

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: J.V.
Date of Birth: [redacted]
CLOSED HEARING
ODR File No. 17720-15-16 KE

Parties to the Hearing:

Parents
Parent[s]

Local Education Agency
Pottstown School District
Administration Building
Pottstown, PA 19464

Dates of Hearing:

Date of Decision:

Hearing Officer:

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June 21, 2016; July 20, 2016;
July 21, 2016

August 12, 2016

Cathy A. Skidmore, M.Ed., J.D.
Certified Hearing Official

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a primary elementary school-aged student residing in the Pottstown School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student has been attending a private school (Other School) pursuant to a District placement since January 2016. Dissatisfied with that program and placement, Student's Parent filed a due process complaint against the District in May 2016, asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,³ as well as the federal and state regulations implementing those statutes.⁴

The case proceeded to a due process hearing convening over three sessions.⁵ The Parent sought to establish that the District failed to provide Student with FAPE in the least restrictive environment during the 2015-16 school year, and in its proposals for Extended School Year (ESY) services during the summer of 2016 and the program for the start of the 2016-17 school year. As remedies, the Parent requested compensatory education and a directive for a placement for Student within a District elementary school. The District maintained that its special education program, as offered and implemented, was appropriate for Student without violating

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 federal regulations implementing the IDEA are at 34 C.F.R. §§ 300.1 – 300.818; and those implementing Section 504 are at 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are at 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14, implementing the IDEA) and 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15, implementing Section 504).

⁵ References to the record will be as follows: Notes of Testimony (N.T.); Joint Exhibits as paginated (SD-) followed by the exhibit number; and Hearing Officer Exhibits (HO-) followed by the exhibit number. Citation to SD-109 through SD-128 is not necessary because each of those exhibits is a duplicate due to the parties' agreement after the first hearing session to submit all joint exhibits, but inclusion of those documents was necessary to ensure a complete and accurate record. Counsel and the parties must be commended for producing and agreeing to a record consisting entirely of joint exhibits. The admitted exhibits are set forth in HO-1.

the principles of least restrictive environment, and that a return to the District for the start of the 2016-17 school year would be premature and fail to meet Student's needs.

For the reasons set forth below, the Parent will prevail on many but not all of the claims presented.

ISSUES

1. Whether Student's placement was and is appropriate for Student and in accordance with the principles of least restrictive environment;
2. If that placement is not appropriate for the 2016-17 school year, should the District be directed to develop a new program and placement; and
3. If that placement was not appropriate during the 2015-16 school year and summer of 2016, whether Student is entitled to compensatory education, and in what form and amount?

FINDINGS OF FACT

1. Student is a primary elementary school-aged resident of the District who is a child with a disability and is eligible for special education. (N.T. 29-30)
2. Student historically exhibited relative strengths in mathematics problem solving and social skills. However, Student has engaged in physically aggressive behavior beginning prior to entry into kindergarten. Student began receiving behavioral health services in 2010 and was diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD), with a Rule Out of Mood and Anxiety Disorder. Student has attended an after school program through the behavioral services agency. (SD-5)

Former School District: 2013-14 and 2014-15 School Years

3. Student attended kindergarten and first grade in a neighboring school district. During first grade (2014-15), Student exhibited physical aggression toward the teacher and toward property, as well as disrespectful behavior and failure to follow directions. Student had a behavior plan and spent some portions of the school day in a small classroom setting and was provided one-on-one assistance at times. (SD-5 pp. 1-3, 11)
4. A psychiatric evaluation in July 2014 revealed continued hyperactivity, lack of focus, oppositionality, and defiance. Diagnoses at that time were ADHD, ODD, and Rule Out

Bipolar Disorder. The psychiatrist prescribed medication but Student was never given any of that prescription. (N.T. 487-88; SD-78)

