the neighborhood elementary school. When the Parent arrived at the elementary school, she met with the principal who confirmed with the Director of Student Learning Supports that Student should be registered there, and the Parent completed several necessary forms. She also arranged for the school psychologist to meet with Student for an evaluation several days later. (N.T. 42-45, 93-97, 149-51, 283-85, 338-39; S-7)
22. Because Student was enrolling after the start of the school year, the District had not undertaken to conduct an evaluation as it would normally have considered if the decision to transition Student to the District had been made in February or March. Such an evaluation would have included an observation of Student in the IU program by a District school psychologist and other staff. (N.T. 280-83, 289-90, 340-41)

23. On the day of the evaluation, the Parent and Student met with the school psychologist for approximately twenty minutes. Student had some difficulty attending to tasks during this evaluation. (N.T. 45-46, 285-89, 318-19)
24. The District school psychologist administered the Wechsler Preschool and Primary Scale of Intelligence – Fourth Edition (WPPSI-IV). Based on the four subtests of the WPPSI-IV that were considered to be valid and Student’s adaptive behavior skills (Vineland Adaptive Behavior Scales – Second Edition (VABS-2)) completed by the mother, the District school psychologist calculated a General Ability Index (GAI) score within the low range, and determined that Student was intellectually disabled. She did opine that Student’s GAI score would likely change if Student were more attentive; she further recognized that the WPPSI-IV as a language-based assessment can underestimate the cognitive ability of children who have language deficits. The Wechsler Individual Achievement Test – Third Edition was also administered to Student, yielding scores in the low range on the early reading skills and math problem solving subtests; no other subtests were attempted. Additionally, Student’s behaviors were assessed using the Behavioral Assessment System for Children – Second Edition completed by Student’s mother, yielding scores all in the average range. (N.T. 293-97, 326-27; J-9 pp. 5-9)
25. The District RR concluded that Student was eligible for special education with Intellectual Disability as the primary disability category and Speech/Language Impairment as the second disability category. Strengths and needs were identified, and recommendations to the IEP team included a full time life skills placement at an elementary school that was not Student’s neighborhood school. (J-9 pp. 10-11)
26. The Parent and school psychologist visited the proposed, young elementary (kindergarten through second grade), life skills classroom with Student after the assessments. (N.T. 46-47, 98-100, 290, 299, 301, 319-20, 400, 402-04)
27. Several days after the evaluation and life skills class visit, the school psychologist called the Parent, and at some point recommended full-time life skills for Student. When the Parent said she did not agree with that recommendation, the school psychologist suggested a half day kindergarten program and a half-day life skills program. (N.T. 48-49, 101-03, 298, 345-46)
28. A meeting convened on September 29, 2014 to review the Reevaluation Report (RR). The District continued to recommend a full-time life skills placement, and the Parent continued to disagree with that recommendation, asking about the possibility of Student being provided with an aide. She also completed the remaining forms necessary for Student’s enrollment at the District and provided additional information. (N.T. 49-51, 94-96, 134-35, 152, 285, 304-05, 346-50, 390-92)
29. There was no IEP developed prior to the September 29, 2014 RR meeting when placement was discussed. (N.T. 51, 353-54, 392-93)
30. The District revised the RR after the September 29, 2014 meeting to include information from the Parents and the behavioral service agency, as well as evaluations by a District

speech/language pathologist and an occupational therapist conducted during that meeting. Student was distracted by specific objects of interest to Student in the building during those assessments and the therapists ultimately discontinued those evaluations because of Student's lack of focus on the tasks they presented. These therapists did use the results of their assessments in developing goals for Student's IEP. (N.T. 104-06, 234-39, 243, 245, 265-66, 306-08, 350; J-11)

