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

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: D.P.

Date of Birth: [redacted]

Dates of Hearing: 3/16/2015, 5/11/2015, 5/14/2015, 5/15/2015

CLOSED HEARING

ODR File No. 15726-14-15 AS

Parties to the Hearing:	Representative:
Parents Parent[s]	Parent Attorney Judith Gran, Esq. Reisman Carolla Gran LLP 19 Chestnut Street Haddonfield, NJ 08033
Local Education Agency Philadelphia City School District Office of General Counsel Philadelphia, PA 19130	LEA Attorney Michele Mintz, Esq. 1301 Masons Mill Business Park 1800 Byberry Road, #1301 Huntingdon Valley, PA 19006
Date Record Closed:	June 9, 2015
Date of Decision:	June 24, 2015
Hearing Officer:	Cathy A. Skidmore, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)[1] is a kindergarten-aged student in the Philadelphia School District (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, Section 504 of the Rehabilitation Act of 1973 (Section 504),[3] and the Americans with Disabilities Act (ADA),[4] as well as the federal and state regulations implementing those statutes.

The case proceeded to a due process hearing convening over four sessions,[5] at which the parties presented evidence in support of their respective positions. The Parents[6] sought to establish that the District failed to offer Student an appropriate educational program in the least restrictive environment as Student made the transition to school-aged programming; that the District discriminated against Student; and that the District retaliated against the Parents. The District maintained that its special education program, as offered and implemented, was appropriate for Student, and that it did not engage in any discrimination or retaliation against the family.

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[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] 42 U.S.C. §§ 12101 *et seq*.
[5] The record closed upon receipt of the parties' Closing Arguments on June 9, 2015. Subsequently, on June 22 and 23, 2015, counsel for the Parents submitted a letter responding to the District's closing, and the District objected but also provided a reply. The parties' various communications to the hearing officer after the record closed, without the attachments, were collectively marked as Hearing Officer Exhibit (HO-) 1. The content of those communications and attachments were not considered because this hearing officer found their purpose to be nothing more than unnecessary recitation to the record, which had already been carefully reviewed in drafting this decision. HO-1 is hereby admitted into the record. The parties' exhibits that were admitted to the record (Notes of Testimony (N.T.) 1277-78) will be referenced as follows: Parent Exhibits as "P-" and School District Exhibits as "S-".
[6] Student's mother was the more active participant in Student's educational programming during the time period in question, but the plural Parents is used when it appears that she was acting on behalf of herself and the father. The singular Parent is used to refer specifically to the child's mother.

For the reasons set forth below, I find in favor of the Parents on the FAPE and discrimination claims, but in favor of the District on the issue of retaliation.

ISSUES

1. Whether the special education program proposed by the District as Student entered kindergarten for the 2014-15 school year was appropriate including placement in the least restrictive environment;

2. Whether the District should be directed to continue to provide a program for Student in the general education environment with consideration of appropriate supplementary aids and services for the 2015-16 school year;

3. Whether the District engaged in discrimination and retaliation against the family in violation of Section 504 and the ADA; and

4. If the District did engage in discrimination and retaliation, should it be ordered to cease that conduct?

FINDINGS OF FACT

1. Student is an early elementary school-aged student residing in the District. Student is eligible for special education on the basis of an Autism Spectrum Disorder (ASD). (Notes of Testimony (N.T.) 47-48)

2. The District is a recipient of federal funds. (N.T. 48)

General Background

3. Student is an observational learner who benefits from peer modeling of appropriate behavior. (N.T. 643, 649, 822-24, 835, 855-56, 859; P-6)

4. Student and Student's family do not live in the precise geographic area served by the elementary school that Student attended for the 2014-15 school year (hereafter Elementary School). Student's siblings also attended Elementary School. (N.T. 196-97, 1020-21)

5. Elementary School does not have an autistic support program, and none of its teachers have specific training in working with children with autism. (N.T. 163, 346, 359-60, 487, 717)

6. Student was first diagnosed with ASD at the age of four by a developmental pediatrician, and was provided with early intervention services. (N.T. 1136; P-7; S-1)

7. An initial Evaluation Report (ER) by the early intervention service provider was issued in November 2012. At the time, Student attended two different preschools. This ER included family information and health history, and an evaluation of Student's cognitive, communication, social and emotional, physical, and adaptive development revealing delays in the cognitive, communication, and physical domains. The evaluation also yielded concerns with sensory processing. The ER concluded that Student was eligible for early intervention services. (S-1 pp. 3-25)