5. Student was evaluated by the other school district and identified as eligible for special education on the basis of emotional disturbance in December 2014. Cognitive assessment in the Evaluation Report (ER) reflected a low average full scale IQ (88) with a relative weakness with processing speed (Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV)). Academic achievement testing revealed low average to average scores in the areas of reading and mathematics, with low scores in writing skills (Wechsler Individual Achievement Test – Third Edition (WIAT-III)). Social and emotional functioning (Behavior Assessment System for Children – Second Edition (BASC-2)) revealed several clinically significant concerns at home (aggression, attention problems, and activities of daily living); aggression was a clinically significant concern at school. At-risk concerns were reflected for both environments: hyperactivity, atypicality, adaptability, social skills, leadership, and functional communication at home; and hyperactivity, conduct problems, depression, attention problems, learning problems, withdrawal, adaptability, and leadership at school. (SD-5)
6. A subsequent Occupational Therapy evaluation revealed needs for those services to address visual motor integration, sensory regulation, and fine motor skill weaknesses. (SD-10 pp. 11-13)
7. Student's Individualized Education Program (IEP) at the other school district as of April 2015 provided annual goals in reading decoding and occupational therapy (handwriting and other fine motor skills). Program modifications and specially designed instruction (SDI) were positive reinforcement of desired behaviors, a behavior chart, and passive restraint as needed for a threat to Student or others; sensory strategies integrated into the school day; and small group language arts instruction. Occupational therapy was a related service once per cycle. Student's program was one of supplemental emotional support, with participation in regular education except during language arts instruction. (SD-10 pp. 4-29)
8. Student had a one-on-one aide for some period of time in that other school district. (N.T. 443)
9. Student's report card at the end of the 2014-15 school year reflected that Student was approaching or meeting most expectations in reading, mathematics, and language arts, and listening attentively was the only noted area of concern. (SD-8)

Entry Into District: 2015-16 School Year

10. Student enrolled in the District in June 2015. Based on the District's review of the IEP from the other school district, the team concluded that Student required emotional support. (N.T. 33, 39-40; SD-9, SD-98 pp. 1-2)
11. An IEP meeting convened on August 24, 2015 with the Parent. The regular education teacher who attended the August 2015 IEP meeting did not teach at a District elementary

school but was available during the summer. (N.T. 142-43, 336, 355-56, 425, 447-48, 477)

12. The District's August 2015 IEP incorporated the prior school district's IEP in its entirety and was considered to be an interim IEP, to be implemented on the first day of school (August 31, 2015). The Parent approved the accompanying Notice of Recommended Educational Placement (NOREP), and the District implemented the August 2015 IEP at the start of the school year. (N.T. 146-47, 194, 337-38, 478; SD-10, SD-11)
13. The District did not have emotional support available at Student's neighborhood elementary school; that type of support was only provided at a different elementary school. On the same day as the IEP meeting, the District determined that Student should attend the elementary school with emotional support and that there was space available there for Student. (N.T. 195, 364-65, 447-48; SD-98 pp. 1-2)
14. Because the District's "Back to School Night" was also held on August 24, 2015, there was not a desk for Student in the regular education classroom at the elementary school Student would attend during that event. The Parent and Student met the regular education and emotional support teachers that night. (N.T. 194-95, 424-25, 443-44)
15. Student began the 2015-16 school year (second grade) participating in regular education for reading and mathematics instruction, Response to Intervention services, special classes, lunch, and recess. Student wanted to be in the regular education classroom. (N.T. 222, 255-56, 429-30, 434, 438-39, 440)
16. Student had social skills instruction four times per six-day cycle for thirty to forty minutes in small group sessions in the emotional support classroom. The group worked on communication skills and regulating emotions. (N.T. 218-19, 255, 430-32)
17. The regular education classroom had 22 to 24 students and one teacher. Sometimes other adults were in the classroom, such as the learning support teacher or an aide. (N.T. 429, 436-37)
18. Student's emotional support classroom had two assistants that were in the classroom for part of the school day. When Student was part of the classroom, there were twelve or thirteen students. (N.T. 138-39, 206, 264-65)
19. Student's emotional support teacher had the appropriate credentials in addition to several years' experience providing emotional and learning support to students. She was trained in crisis prevention intervention (CPI) by the District. (N.T. 141-42, 197-99)
20. The elementary school principal at the building Student attended was certified as a CPI trainer. (NT. 395-97)
21. CPI includes techniques for de-escalating behavior in addition to safety and physical restraint. Physical restraint of a child is only done as a last resort by someone who is CPI-certified. (N.T. 225-26, 396)