31. At the request of the Parents, the District speech/language pathologist and occupational therapist sought and received input from the private therapists on their experience with Student's needs and abilities in those areas. (N.T. 231-34, 241, 252-53, 255-57, 263-65; S-4, S5)
32. The District held a meeting of staff on October 6, 2014 to discuss Student's needs and how they should be met, as well as the revised RR. In attendance were the principal, a learning support teacher, a speech/language therapist, an occupational therapist, the Director of Student Learning Supports, and the school psychologist who evaluated Student. (N.T. 153-54, 159, 169, 177-78, 241-42, 303-04, 350-54, 394-97)
33. An IEP meeting convened on October 20, 2014 at the elementary school building where the District was recommending Student's full-time life skills placement. The Parents requested and were provided with a draft of the IEP before the meeting. (N.T. 53-54, 57, 111-12, 137-38, 365)
34. The draft IEP identified communication and behavior as special consideration needs, and summarized information from the District's RR. The section on "How the student's disability affects involvement and progress in the general education curriculum" (J-12 pp. 9-11; *see also* pp. 27-28) summarized the recommendations of the District members of the IEP team from their October 6, 2014 meeting that Student would not be successful in a regular education environment even with a PCA, except for some special classes to be determined by the teacher and PCA. The level of support was full-time, with life skills and speech/language identified as the types of support. (J-12)
35. In addition to identifying Student's educational strengths and needs, the draft IEP contained annual goals addressing pre-reading skills, early math skills, speech/language therapy (speech intelligibility, expressive and receptive language skills), and fine motor skills. Program modifications and items of specially designed instruction, including a PCA, were also provided. All programming and services were to be provided in the life skills program at the non-neighborhood school. (J-12)
36. The Parents did not agree with some of the IEP goals because they believed that Student was already able to perform many of the tasks included in several of the goals. The Parents and their advocate expressed a number of other concerns with the draft IEP, including the RR results. (N.T. 54-56, 242-44, 366-67, 415-17, 478-79)
37. There was very little discussion about the Parents' interest in having Student be placed in the regular education environment, and the District did not suggest any placement other

than full-time life skills support at the elementary school building that was not Student's neighborhood school. (N.T. 57-58, 60-61, 112-14)

38. The Parents' advocate who attended the meeting asked about the Supplementary Aids and Services (SAS) Toolkit, a resource developed by and offered through the Pennsylvania Training and Technical Assistance Network (PaTTAN) together with the Pennsylvania Department of Education and its Bureau of Special Education.⁶ The District believed it was necessary to wait until Student was in a classroom before implementing the Toolkit. (N.T. 58, 140, 368, 393)
39. Student's BSC attended both the RR and IEP meetings in the fall of 2014. There was no discussion at those meetings of behavioral services provided in the home. (N.T. 73-74)
40. The District planned to conduct an FBA of Student once Student began attending school. (N.T. 312-14, 377-79)
41. The District proposed full-time life skills support for Student in a Notice of Recommended Educational Placement (NOREP). The Parents did not approve the NOREP. (N.T. 371-72; J-14)
42. The life skills classroom that the District proposed is a full-time program for kindergarten through second grade with a high adult to student ratio, five adults to seven students. There is a teacher in the classroom and an instructional aide who is a certified special education teacher as well as three paraprofessionals. This classroom is similar to that in the regular kindergarten class, but the children have lunch and recess which are with regular education classes, and the special classes involve typically-developing peers. Children are always accompanied by an adult when leaving the classroom. A sensory room is available to the life-skills student for the majority of the school day. The student population is smaller than that at Student's neighborhood school. (N.T. 315-16, 352, 360-64, 400, 405, 407-10, 427, 430-31, 433-34, 441-44, 450-51, 474-75; J-17)
43. The teacher of the proposed life-skills classroom utilizes a schedule for the students. The children participate in various stations throughout the school day to complete academic and functional tasks, practice gross and fine motor skills, and engage in play and sensory activities, all built around weekly themes. Students who receive related services are provided them either in the classroom or in a pull-out setting; some children leave to go to the regular kindergarten class for part of the day. All of the students' activities are based on their individual needs. (N.T. 404, 418-30, 431, 464-65)
44. The regular kindergarten class in the building where the proposed life-skills program is located is a half day program. (N.T. 316, 458-63; S-2)

⁶ This document was admitted as an exhibit, P-10, and is also available at <http://www.pattan.net/category/Resources/Instructional%20Materials/Browse/Single/?id=4de7a28fcd69f969196400> (last visited January 27, 2015).