8. An Individualized Family Service Plan/Individualized Education Program (IFSP/IEP) was developed in January 2013 and updated over the course of the calendar year. This document indicated that Student did not engage in behaviors that impeded Student's learning or that of others. Outcomes/Goals addressed communication, following directions, fine motor skills, pre-academic skills, social interactions, and transitioning to new activities. The IFSP/IEP included specialized instruction, speech therapy, occupational therapy, and behavioral support in a full-time regular preschool environment. (S-29 pp. 28-63)

9. A plan for Student's transition to school-aged (kindergarten) programming was made part of the IFSP/IEP. (S-1 pp. 62-63)

10. During the 2013-14 school year, Student attended two typical preschools, one three days per week in a class of approximately 20 children, and two days per week in the other setting. Early intervention services were provided in those environments. At the beginning of the school year, Student at times exhibited frustration and at other times was overly excited, but required minimal redirection that was not unusual for children of that age. Other strategies such as repetition of directions and instruction and prompting/reminders were successful for Student as with Student's peers in the classroom. Student was able to learn from observing peers' behavior in the preschool. (N.T. 632-39, 650-51; P-6; S-7)

11. In January 2014, the Parents provided written notice of their intention to register Student for kindergarten in the District. (S-1 p. 2)

12. When the Parents first attempted to register Student at Elementary School in approximately March 2014, they met with the principal and a special education director. The District special education director indicated that he did not believe Student's needs could be met at Elementary School. However, the principal did register Student at Elementary School. (N.T. 123-24, 133, 135, 137-39, 154, 197-98, 200, 242-43, 1021-25, 1048, 1065, 1139, 1145-47, 1268, 1273)

13. Following the Parents' efforts to register Student at Elementary School, some parents of other students at Elementary School spoke with the Parents and expressed concerns with Student being part of the regular kindergarten classroom. (N.T. 1049-50, 1138-39, 1141-43, 1213-15)

14. When children who are transitioning from an early intervention program register with the District, a director of special education reviews the relevant documents including the IEP

to determine an appropriate placement for that Student. The documents are made available to the District through its computer system. (N.T. 64-65, 72-73, 76)

15. A placement determination for special education students transitioning into the District made by the director of special education is based on the needs of the child, and sometimes location of available services, before an IEP is developed. (N.T. 73-75, 313)

16. The District director of special education who was responsible for Student's transition to school-aged programming determined after a review of Student's early intervention records that Student should attend an elementary school that had autistic support available based on Student's diagnosis of ASD. (N.T. 77-78, 1170, 1172)

17. The District uses a software program to draft IEPs. The program itself populates some of the fields based on information already in the computer system, such as demographics. It allows the users to draft goals for any areas of need identified, but not for any areas that are not listed somewhere on the IEP as needs. (N.T. 489-93, 528, 543-47)

18. If a new IEP is not developed for a child transitioning to school-aged programming, the previous IEP is implemented. At times, when children first enter its school-age programming, the District may provide special education services that staff believes are necessary before an IEP is developed. (N.T. 87, 90, 178, 501)

District's Summer 2014 Evaluations

19. Student was evaluated in June 2014 as part of the transition from early intervention to the District. The Parents gave consent to the District's evaluation. (N.T. 276-77, 279, 1025-26; S-3)

20. The District school psychologist tried unsuccessfully to obtain parental input into the evaluation, but was not able to reach them by telephone. The Parents did not provide input at that time. (N.T. 314-15, 322-23, 1027, 1051, 1210-11, 1209-10, 1272-73; P-4, P-52 p. 5)

21. The District school psychologist issued a Psychoeducational Reevaluation Report (PRR) that is provided to the school team to determine what to incorporate into the District Reevaluation Report (RR). The PRR for Student contained a summary of historical information from the existing records including the early intervention ER. The school psychologist administered assessments of Student's cognitive functioning yielding variable scores with an average range score overall; and of academic achievement with scores in the average range in basic reading skills, and in the well below average range in written expression and mathematics reasoning. Based on the Child Autism Rating Scale – Second Edition (CARS-2) questionnaire completed by a teacher, the school psychologist determined Student was eligible for special education on the basis of Autism. (N.T. 279, 308-09, 311, 335-36; S-3)

22. The District school psychologist who initially evaluated Student for the District considered his role to be to determine whether Student was eligible for special education.