22. From the start of the school year, Student was able to earn rewards for exhibiting appropriate behavior. One such reward for Student was the ability to take a break to use technology in the emotional support classroom, an activity that Student enjoyed. (N.T. 203-04)
23. On or about September 8, 2015, the emotional support teacher created a daily point sheet for Student that followed Student into the regular education and special classrooms. Student earned points for meeting goals of (a) following classroom rules and (b) asking the teacher for help, with fewer points earned when prompting was necessary. The point sheet did not specify the environment (regular, emotional support, or special classroom) where Student's points were earned. An additional goal was added to the point sheet in December for remaining in the classroom. (N.T. 155-56, 170-71, 207-08, 255, 432-34; SD-95, SD-98 pp. 225-26)
24. Student exhibited only minor behavioral challenges in the regular classroom. Nevertheless, by the end of the second week of school, Student was spending the majority of the school day in the emotional support classroom due to concerns over Student's behaviors. Student continued to participate with regular education peers for special classes, lunch, and recess some days but not on others. Student was sent home some days because of behaviors. (N.T. 139-40, 167-68, 221, 255-64, 431-32; SD-95)
25. The emotional support teacher recommended a functional behavioral assessment (FBA) in mid-September because of the behaviors Student was exhibiting. The Parent gave permission for the FBA to be conducted by a Board Certified Behavior Analyst (BCBA) from the local Intermediate Unit (IU). (N.T. 158-59, 209; SD-12)
26. The emotional support teacher conducted the FBA, providing anecdotal information over a two-week period in the second half of September about the type and duration of Student's problematic behaviors. Identified behaviors of concern were "physical aggression towards peers and staff members, verbal disrespect, eloping from the classroom setting, throwing classroom items [and] property destruction." (SD-14 p. 1) Noted skill deficit areas contributing to the behaviors were social and self-regulation skills. The hypothesis in the FBA was that, when Student was engaged in a non-preferred activity or negative peer interaction, Student exhibited aggressive behavior to escape or gain attention of others. (N.T. 159-60, 212-13; SD-14)
27. Student was suspended on September 24, 2015 for one day for physical aggression against a peer and the emotional support teacher. Student had also engaged in other aggressive behaviors at school that day. (N.T. 153, 211-12; SD-13)
28. Additional behavioral data was collected in the emotional support classroom beginning approximately September 21 to track Student's physical aggression and verbal disrespect. The emotional support teacher and the classroom assistants recorded the behaviors as they occurred, but only occasionally identified antecedents to or consequences of the behaviors. (N.T. 179-80, 227; SD-93)

29. Student was injured on September 28, 2015 during transportation to the after-school program operated by the behavioral services agency; no District personnel were involved. Specifically, an aide on the vehicle struck Student several times. Student was very upset by this incident, and the next morning the Parent notified the emotional support teacher of the event and Student's reaction. (N.T. 163-65, 450-52; SD-38)
30. A new IEP was developed on September 29, 2015. Student's regular education teacher did not attend the IEP meeting. (N.T. 165-66, 213-14, 387, 482; SD-15 pp. 36-38)
31. The September 29 IEP set forth Student's present levels of academic achievement and functional performance in reading and mathematics, and noted Student's performance on the IEP goals. Behavioral information was also reported from the FBA. Parent concerns reflected Student's behaviors and social skills. The IEP noted identified needs in reading fluency and comprehension, social skills, occupational therapy, and behavior. (SD-15)
32. Goals in the September 29 IEP addressed occupational therapy skills (fine motor including handwriting), behavior (compliance with adult intervention when aggression occurred), and reading fluency and reading comprehension (first grade level). Program modifications and SDI provided for breaks, behavioral strategies including positive reinforcement and a daily point sheet, social skills instruction, preferential seating and prompting, and access to the emotional support classroom. Occupational therapy, social skills group, and transportation were identified as related services. Student's program was for supplemental emotional support in a District elementary school; however, Student was to spend the entire school day in the emotional support classroom until Student's behaviors improved. (SD-15)
33. A Positive Behavior Support Plan (PBSP) was included in the September 29 IEP that repeated the behavior goal, program modifications and SDI; antecedent strategies (positive reinforcement, breaks, and use of the point sheet), replacement behavior (use of coping strategies) and consequences of performing the replacement behavior (positive reinforcement) and those of performing the problem behavior (planned ignoring when safe to do so, redirection, and provision of choices) were also specified. (SD-15 pp. 30-35)
34. The Parent approved the September 29, 2015 NOREP accompanying the IEP on that same date. (N.T. 483; SD-16)
35. Student was physically restrained by the elementary school principal on October 5, 2015 in the emotional support classroom. Student was then suspended for two days for aggressive behavior and failing to follow directions in the emotional support classroom. (N.T. 173-74, 400, 452-53; SD-18, SD-19, SD-20)