45. In Student's neighborhood school, there are three kindergarten classes, two in the morning and one in the afternoon (all half-day). There is a special education life-skills support classroom for children in third through fifth grades who receive one-on-one instruction; and a learning support classroom where students are provided itinerant and supplemental learning support by a special education teacher. The learning support teacher also works with and teaches students in other classrooms. This elementary school building has a sensory room that is in frequent use. (N.T. 154-55, 166, 168, 171-73, 175-76, 397)
46. During the October 20 IEP meeting, the District revised the document to add the Parents' concerns over and disagreement with a full-time life skills placement and other input. Of significance, the Parents' disagreement with the section on "How the student's disability affects involvement and progress in the general education curriculum" (J-13 pp. 9-11) was added to the IEP to reflect their belief that Student could be successful in, and benefit from, the regular education environment with supplementary aids and services. Minor revisions were made to a few of the IEP goals. (N.T. 59, 157-58, 366-67, 397, 416, 480; J-13)
47. The Parents understood that Student's opportunities to participate in regular education specials with non-disabled peers would be determined by the teacher or an aide. This understanding is consistent with the language in the draft and final IEPs, although the final IEP specified that the IEP team would make this determination "relying on the data from the teacher and PCA." (J-13 p. 29) (N.T. 62-63, 439-40; J-12 p. 28, J-13 p. 29)

Post-NOREP

48. The Parents filed a Due Process Complaint on or about November 17, 2014, to which the District responded. (P-5; J-15)
49. Student was evaluated by a private neuropsychologist in November and December 2014, and she issued a report. Student was directly assessed on two occasions for this evaluation, and the neuropsychologist observed Student on one occasion during a private speech therapy session. (N.T. 191, 194-95, 210-11; P-4)
50. During the observation portion of the private evaluation, the neuropsychologist took data on Student's on- and off-task behavior through time sampling. Student was on-task for 80% of the time during that observation. The private speech therapist used strategies such as providing a schedule, clear expectations of tasks, and positive reinforcement to help Student remain on task. (N.T. 195-98; P-4 p. 3)
51. For the assessment portion of the evaluation, the private neuropsychologist evaluated Student's cognitive function through the matrix reasoning subtest of the Wechsler Intelligence Scale for Children – Fourth Edition and the Receptive One Word Vocabulary Test. Her assessments resulted in a conclusion that Student's cognitive functioning was in the low average range. She also reviewed the VABS-2 and conducted an interview of the Parents to determine Student's strengths and weaknesses in adaptive functioning. (N.T. 198-200, 202-06; P-4 pp. 3-5)

52. Academic assessment (Bracken School Readiness Assessment – Third Edition) reflected many appropriate pre-academic skills with some inconsistency in attention and performance. The private neuropsychologist opined that some of Student’s weaknesses may be attributable to Student’s language deficits. (N.T. 200-01; P-4 p. 3)
53. The private neuropsychologist also administered the Autism Diagnostic Observation System and the Aspergers Syndrome Diagnostic Scale. Based on these instruments, she concluded that a diagnosis on the Autism spectrum was unlikely. (P-4 pp. 4-5)
54. The recommendations in the private neuropsychologist’s report included IDEA eligibility under the Other Health Impairment category; placement in a regular education classroom with an aide; an FBA followed by a behavior support plan; and related services. (P-4 p. 6)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

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

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be credible, and the majority of the testimony with respect to factual

matters important to resolving the issues was consistent, despite the parties' rather disparate positions. The weight accorded various witnesses' testimony is addressed further below as necessary; but this hearing officer's general observations are that the Parents presented as devoted, loving parents and ardent advocates for Student; and, the District personnel all presented as qualified and dedicated professionals whose recommendations were based upon their collective belief of what was most appropriate for Student.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit.

IDEA Principles

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to a student who qualifies for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that the FAPE requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 247 (3d Cir. 1995).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary*

Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). 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. Nevertheless, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

There can also be no question that a major premise of the IDEA is that parents must be permitted to participate meaningfully in making educational decisions about their children. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b); *see also Letter to Veazey*, 37 IDELR 10 OSEP 2001) (confirming the position of OSEP that local education agencies cannot unilaterally make placement decisions about eligible children to the exclusion of their parents). Parents play “a significant role in the IEP process.” *Schaffer, supra*, at 53. Indeed, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

Also critical is the IDEA obligation for eligible students to be educated in the “least restrictive environment” which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993), the Third Circuit adopted a two-part test for determining whether a student has been placed into the least restrictive environment as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, successfully be educated within the regular classroom; and the second prong is that, if placement

outside of the regular classroom is necessary, there must be a determination of whether the child has been included with non-exceptional children to the maximum extent possible. *Id.* In evaluating the first prong, the efforts the school has made to include the child (which must be more than “token gestures”), a comparison of the benefits to the child of placement in a regular classroom versus a separate special education setting, and “possible negative effects” of inclusion on the other students, must be considered. *Id.* at 1215-18.