He made a number of programming recommendations in the PRR that were based on Student's eligibility category of Autism, and score on the CARS-2, rather than specific to Student. This psychologist determined that Student would benefit from a program that included both regular education and autistic support to address Student's social skills, communication needs, and anxiety. (N.T. 299-303, 305-06, 314, 316)

23. The early intervention behavior support specialist provided input for the June 2014 evaluations within days of completion of the PRR. She reported on Student's participation in the two preschool environments and ability to communicate, interact with and imitate peers, and follow routines. Student did exhibit behavioral difficulty with changes to routine and transitioning to non-preferred activities but positive behavior supports were generally successful; this behavior specialist also recommended 1:1 services for the transition to kindergarten. (P-2, P-3)

24. The District issued an RR for Student in June 2014. The computer software program used by the District for evaluations can add the recommendations provided in a PRR directly into a student's evaluation or reevaluation report; and Student's June RR contained the content of the June PRR including its verbatim recommendations. Speech/language assessments for the RR revealed needs in articulation and receptive and expressive language skills. Occupational therapy was also recommended based on a review of records. Student was determined to be eligible for special education on the basis of ASD and a Speech/Language Impairment. (N.T. 308-11, 347-48; S-4)

25. The Parents met with the principal of Elementary School and with the special education liaison to discuss the June 2014 RR. The Parents indicated concerns with the RR, and both of the District representatives expressed their views that Student's needs could not be met at Elementary School. (N.T. 1151-58)

26. The school psychologist who conducted the initial evaluation did not attend any meetings involving Student. (N.T. 310, 323-25)

27. In July 2014, the Parents provided input for the District's reevaluations that included medical and developmental history information, a summary of previous services, and their request for full inclusion for Student, as well as a description of Student's academic and behavioral skills and difficulties. They made a number of suggestions for Student's program as Student transitioned to kindergarten including one-on-one support. (P-4, P-5)

28. Supplementary information from the preschool and early intervention service providers was given to the District in July 2014. Additionally, the Parents provided a portion of an April 2013 report from a pediatric neurologist who evaluated Student for and diagnosed ASD (Mild/High Functioning) and Dyspraxia. These reports and summaries provided suggestions for Student's educational programming needs. (P-6, P-7)

2014-15 School Year Program Development

29. The Parents received a computer-generated notice in August 2014 that Student would attend a different elementary school than the one where they had attempted to register

Student. However, Student did begin to attend kindergarten at Elementary School on its first day. (N.T. 79-80, 102, 1028-29, 1163, 1166; P-11)

30. After the Parents expressed concern with the June RR, the District proceeded with a second reevaluation. A second school psychologist drafted a PRR that included information from the June PRR and RR as well as input from the Parents, additional information from the early intervention records, reports of the preschool behavior support specialist and preschool teacher, and the outside neuropsychological evaluation summary; it also omitted certain older information at the request of the Parents. The Parents' disagreement with the June PRR was also contained in this PRR. This second school psychologist spoke with the first school psychologist about the recommendations and did not make any changes to those, believing that a combination of autistic support and regular education was appropriate for Student. (N.T. 158-59, 337-45, 359, 362-64, 390, 1153-54; S-6)

31. The District issued a new RR in September 2014. This report incorporated all of the new information supplied for the September 2014 PRR, and continued to conclude that Student was eligible for special education on the bases of ASD and a Speech/Language Impairment. The same general recommendations for a student with ASD from both PRRs were repeated in the September RR. (S-7)

32. A meeting of District personnel convened in September to discuss Student's programming needs, concluding that a program of regular education with autistic support was appropriate. The team that met did consider providing Student with a one-on-one aide. (N.T. 351, 358-59, 361-63, 369-70, 372)

33. A meeting convened in September 2014 with the Parents to discuss the more recent RR as well as the school that Student would attend. The District special education director who was involved in the spring attended that meeting, and again suggested that Student's needs could not be met in Elementary School. The team did agree that Student would attend Elementary School, however, as the Parents requested. (N.T. 94-96, 1032-33, 1168, 1170-71; P-13)

34. The special education liaison at the elementary school Student was to attend drafted an IEP based on the reevaluation reports and recommendations of the school psychologists for autistic support. She drafted the IEP for life skills support because she believed that Student's needs best fit that classification in the software program. The liaison did not anticipate this draft IEP would be the final programming document because the information on which it was based was limited. (N.T. 480-84, 485-93, 548-49)

35. The draft IEP from September 2014 provided present levels of academic achievement and functional performance, and identified strengths (following routines and directions, peer interactions, basic reading skills) and needs (fine motor skills, speech/language, written expression, functional reading, mathematics reasoning, social skills, and communication). Goals addressed following directions/attending to nonpreferred tasks, peer interaction/play skills, expressive language, literacy, articulation/speech intelligibility, basic reading and writing skills, fine motor skills, and mathematics

reasoning. Occupational and speech/language therapy were included as related services. This IEP did not include the type and level of special education support. (S-5)