Hospitalization Program: 2015-16 School Year

36. In early October, soon after the physical restraint, Student entered a partial hospitalization program due to Student's behavior. Student was placed on medication for the first time, and due to a poor reaction to the regimen, Student entered inpatient hospitalization. (N.T. 453-54, 483-84, 488, 509; SD-27 p. 12)

37. Another IEP meeting convened on October 19, 2015, and the regular education teacher did attend. The team discussed Student's discharge from the hospitalization program at that time and return to the same District elementary school. Evaluation for wraparound services had also been scheduled. The IEP was revised to include behavioral data since the September IEP meeting; CPI and additional activity breaks were added to the program modifications and SDI. (N.T. 184, 228, 230-31, 428, 454; SD-22, SD-23 pp. 1-2, SD-24)
38. An IEP telephone conference was held on November 4, 2015. The regular education teacher did not participate. Staff from the hospitalization program participated in that call, and shared behaviors that Student exhibited there including defiance, physical aggression, and refusal to comply with demands. The Parent shared that Student did not want to return to school. One recommendation was for wraparound services to include full-time Therapeutic Staff Support (TSS) at school for 45 days in addition to services at home. (N.T. 185, 237, 435-36, 454-55; SD-23 pp. 3-4, SD-27 pp. 12-14)
39. Another IEP meeting/telephone conference was held on November 9, 2015 to again discuss Student's discharge from the hospitalization program. Student had been doing well since a medication change several days earlier and was expected to be discharged that same date. (N.T. 56, 186-87, 238-40; SD-23 p. 5, SD-27 p. 13)
40. The IEP team discussed out-of-District placements at the November 9, 2015 meeting, and a suggestion was made for five hours per week of instruction in the home while such placements were considered. The Parent did not agree to instruction in the home. At the time, the Parent was concerned about Student returning to the District. The coordinator of out-of-District placements attended the meeting and suggested several such placements. The Parent signed release forms that day so that the District could send referral packets. (N.T. 188-89, 239-40, 272-73, 275-76, 280, 314-15, 317-18; SD-27 pp. 14, 43, SD-98 pp. 19, 26, 69)
41. The District sent a referral packet to Other School, and the Parent visited there with Student and the out-of-District coordinator in November 2015. (N.T. 283-84, 287, 321, 329, 460)
42. A November 23, 2015 meeting was cancelled on request of the Parent. (N.T. 358-59; SD-28)

Return to District: 2015-16 School Year

43. At a December 1, 2015 meeting, the IEP team discussed Student's return to the District elementary school. The regular education teacher did not attend that meeting. The team determined that Student should only attend until approximately 12:30 p.m. (after lunch) for the first few days. The team also discussed the fact that Student's behaviors could be triggered by the point sheets. The team agreed that the point sheets would not be shown to Student and only shared between the emotional support teacher and the Parent. (N.T. 61, 182-83, 240-41, 339-40, 358-59, 428-29, 435-36, 462, 491; SD-23 pp. 6-7, SD-30, SD-32 p. 1)