Importantly, however, LRE principles “do not contemplate an all-or-nothing educational system” of regular education versus special education. *Id.* at 1218 (quoting *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1050 (5th Cir. 1989)). All local education agencies are required to make available a “continuum of alternative placements” to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); *see also* 22 Pa. Code 14.145. And, FAPE and LRE are related, but separate, concepts. *A.G. v. Wissahickon School District*, 374 Fed. App’x 330 (3d Cir. 2010) (citing *T.R.*, *supra*, at 575, 578); *see also L.G. v. Fair Lawn Board of Education*, 486 Fed. Appx. 967, 973 (3d Cir. 2012).

The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood*, *supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). 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 Parents' Claims

The first issue is whether the District adequately considered placement for Student in a regular education kindergarten environment with appropriate supplementary aids and services. After careful review of the evidence and the applicable law, the record compels a conclusion that it did not.

Before proceeding to the requisite discussion of LRE, one point of disagreement between the parties merits initial consideration. The District has determined that Student's cognitive functioning meets the criteria for intellectual disability, while the Parents' private neuropsychologist determined that Student's abilities are in the low average range. Those two recent assessments of Student's cognitive abilities share the important characteristic that neither administration yielded a fully completed instrument providing a confident measurement of Student's intelligence. (Findings of Fact (FF) 24, 51) Nevertheless, the parties appear to agree that any question of whether or not Student meets the criteria for an intellectual disability under either the DSM-IV or DSM-5⁷ (N.T. 204-06, 294, 322-24) is not necessarily critical, since special education programming must address a child's unique and individual needs regardless of classification or eligibility category.

The first prong of the *Oberti* test is whether the child can, with supplementary aids and services, successfully be educated within the regular classroom; and this prong requires consideration of three specific elements: (a) the efforts the school district has made to include the child; (b) a comparison of the benefits of placement in a regular classroom and placement in a different, separate setting; and (c) the possible effects of inclusion on the other students.

⁷ The DSM is the Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association, which was most recently revised in 2013 with the Fifth Edition.

The record reflects that the District gave limited consideration to including Student in a regular education kindergarten classroom. The initial placement recommendation was made prior to the development of an IEP for Student (FF 26, 27, 28, 29), which is not the proper sequence for making a special education placement determination. 34 C.F.R. § 300.116(a)(2)(b) (LEAs “must ensure that “[t]he placement decision ... [i]s *based on* the child’s IEP.”)(emphasis added). While the District was certainly permitted to hold a meeting of its staff to prepare for the IEP meeting, its discussions of placement prior to the creation of that document as a team cannot suffice to demonstrate consideration of the entire IEP team, including Student’s Parents, of Student’s placement. Moreover, the District never wavered from its original, specific recommendation for a full-time life skills program. When the IEP team did meet, there was little if any actual *discussion* of this consideration; rather, the Parents’ viewpoints were merely noted in the IEP itself. (FF 37, 38) The array of actual supplementary aids and services considered by the team are uncertain beyond those mentioned in the IEP: adapted learning materials, a modified curriculum, modified assessments, a PCA, and a positive behavior support plan (J-13 p. 28).⁸ The IEP team expressly did not reject these supplementary aids and services (J-13 p. 28), yet the District members of the team concluded that they would not allow Student to make progress in a general education classroom based on behaviors that Student had not demonstrated in the preschool classroom; and on Student’s difficulty with attention, limited functional communication, and high level of need, all of which were based upon limited observations of and interactions with Student⁹ and lacked meaningful consideration of available supports that

⁸ The District’s belief that the SAS Toolkit cannot be used until the child is actually attending school is puzzling, given the explicit language in that document that provides guidance for “efforts that begin prior to the writing of an IEP.” (P-1 p. 3)

⁹ The District cannot of course be faulted for its inability to conduct extensive observations of Student in an educational environment; nevertheless, its knowledge and understanding of Student’s educational strengths and needs is obviously circumscribed.

had proven to be successful in the preschool, home, private therapy, and other environments. (FF 7, 8, 9, 14, 23, 30, 37, 39) And, despite testimony of one District witness (not the scrivener) that the team “rewrote” the IEP on October 20, 2014 (N.T. 366, 397-98), a comparison of the draft and final documents does not support this characterization.