36. Student's IEP team met in early October 2014 to review the draft IEP. A revised IEP was created after the meeting that included updated information for the present levels of academic achievement and functional performance following Student's entry into kindergarten. A need for an occupational therapy evaluation and a functional behavioral assessment (FBA) were noted. The annual goals were virtually unchanged but the IEP was not drafted for life skills programming as before. New items of specially designed instruction (adapted seating, a timeout area, scheduled movement breaks, simplified directions, and daily reports to the Parents) were added; speech/language and occupational therapy remained as related services. Student was determined to be eligible for extended school year (ESY) services. Student's support was identified as supplemental learning support at Elementary School, but the District again recommended at the meeting that Student be provided a program that included autistic support at a different elementary school. (N.T. 361, 499, 689-90, 1037, 1051-53, 1174-77; S-5, S-8)

37. The Elementary School guidance counselor attended the October IEP meeting, and agreed with the recommendation of the school psychologists that Student be provided with autistic support in a small group environment in addition to regular education. (N.T. 697-99, 703-05)

38. The Parents did not approve the Notice of Recommended Educational Placement (NOREP) issued with the October 2014 IEP. (S-10)

39. The District sought permission to conduct an occupational therapy evaluation and an FBA as noted in the October 2014 IEP, but the Parents did not provide consent. (S-9)

40. The Parents wrote to the principal of Elementary School after the October 2014 IEP meeting, and expressed concerns with, among other things, implementation of Student's existing IEP with respect to behavioral support and progress reporting for related services. (N.T. 172-74, 1180-81; P-16)

2014-15 Kindergarten Program

41. Kindergarten classes began approximately two weeks after other students start school. Student attended a regular education kindergarten class of thirty students at Elementary School from the first day of school. (N.T. 87, 161, 203, 408, 438, 443)

42. The kindergarten teacher meets with the parents of all students before the school year begins. She was not able to arrange to meet Student's Parents. (N.T. 419-20, 1167)

43. Student's kindergarten teacher consulted with the special education teacher, who also provided some individualized support for Student in the classroom. The two teachers discussed accommodations for Student, who at times exhibited frustration in the classroom. (N.T. 406-07, 409-10, 431-32)

44. Student demonstrated some concerning behaviors at the beginning of the school year, such as lying on the floor in a particular position instead of sitting like the other children, but those behaviors stopped early in the year. Student at times required redirection. Student also exhibited a fascination with a particular type of room in the school building, but that interest diminished significantly by the second month of the school year. Student does continue to exhibit interest in such rooms outside of school. (N.T. 121-22, 422-23, 444-46, 503, 516, 748-49, 751-52, 1040-41, 1215-17; P-16 p. 2, P-53 p. 1)

45. Student had reading instruction in the kindergarten classroom with the other students in the class. Student also participated in the morning routine, lunch, mathematics, science, social studies, free time, special classes, and snack time. (N.T. 428-30, 450-51, 454-56, 763, 787-88)

46. The kindergarten class, including Student, was provided instruction by the school guidance counselor every other week to learn social and emotional awareness skills. (N.T. 690-91, 713-15)

47. Following a recommendation of a District occupational therapist, Student had a supportive chair in the classroom and a cushion to use when the children sit on the floor. (N.T. 410, 503)

48. Student's kindergarten teacher was able to meet Student's needs in the classroom. (N.T. 431-33)

49. Student's kindergarten teacher provided daily reports to the Parents at the beginning of the school year, decreasing the frequency because there was often nothing significant to share until those communications became rare in approximately February or March 2015. (N.T. 447-49)

50. Beginning in mid-October, a special education teacher worked with Student every day in the computer lab providing reading and mathematics instruction in small groups because Student was not at the same level in those areas as other students. Part of this instruction focused on phonics utilizing a computer program. Student was outside of the regular classroom for this instruction between 45 and 90 minutes each day (45 minutes on Mondays and Fridays, 90 minutes on Tuesdays, Wednesdays, and Thursdays) for a total of 360 minutes per week. This special education teacher also was present to offer consultation and to work with Student during mathematics instruction early in the school year but discontinued that when it appeared Student did not need the support. (N.T. 148-50, 210-22, 426-28, 451-52, 454-55, 739-50, 755-56, 759-60, 773-74, 776-78, 784, 789-90)

51. The Parents were unaware of this pullout instruction for Student until January or February 2015, and first learned of the scheduling of this instruction during testimony about it at the due process hearing. (N.T. 1074, 1075, 1207-08, 1232-33, 1237, 1269)