44. Also at the December 1 meeting, the team discussed Student's better response to adults of the same gender as Student than to adults of the other gender. Student's IEP and PBSP were revised to add an adult role model of Student's gender in addition to a specific reward and use of a specific item to assist with calming. The Parent also requested that Student be provided with a one-on-one aide, but the District suggested that such consideration required additional data and evaluation of the success of interventions. (N.T. 241-42; SD-31, SD-32 pp. 1, 16, 28)
45. Student's IEP was further revised at the December 1 meeting to reflect the return to the previous elementary school on a modified schedule for the first two days; add transportation in the afternoon; reflect Student's medication and wraparound service hours; and note observations by a behavior consultant two days per week. The Parent approved the accompanying NOREP. (SD-32 pp. 14, 16, SD-33)
46. Student returned to the District on December 2, 2015. For the first few days after Student's return, Student attended until 12:30 p.m. and was in the emotional support classroom for that entire time period. Student was provided a significant amount of individual, one-on-one support at that time. (N.T. 178, 238-39, 242-43, 252-53, 439; SD-100)
47. Student had a TSS worker for two hours per day at school when Student returned to the District in December. (N.T. 246, 361-62)
48. After Student's return to the District in early December, Student began to exhibit a new behavior of concern: elopement from the classroom. (N.T. 244-45)
49. Student was restrained on December 7, 2015 by the elementary school principal because Student attempted to elope from the school building and was aggressive toward property. Student's Parent was called and picked up Student from school. (N.T. 246-47, 402-04; SD-39, SD-40)
50. An IEP meeting convened on December 10, 2015 to discuss the recent restraint and Student's behaviors, as well as continuing the shortened length of Student's school day and consideration of placement outside of the District. The regular education teacher did not attend that meeting. The Parent reiterated her request for a one-on-one aide, at least for hours that the TSS would not be present at school. (N.T. 248, 360-62, 429, 463-64; SD-41, SD-43 p. 1)
51. Student's IEP and PBSP were revised to add behavioral information since Student's return to the District as well as a visual chart of rewards. The Parent approved the December 10, 2015 NOREP. (SD-42, SD-43 pp. 14-16, 18, 31, 45, SD-44)
52. Also in December, the IU BCBA developed a form to describe Student's behaviors, specify antecedents and consequences, and note the duration of each incident; a new data collection sheet was also created and used along with the daily point sheets. (N.T. 193-94, 244-46, 248-50; SD-45, SD-94)

53. Student was suspended on December 23, 2015 for one-half day for physical aggression against the emotional support teacher. (N.T. 405; SD-46)
54. Student spent very little time engaged in academic tasks in December 2015 and January 2016 (generally less than 60 minutes per day) and continued to exhibit significant aggressive and elopement behaviors as well as noncompliance and work refusal. (SD-94, SD-95 pp. 47-80)
55. The emotional support teacher was unable to collect ESY data for Student because of Student's noncompliance and refusal to complete tasks. (N.T. 251-52; SD-98 p. 151)
56. The District continued to explore alternative placements for Student after Student returned in December; by early January, the District had concluded that it could not meet Student's needs within the District. (SD-98 pp. 32, 35-36, 41-43, 45-46)

Placement in Other School: Spring Semester of 2015-16 School Year

57. Other School is a private academic school for children with emotional problems, ranging from kindergarten through eighth grade. Other School is licensed by the Commonwealth of Pennsylvania but is not an approved private school. (N.T. 585-86, 597)
58. Student was placed into a full-time emotional support classroom at Other School beginning on January 15, 2016. There were eight total students in the classroom (except for a smaller group mathematics class) and five to seven adults including a certified special education teacher. In addition to mathematics, Student had reading, social studies, science, and special classes. Student was provided with one-on-one support for some portion of the school day. (N.T. 365, 527-30, 550-51, 576-77, 579, 588; SD-69 p. 1)
59. Student's IEP was revised again in January 2016 to reflect that Student was attending Other School, and was described as an "interim IEP". Curb to curb transportation was added. The Parent approved the January 2016 NOREP "unless...another school that meets [Student's] needs" could be found. (SD-52 p. 3) (N.T. 491; SD-51 pp. 1, 32, 35-36, 38-40, SD-52)
60. Students in the Other School classroom were provided global directions to perform tasks, then students were individually prompted as necessary. Individual prompts could be verbal or physical. (N.T. 570-71, 581-82)
61. Student had point sheets at Other School where Student earned points by performing expected behaviors. (N.T. 554-55)
62. Student did not typically exhibit aggressive behavior toward others or to property at Other School. Student did at times refuse to complete work, or become upset and be unable to calm Student's self. (N.T. 531; SD-73, SD-74)
63. The District arranged for Student's transportation to Other School. In the beginning, Student had a ninety minute van ride in the morning after a 6:45 a.m. pickup with school