The private neuropsychologist’s observation of Student in both her assessments and the private speech/language session was particularly compelling on this prong of the *Oberti* test and was therefore accorded significant weight. (FF 49, 50, 51, 52, 53, 54) Furthermore, it is at best speculative that the provision of a PCA and an appropriate positive behavior support plan, in addition to other appropriate supports, would be insufficient to address attentional difficulties or disruptions that Student may experience in the regular kindergarten classroom. *See Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 U.S. Dist. LEXIS 21639 **27-28 (E.D. Pa. 2003) (finding that IEP team’s failure to identify and reject specific supplementary aids and services evidenced lack of appropriate consideration of this *Oberti* prong). Moreover, while Student will likely need additional support for transitions (N.T. 208 215-16), the record does not support a conclusion that this need cannot be appropriately accommodated. Finally on this element, there was substantial testimony that the neighborhood school building lacks a space where Student could be taken if Student should experience a “meltdown” (N.T. 155, 159-60, 171-74, 357), yet the available evidence does not support a conclusion that Student engaged in this behavior in a school setting. In addition, it is not inconceivable that any child, especially a kindergarten-age child, might engage in disruptive or uncontrollable behavior and would need a quiet space away from peers; if such a room is lacking in a particular building, that is a circumstance that is not exclusive to Student and cannot therefore serve as a reason for his/her segregation.

The next element is the comparison of benefits of the regular education classroom to those in the recommended special education setting. This section of the IEP includes significant detail on the intensive and more individualized support available in the segregated setting (J-13 p. 28-29), yet outside of the Parents' views, the District team members appear to have omitted consideration of any of the unique benefits of an inclusive environment such as development of social and communication skills, availability of role modeling, and improved self-esteem, all of which can lead to the critical goal of increased independence. *Oberti, supra*, at 1216. Furthermore, the fact that Student may make more progress in a segregated setting is not determinative and "does not justify exclusion." *Id.* at 1217.

The final element of the first *Oberti* prong is the potential effect of a student's inclusion in the regular education environment on the other students. Here, again, the team focused on the possibilities of Student disrupting the class based on its understanding of previous behavioral difficulties that were not evident in the preschool and outside therapy environments. While it is of course certainly possible that Student's presence in the regular kindergarten classroom may involve some disruption and/or distractions, the purpose of providing supplementary aids and services is to address the student's unique needs in the classroom in order to appropriately access his or her education. Additionally, this section of the IEP failed to include serious consideration of any real *benefits to* the typically-developing peers in the classroom (a requisite question, J-13 p. 29), such as developing, at an early age, an understanding of individual differences.

To conclude the discussion of the first part of the *Oberti* prongs, it merits mention that the District contends that because it has not had the opportunity to observe Student at school, it should not be faulted for proposing an interim placement, as occurred in *S. v. Vashon Island School District*, 337 F.3d 1115 (9th Cir. 2003). However, here, the record does not demonstrate

that the District's proposal was intended to serve the function of an interim placement for a specific period of time, as was the case in *Vashon Island*. Accordingly, this argument cannot defeat the above conclusions.

Having determined that the District failed in its obligation to meet the first prong of the *Oberti* test, it is not necessary to move on to the second; however, the parties' positions on whether the District proposed that Student be included with non-exceptional children to the maximum extent possible merits some discussion. The Parents take exception with the provision in the IEP that Student's teacher and PCA would be determining the extent to which Student could attend special classes with typically-developing peers. (FF 47) The District contends that this condition is not impermissible, citing, *inter alia*, *R.E.B. v. State of Hawaii, Department of Education*, 2014 U.S. Dist. LEXIS 52873, *31 (D. Haw. 2014), where the Court found that delegating the determination of the extent of the student's participation in regular education to the teachers was not fatal to its adherence to LRE principles. In *R.E.B.*, however, the child had no previous experience in a regular education setting and, furthermore, there was an express provision in the IEP that the student would participate in some regular education beyond that left to the discretion of the teacher. Thus, while the IEP team in this case may certainly consider whether some aspects of inclusion should be determined on a daily basis by District professionals, the facts of *R.E.B.* are sufficiently distinguishable and not controlling.