52. Student had mastered all of the goals in the previous IEP, but the goals were never revised outside of draft form because the Parents did not agree to any IEPs proposed by the District. (N.T. 411-13, 449, 758, 764-65, 767-69, 781-82, 1073)

53. The District has not provided progress reports for Student because there is no agreed District IEP, and the computer program it uses does not generate such reports if an IEP has not been finalized for implementation. No one considered creating reports that could be generated outside of the computer program. (N.T. 769-72)

54. The Parent asked to observe Student in the classroom in the fall of 2014 and also offered to volunteer in the classroom. She did observe on one day but was not able to arrange her schedule to return for additional observations. (N.T. 187, 191, 193-96, 1183-86, 1251-53; P-18, P-19, P-20; S-23 pp. 11-21)

55. The District required that any parents who volunteer to work directly with students on more than an occasional basis at Elementary School obtain and provide copies of background clearances for criminal record and child abuse history. The policy of requiring the clearances to be provided to the District by volunteers was not consistently enforced at Elementary School. The Parent did not provide her clearances to Elementary School or the District. (N.T. 184-90, 238-40, 580-81, 620, 952, 1081-83, 1111-12, 1181-83, 1244-45; P-22; S-19)

56. The District issued a notice to the Parents of Student's illegal absences in November 2014 and January 2015. The Parents had provided excuses for those absences. No truancy proceedings took place. (N.T. 203-05, 1200-01, 1261; P-49)

57. The District drafted a revised IEP in February but no meeting convened to discuss it. This IEP included updated information for the present levels of academic achievement and functional performance. New and revised annual goals related to early mathematics skills, early reading skills, expressive language, literacy, articulation/speech intelligibility, and peer interaction/play skills. Occupational therapy consultation to address sensory needs was also added; other program modifications, items of specially designed instruction, related services, and ESY programming remained. This IEP continued to propose learning support at the supplemental level. (N.T. 508, 512-14, 532-33, 1070-71; S-13)

Elementary School Association

58. Elementary School had a home and school association during the 2013-14 and 2014-15 school years. That association served as a liaison between the parents/students and teachers, and also conducted fundraising. Student's Parent was a member and officer of the association. (N.T. 212-13, 562-66)

59. In the summer of 2014, an issue arose among the association officers, and between the association and the principal at Elementary School, regarding the use of funds for the school library. Two of the association officers and the principal wanted to use association funds for that purpose, and two other association officers, including one of

the Parents, did not. (N.T. 248-49, 256, 566-67, 575-78, 580, 599, 932-34, 966-69, 976, 1161; P-9)

60. At two fall 2014 association meetings, the library funding was discussed as were changes to bylaws. The Parent attended these meetings which became very heated. At the conclusion of one of those meetings, the officers all agreed to provide the funds for the library. (N.T. 221, 244-48, 575-79, 605-07, 681-82, 708-10, 719-23, 942-46, 948-50, 970-71, 977-82, 1036-39, 1085-88, 1117-18, 1203-05)

61. After the September 2014 meeting involving the library funding, a petition circulated among parents, on school premises and off premises during school-related activities, to remove the Parent from office. The District was not involved in circulating the petition, although one employee did sign it. Some parents objected to this petition. (N.T. 213, 216, 218, 222-24, 227, 249-50, 385-87, 435-36, 441-42, 524-25, 582, 584-85, 609, 622-25, 672-74, 681-82, 684, 707-08, 932-34, 936, 945, 949, 964-65, 996-97, 1041-42, 1058-59, 1098-99, 1118-20, 1124, 1188, 1192-93, 1194-95, 1254-57; P-23, P-28, P-29, P-30, P-31; S-21, S-22)

62. In November 2014, the majority of the association's officers resigned; the Parent did not. Sometime after those resignations, a new organization with new officers replaced the former association, although some of the former officers were re-elected. (N.T. 229-32, 609-11, 615-16, 927-930, 940, 963-64, 973-75, 1007, 1012-13, 1092-93, 1189, 1195-96; P-35, P-36, P-37)

63. The Parent did not run for election as an officer of the new association. (N.T. 930, 975, 1257-58)

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 generally credible on matters relevant to the issues presented, and finds any inconsistencies in the testimony to be due to variations in the witnesses' respective recollections and perspectives. It should also be noted that the Parents presented as devoted advocates for and loving parents of Student; additionally, the District personnel who have been involved in Student's programming presented as dedicated professionals both in general and with respect to Student and Student's education. These observations were evident to this hearing officer throughout the hearing, despite the parties' conflicting positions and perspectives on the issues.

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.[7] The parties' Closing Arguments were also carefully reviewed.