starting at 8:30 a.m., and a fifty minute return trip after school ended at 2:30 p.m. The Parent raised concerns with the distance and long duration of the ride to and from Other School, and the District explored options. Student's psychiatrist opined that Student should be provided with transportation that was as short in duration as possible, and that a trip of "several hours" would be "detrimental to [Student's] mental health" (SD-57). (N.T. 293; SD-56 p. 21, SD-57, SD-98 pp. 69-70, 137-45, 155-56)

64. The Parent shared concerns in January and February with fighting and other behavior on the van to Other School. By early March, Student was placed on a different bus and the commute was reduced to fifty minutes in the morning and forty minutes in the afternoon. (N.T. 466-68, SD-98 pp. 144-45, 183-85, 223)
65. Other School conducted an FBA in February 2016 regarding Student's behaviors of concern: physical aggression towards other people and property, verbal disrespect, and disruption to the classroom. A number of skill deficits were identified as related factors. No data was provided in the FBA, but two hypotheses of the function of the behaviors were developed that essentially suggested that Student would engage in behaviors to escape demands or gain attention during a challenging or non-preferred task. (N.T. 525-26; SD-59)
66. An IEP meeting convened in February 2016 and the team discussed the Parent's concerns about transportation to and from Other School and whether Student should be attending there. The Parent sought to have Student return to the District, but its members of the IEP team did not believe that Student was ready for that transition. Changes to the transportation were discussed. (N.T. 293-95, 301, 340-41, 362-63, 465-68, 494, 557-58; SD-98 pp. 223-24)
67. A new IEP was developed at that February meeting. Student's present levels of academic achievement and functional performance reflected reading, writing, and mathematics skills in addition to the results of the Kaufman Test of Educational Achievement in February 2016. Behavioral information revealed that Student was able to follow directions, complete tasks, and engage in appropriate peer interactions; when Student did become upset, Student was learning to regulate emotions with reinforcement. (S-63 pp. 1-6)
68. The February IEP noted a number of strengths in social and academic skills. Needs were noted in the areas of reading fluency and comprehension, mathematics calculation, some social skills, behavior, and occupational therapy. Annual goals with short term objectives addressed reading comprehension (third grade level), reading fluency (third grade level), mathematics calculation skills, fine motor skills (as in the previous IEP), and behavior (increasing ability to (a) follow directions and complete tasks, (b) accept redirection without aggression, and (c) gain attention using socially appropriate skills; all with decreasing prompts). Program modifications and SDI provided for small group instruction, preferential seating, manipulatives, extra time for work completion, a visual schedule, a prompt hierarchy, coaching for problem solving and opportunities for breaks, social skills, and a PBSP with use of daily point sheets. Counseling, transportation, and occupational therapy were specified as related services. (SD-63)