Other concerns of the District such as the need for a different curriculum for Student, the lack of a learning support classroom in the neighborhood elementary school, and scheduling difficulties, cannot operate to overcome the presumption for, and deny Student the right to be educated in, the regular education environment to the maximum extent possible. It may be that at some point in the future, the IEP team may decide that Student requires a level of support that

is something less than full-time regular education with supplementary aids and services. If and when that occurs, the team will need to also consider the second *Oberti* prong and ensure that Student is included to the maximum extent appropriate. However, at this point in time as Student begins a school-age program, the Parents have established that the District violated the IDEA presumption in favor of regular education, in the same school Student would attend if not IDEA-eligible,¹⁰ in planning for Student's transition to the District.

Remedies

Having concluded that the District did not adequately consider Student's placement in the regular education environment with appropriate supplementary aids and services, the next question is what remedy should be awarded. The Parents seek an order for a full-time regular kindergarten placement with appropriate supplementary aids and services, and this request shall be granted. With the exception of pull-out related services or other educational support, the IEP team will be ordered to revise Student's IEP to provide for placement in a regular education classroom with appropriate supplementary aids and services to include a full-time PCA, and a plan for development of a positive behavior support plan including an FBA. The team will also be directed to consider any and all other appropriate supplementary aids and services using the SAS Toolkit approach. The team may also take that opportunity to consider whether any of Student's IEP goals should be revised at that time or following assessment of Student's performance in the kindergarten environment. The team may wish to set a date by which the members will reconvene to evaluate Student's progress and to consider any necessary revisions to the IEP.

¹⁰ Although there are regular kindergarten classes in both the neighborhood school and the proposed building, there is no reason to depart from the general preference in favor of the neighborhood school. *Carlisle Area School District v. Scott P.*, 2 F.3d 520, 535 (3d Cir. 1995).

The final issue is whether Student should be awarded compensatory education. Here, Student has not been attending school since the very beginning of the 2014-15 school year. Because Student has not been provided with any education, which is a direct result of the District's failure to comply with LRE principles, this hearing officer concludes that the District has denied Student FAPE on substantive grounds.

It is well settled that compensatory education is an appropriate remedy where a school knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the school fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed a scheme that awards the "amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.")). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

This hearing officer finds no evidence in the record to support an award using the *B.C.* approach, and will therefore apply the *M.C.* standard. The District's regular education kindergarten is a half-day program and, based on Pennsylvania School Code regulations, there

are 2.5 hours in a kindergarten child's school day.¹¹ The compensatory education award will begin as of October 21, 2014, the day after the IEP team met to develop and finalize Student's program and placement, which allows for the time the District needed to conduct an evaluation, gather other relevant information, and convene the meeting of all team members. This award will continue through the date that Student begins to attend school consistent with this decision.

The hours of compensatory education are subject to the following conditions and limitations. With the exception of all missed speech/language and occupational therapy services, Student's Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's IEP goals. 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 School through Student's IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age nine (9).

There are financial limits on the parents' discretion in selecting the compensatory education; the costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who did and would have provided educational and related services to Student during the period of the denial of FAPE.

¹¹ 22 Pa. Code § 11.3.

Lastly, having reached the above conclusions based on the IDEA, there is no need to discuss further the Parent's Section 504 claims.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District failed to propose an appropriate special education program to Student in the LRE; that as a result, the IEP team will be required to reconvene to revise Student's IEP in accordance with those principles; that this violation constituted a denial of FAPE; and Student must be provided with compensatory education.

ORDER

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

1. Within ten days of the date of this order, the District shall convene a meeting of Student's IEP team to revise the IEP to provide for Student's placement in a regular education kindergarten classroom in Student's neighborhood school, utilizing the SAS Toolkit to determine appropriate supplementary aids and services.
 - a. The IEP shall include provision for a full-time PCA for Student and a specific plan to conduct an FBA and thereafter develop a positive behavior support plan.
 - b. The Parents shall cooperate with any request to provide consent to the FBA.
2. The District shall provide Student with compensatory education in the amount of 2.5 hours per day for each school day that school was in session from October 21, 2014 until the first day Student attends school consistent with ¶1. The compensatory education shall include provision by the District of all missed speech/language and occupational therapy services, and the remaining hours are subject to the conditions and limitations set forth above.
3. Nothing in this Order precludes the parties from mutually agreeing to alter any of the directives regarding the timelines, content of the IEP, or nature of compensatory education set forth in this decision and Order.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: January 31, 2015