IDEA Principles

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to

[7] The District moved to strike certain testimony during the hearing (N.T. 593, 809-10, 812-13) and in its Closing Argument (at 46). The motion is denied as the bases for the objection relate more to the weight of that evidence. I do note that I accorded little weight to the testimony of the Parents' expert on the District's evaluations based on his qualifications as well as the lack of relevancy to the legal requirements for an appropriate evaluation; in any event, the adequacy of the District's evaluations were not specified as an issue in this case. Further, I similarly found little value in speculative testimony provided over the District's objection (N.T. 587-89, 1045).

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

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). Importantly, 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 crucial is the IDEA obligation for eligible students to be educated in the "least restrictive environment" (LRE) which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993), the Third Circuit adopted a two-part test for determining whether a student has been placed into the least restrictive environment as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, be educated successfully within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the child has been included with non-exceptional children to the maximum extent possible. *Id*. In evaluating the first prong, the efforts the 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 all be considered. *Id*. at 1215-18. Essential to the analysis of the comparison of educational benefit, the mere fact that a child might progress better academically in a segregated setting than in an inclusive setting is not determinative, since one must evaluate the unique benefits of the typical environment for the individual child, such as social skills and peer interactions. *Girty v. School District of Valley Grove*, 163 F.Supp.2d 527, 536 (W.D. Pa. 2001), *aff'd mem.*, 60 Fed. Appx. 889 (3d Cir. 2002) (quoting *Oberti* at 1217).

Importantly, 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); 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). Nevertheless, in examining an LRE issue, "[i]f the school has given no serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child, then it has most likely violated the Act's mainstreaming directive." *Oberti*, *supra*, at 1216.

Section 504 and ADA Principles

The Parents also assert claims under both Section 504 and the ADA in addition to the IDEA. Generally speaking, 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 further 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).

> In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is "disabled" as defined by the Act; (2) he is "otherwise

> qualified" to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

Ridgewood at 253. Intentional discrimination requires a showing of deliberate indifference, which may be met by establishing "both (1) knowledge that a federally protected right is substantially likely to be violated … and (2) failure to act despite that knowledge." *S.H. v. Lower Merion School District*, 729 F.3d 248, 265 (3d Cir. 2013).

With respect to discriminatory retaliation, the following principles are applicable.

> The elements of a retaliation claim require a showing by the filing party (1) that they engaged in a protected activity, (2) that defendants' retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or her rights, and (3) that there was a causal connection between the protected activity and the retaliatory action.

Lauren W. v. DeFlaminis, 480 F.3d 259, 267 (3d Cir. 2007) (citations omitted). A defendant may defeat the claim of retaliation by showing that it would have taken the same action even if the plaintiff had not engaged in the protected activity. *Id*. To establish the requisite causal connection a plaintiff usually must prove either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link. *Id*. (citations omitted).

With respect to the ADA issues, the substantive standards for evaluating claims under Section 504 and the ADA are essentially the same. *See, e.g., Ridley School District. v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). The discussion below serves as a final determination of all Section 504 and ADA claims, as well as the IDEA issues, in this matter.

The Parents' Claims

Least Restrictive Environment

The first issue is whether the District adequately considered the least restrictive

environment mandate in proposing a placement for Student in kindergarten with appropriate supplementary aids and services. This hearing officer is compelled to agree with the Parents that the District did not comply with this obligation.

As set forth above, 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. In evaluating these factors, it is important to recognize that the regular education setting may be considered a starting point for determining placement for a child with a disability.[8]

The record reflects that the District gave virtually no consideration to including Student in a regular education kindergarten classroom prior to the start of the 2014-15 school year. The initial placement recommendation was made based on a limited record review and prior to the development of an IEP for Student, 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). Further, the evidence is irrefutable that the program and placement recommendations were based solely on Student's ASD diagnosis, rather than on any meaningful consideration of Student's particularized strengths and needs.

[8] *See, e.g.*, Basic Education Circular, Least Restrictive Environment (LRE) and Educational Placement for Students with Individualized Education Programs (IEPs) (July 1, 2002) (stating that, "The presumption is that IEP teams **begin** placement discussions with a consideration of the regular education classroom and the supplementary aids and services that are needed to enable a student with a disability to benefit from educational services." (emphasis in original)).