69. A PBSP was also developed in February with goals to increase the ability to follow directions and complete tasks with decreasing prompts; increase the ability to accept redirection without aggression with decreasing prompts; and increase the ability to gain attention using socially appropriate skills with decreasing prompts. Antecedent strategies, replacement behaviors, and consequences were included in the PBSP. This document was discussed at the February 2016 meeting. (N.T. 310; SD-60)
70. The February 2016 IEP indicated that Student was eligible for ESY services, which were proposed for Student at Other School. (N.T. 78, 114, 348; SD-63 p. 29)
71. Student did not have a one-on-one aide at Other School. (N.T. 577, 592)
72. As of March 7, 2016, Student had not engaged in physical aggression toward others or property at Other School except on two occasions. Student did generally require multiple prompts to maintain focus on and complete tasks, particularly in mathematics class. (N.T. 539-43; SD-60, SD-61, SD-68)
73. On Student's behavior goals, prior to early May 2016, data was collected on Student performing the desired behaviors with three or more prompts, but not with one or two prompts. The data collection prior to early May did not reflect how many prompts were provided to Student prior to performing specified tasks. (N.T. 542-49, 569-70, 572-74; SD-99 p. 1)
74. As of the end of the third quarter at Other School, Student had all A and B grades. Other School also provided data on Student's performance on the skills addressed by the IEP goals. (SD-69)
75. Baselines on the academic IEP goals for Other School were determined in May 2016. For the academic goals (reading comprehension and reading fluency), baselines could not be determined earlier because Student was not yet functioning at the grade levels specified in the goals. However, baselines were also not determined for the short term objectives that specified criteria at other grade levels including where Student was performing. (N.T. 536-39, 559-60)
76. Baselines on the behavioral IEP goals for Other School were not determined before the May 2016 IEP was finalized. (N.T. 574-76)
77. Another IEP meeting convened on May 4, 2016. Student's recent District reevaluation was discussed in addition to Student's placement. (N.T. 349-50, 468-69, 497-98, 592-93; SD-84)
78. The May 2016 IEP updated the present levels of academic achievement and functional performance, and significant portions of the Reevaluation Report (RR) were copied into the document. Strengths and needs remained virtually the same, with the addition of articulation as a need. Goals and short-term objectives were essentially retained from the prior IEP, and a new articulation goal was added. Program modifications and SDI mirrored the prior IEP, with speech/language included as a new related service. Student's proposed program in the May 2016 IEP was full time emotional support at

Other School. The Parent did not approve the accompanying NOREP. (N.T. 475; SD-84, SD-88)

79. Student's PBSP was also reviewed in May. At that time, Student was demonstrating consistency in following directions, accepting redirection, and gaining attention from others appropriately. The PBSP noted the team's decision to collect data on the number of prompts needed before compliance with the goal behaviors. (SD-83)
80. The District IEP team members proposed in May 2016 to consider Student's transition back to a District placement based upon data collected during ESY services at Other School. The Parent did not approve the NOREP for ESY 2016 at Other School. (N.T. 370-71, 372-73, 375, 469-70, 594-95; SD-87)
81. As of the end of the fourth quarter at Other School, Student had all A and B grades. Other School also provided data on Student's performance on the skills addressed by the IEP goals. (SD-105)
82. Student did not attend the ESY program at Other School in 2016. Student attended a program through the behavioral services agency instead. (N.T. 373, 470, 473-74, 501, 568)

District Reevaluation: April 2016

83. In late February 2016, the District sought permission to evaluate Student to plan for Student's return to District programming. The Parent consented to the reevaluation. (SD-64)
84. The District conducted an evaluation of Student in April 2016 and issued an RR. As part of the RR process, the District school psychologist conducted two observations of Student at Other School in early April 2016. (N.T. 31, 68, 103-04; SD-80)
85. The District school psychologist completed a draft RR on April 21, 2016 that did not include the Parent rating scales. A revised RR was issued on April 22, 2016 that included the rating scales completed by the Parent. The April 22, 2016 version of the RR is the final and complete document. (N.T. 92-93, 123; SD-80, SD-81)
86. The RR summarized previous information from the prior school district, including its ER, and from the behavioral service provider including the psychiatric evaluation in July 2014. A synopsis of Student's program in the District was also provided, including detailed behavioral data; and information from Other School records (present levels, FBA, progress monitoring, and teacher input) was also contained in the RR. (N.T. 93-97; SD-81)
87. The District school psychologist conducted a variety of assessments of Student at Other School over four different dates. Student was distractible and engaged in behaviors suggesting work avoidance during those sessions, including refusing to complete certain subtests, but all planned testing was completed for the RR. The District school psychologist concluded that Student's cognitive and achievement assessment results

should be interpreted with caution, believing that Student was capable of better performance than exhibited during those assessments for the RR. (N.T. 106-08, 120-22; SD-81)