The Parents were given no opportunity to participate in the preliminary decision-making on the type and level of support Student needed for kindergarten, despite their stated preference for inclusion. Further, the District team members did not at any time retract the original, specific recommendation for a program with autistic support that was not available at Elementary School. Then, when it did nonetheless agree to Student's attendance at Elementary School, it abruptly changed its recommendation to supplemental learning support with no indication why this level or type of support was appropriate for Student. Tellingly, the October 2014 IEP, proposing regular education for only 48% of the school day, contains only the briefest reference to LRE and its considerations, stating without any elaboration that Student must be outside the general education class in order to "receiv[e] speech and language therapy and learning support specially designed instruction" with "specially designed instruction … to improve [his/her] ability to access the regular education curriculum." (S-8 pp. 36-37) Here, again, the District was well aware of the Parents' position on inclusion compared to a segregated educational setting, but maintained its stance.

There is also no real indication that the District gave true consideration to the array of supplementary aids and services that are available to assist Student in accessing the regular education curriculum and environment,[9] other than a one-on-one aide. *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 was relevant to appropriate consideration of the first *Oberti* prong). Plainly, the District failed in its obligation

[9] The Supplementary Aids and Services (SAS) Toolkit is 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, to guide IEP teams through the process based on the program and the child. The District is undoubtedly aware of this and/or similar resources given its ongoing professional development training in this area. (N.T. 55-60)

to make reasonable and meaningful efforts to consider a program for Student in the regular education environment with supplementary aids and services.

The next element of the first *Oberti* prong is the comparison of benefits of the regular education classroom to those in the recommended special education setting. The District team members, in maintaining their recommendation for some level of autistic support outside of the regular education environment, unmistakably failed to give meaningful consideration to all of the unique benefits of the inclusive environment to the maximum extent possible. Those benefits, such as development of social and communication skills and the availability of role modeling, can lead to the crucial goal of increased independence. *Oberti*, *supra*, at 1216. Remarkably, the District also ignored the fact that Student is an observational learner who had demonstrated significant success in the typical classroom prior to entry into the District, as well as in the regular kindergarten class by the time of the October 2014 IEP meeting. Here, overall, the comparison of benefits weighs heavily in favor of regular education programming for Student.

The last factor of the first step in the *Oberti* test is the possible impact of Student's inclusion on other students. Here, the record establishes that Student did not manifest problematic behaviors that would impede the learning of the other students in the classroom; and, by all indications, Student has been able to thrive alongside Student's peers.[10] Additionally, even if there were any reason to believe Student's inclusion might have an impact on the other students in the classroom, which there is not, consideration of appropriate supplementary aids and services to enable Student to achieve success in the regular classroom would have been the appropriate response.

[10] The evidence regarding the uninformed viewpoints of other parents, while certainly not relevant to the issue of LRE, was considered only to the extent that it provided some context in this matter; the District did not suggest that that evidence bore any relation to its programming decisions.

For all of these reasons, this hearing officer concludes that the District failed in its obligation to meet the first prong of the *Oberti* test. Thus, it is not necessary to move on to the second prong, and the Parents prevail on the first issue. Among other things, the District will be ordered to comply with the LRE mandate in developing an appropriate program for Student for the 2015-16 school year.

Implementation of Student's Program

A related issue must be addressed with respect to the implementation of Student's educational program over the course of the 2014-15 school year. Student's last agreed upon IEP was that from the early intervention program. However, despite the fact that Student had mastered all of the goals in that document, there was apparently no effort made to meet to make revisions that would respond to Student's current functioning over the course of the 2014-15 school year. The District suggests that the Parents played a role in the lack of revision. (District Closing at 42) While it may not be surprising that the parties did not agree to meet while the due process hearing was looming or ongoing, the District nonetheless made the determination in October 2014 that Student required special education services outside of the regular classroom. Without convening the IEP team to discuss the need for provision of these additional special education services, Student began spending 45 to 90 minutes per day segregated from the regular education environment including Student's peers. Although the District argues that the Parents were aware of this change to Student's program (District's Closing at 37-38), it is apparent that the Parents were again excluded from participating in this important decision and, significantly, did not understand the nature and extent of that new programming until this due process hearing was underway.

In short, the decision to make this change to Student's special education program was an

impediment to the Parents' meaningful participation, and amounted to a denial of FAPE. In addition, even if Student may have benefitted from some of the special education instruction provided outside of the regular classroom, Student was deprived of the opportunity to participate with typical peers and engage in observational learning from them for a more than insignificant portion of the school day. This hearing officer concludes that the removal of Student from the regular classroom for those 45-90 minutes per day, or six hours per week, constitutes a substantive denial of FAPE.

Section 504/ADA Discrimination

The above discussion provides support for the conclusion that the District also discriminated against Student on the basis of Student's disability. Student is clearly disabled within the meaning of Section 504; Student is "otherwise qualified" to participate in school activities; the District receives federal financial assistance; and Student was excluded from participation in or denied the benefits of a program of regular education on the basis of Student's disability, first in the initial placement determination and then in the removal from regular education each day. These actions of the District were undeniably intentional on its part. Thus, this hearing officer makes an express finding of discrimination by the District. To the extent that Student was denied FAPE under Section 504, the foregoing section fully addresses those claims under the IDEA and need not be discussed further.

Retaliation under IDEA, Section 504, and ADA

The next issue is whether the District retaliated against the Parents for their advocacy for Student. They assert that the District's actions in limiting the Parent's ability to volunteer in the classroom, threatening truancy charges, and participating in the association's efforts to remove her from office, constitute retaliatory conduct. (Parents' Closing Argument at 56-62)

Based on a review of the entire record, this hearing officer cannot find that these actions amount to retaliation.

First, with respect to the volunteer opportunities in the classroom, the record at best establishes that the District did not consistently enforce its policy on clearances at Elementary School. Additionally, the Parent herself conceded that she had, but did not provide, the clearances that were requested of her (N.T. 1183, 1244-45). Thus, the failure to comply with the rule, which could have been quickly and easily remedied, was the source of the problem, and this situation cannot be deemed an effort by the District to deter the Parent from volunteering. Moreover, the subsequent failure to follow up on scheduling the hours in the classroom after the principal responded to her request similarly cannot be attributed to the District. Nothing in the record points to retaliation on this basis.

Second, the threatened truancy never materialized into actual charges. Even if some or all of the absences in the District's notice should have been excused, as the Parents suggested in their testimony (N.T. 1200-01), there is nothing novel in a school district issuing form notices under applicable truancy laws that would indicate that this particular action was undertaken in order to retaliate against the Parents, particularly since nothing further occurred in this vein.

Lastly, the third and arguably most significant basis for the Parents' retaliation claims is the asserted participation of the District in the efforts of the association and other parents to remove the Parent from office. The Parents are clearly extremely upset and hurt about, and suspicious of, this particular experience. This event obviously had a lasting impact on their relationships with other parents and with some Elementary School staff, and the timing undeniably overlaps in part with the disagreement between the Parents and District over Student's programming and placement. Nevertheless, the record simply does not support the

conclusion that the District was actively involved in these actions against the Parents. Furthermore, even if one might suspect that any District staff members were aware of the petition and participated in its creation or circulation, a conclusion that this hearing officer does not reach, the reasons for the course of conduct was not at all related to the Parents' advocacy for Student. The record as a whole establishes unequivocally that this whole circumstance was premised on a disagreement over use of funds for the library, and was not even tangentially related to the Parents' dispute with the District over Student's educational programming and placement. Thus, there will be an express finding of no retaliation on the part of the District in this case.

Remedies

The final issue is what remedies are warranted. In their Closing Argument, the Parents suggest Student is entitled to an award for compensatory education, in addition to specific prescriptive relief. (Parents' Closing Argument at 53-57)

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 an award of compensatory education is appropriate for the total number of hours that Student was removed from the regular education environment (outside of related services) applying the *M.C.* standard. This award will remedy the denial of FAPE on this substantive basis as well as the procedural impediment to the Parents' participation in the educational decisions involving their child. The remedy will encompass the entire 2014-15 school year from the first day that Student was removed in October 2014.

The hours of compensatory education are subject to the following conditions and limitations. 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 District through Student's IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age 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 average of the hourly salaries and fringe benefits that were paid to the District professionals who provided educational and related services to Student at Elementary School during the period of the denial of FAPE.

Lastly, the District will be ordered to develop an appropriate educational program for Student for the 2015-16 school year in the regular education classroom to the maximum extent appropriate.

CONCLUSION

In conclusion, I find that the District denied Student FAPE by failing to comply with its LRE obligations and that the District discriminated against Student. I will award compensatory education as well as a directive to the IEP team. I also conclude that the District did not retaliate against the Parents.

ORDER

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

1. Within thirty days of the date of this order, the District shall convene a meeting of Student's IEP team to revise the IEP for the 2015-16 school year to provide for Student's placement in a regular education classroom in Elementary School to the maximum extent appropriate, utilizing the SAS Toolkit to determine appropriate supplementary aids and services.

2. The District shall provide Student with compensatory education in the amount of 360 minutes per week for each week that school was in session from October 15, 2014 through the end of the 2014-15 school year, subject to the conditions and limitations set forth above.

3. The District discriminated against Student on the basis of Student's disability.

4. The District did not retaliate against the Parents.

5. 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

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Cathy A. Skidmore
HEARING OFFICER

Dated: June 24, 2015