88. Cognitively, on the Fifth Edition of the WISC, Student scored in the very low range (FSIQ 79) with little variability among subtests; the General Ability Index score was in the low average range. On the WIAT-III, Student scored in the below average to average range on all subtests and composites; but the Woodcock-Johnson Tests of Achievement – Third Edition was used to assess passage comprehension because Student refused to complete the comparable subtest on the WIAT-III. In that area, Student scored in the below average range but that score also was viewed with caution. (SD-81)
89. Social and emotional functioning was assessed using a variety of measures including the Third Edition of the BASC (BASC-3) and additional rating scales from the Parent, teacher, and Student. On the BASC-3, the Parent did not endorse any concerns; but the teacher rating scales reflected clinically significant concerns with aggression, anxiety, and somatization; and at-risk concerns with conduct problems, depression, attention problems, withdrawal, adaptability, social skills, leadership, study skills, and functional communication. On the Conners rating scales, the parent scores did not reflect any concerns; by contrast, the teacher's ratings reflected very elevated concerns with defiance/aggression, conduct disorder, and ODD. Ratings of Student's executive functioning reflected no concerns. (SD-81)
90. One other measure of emotional functioning was the Scale for Assessing Emotional Disturbance - Second Edition (SAED) completed by the teacher at Other School. In the original RR, the District school psychologist used the normative sample of students with emotional disturbance; but on the revised RR, she used the normative sample of students without emotional disturbance. This change was made in order to be thorough, not in response to the newly received Parent input; however, the effect was that the SAED-2 results were not indicative of emotional disturbance using the former sample, but were indicative of emotional disturbance using the latter. (N.T. 74-75, 112, 122-23; SD-80 pp. 35-36, 44, SD-81 pp. 37-38, 46)
91. Assessment of Student's speech/language skills for the RR revealed an articulation weakness, and services were recommended. Occupational therapy evaluation continued to suggest fine motor skill needs. (S-81)
92. The RR concluded that student continued to be eligible for special education on the basis of emotional disturbance, with secondary disability categories of speech /language impairment and other health impairment (due to ADHD). (SD-81)

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 Parent 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, testifying to the best of his or her recollection; and, the testimony was remarkably consistent with respect to the facts necessary to decide the issues despite the parties’ disparate positions 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, as were the parties’ exhaustive closing arguments.

GENERAL 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 (LEAs), 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). Most critically, 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).

A related precept in 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).

GENERAL SECTION 504 PRINCIPLES

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

LEAST RESTRICTIVE ENVIRONMENT

The major claim raised by the Parent challenges Student’s program and placement both in the District and at Other School as contrary to principles of the least restrictive environment. Proper understanding of this claim requires review of the applicable law.

The IDEA mandates that eligible students be educated in the “least restrictive environment” (LRE) which permits them to derive meaningful educational benefit. *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000).

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 USCS § 1412(a)(5)(A). The federal Office of Special Education Programs has explained this principle as requiring “first consideration” of the regular education classroom with supplementary aids and services. *Letter to Cohen*, 25 IDELR 516 (OSEP August 6, 1996). 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 LRE. 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 LEAs 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. The LRE mandate is “broad”. *Oberti, supra*, at 1216 (quoting *Daniel R.R.* at 1048). Furthermore, FAPE and LRE are related, but separate, concepts; an LEA can be in noncompliance with the LRE mandate but still provide FAPE. *A.G. v. Wissahickon School District*, 374 Fed. App’x 330 (3d Cir. 2010) (citing *T.R., supra*, at 575, 578).

The Parent's LRE claim must be evaluated in two stages: first, with respect to Student's program and placement in the District through mid-January 2016, and second, the placement at Other School for the balance of the 2015-16 school year. The record compels a conclusion that neither placement was determined following careful and deliberative consideration of the LRE.

District Elementary School Placement

Student began the school year with a program of regular education supplemented by emotional support, based on the information known to the IEP team at the time. However, by the end of a mere two weeks of school, and despite the lack of significant concerning behaviors in the regular education classroom, Student was excluded from that environment for a majority of the school day. While the record demonstrates that Student's behaviors in the emotional support classroom were significant and severe through October 5, 2015, presenting challenges and suggesting that Student needed a more intensive level of support than the August and September IEPs provided, it is also evident that the PBSP was not effective and required significant revision. The decision to conduct an FBA in mid-September was certainly an appropriate response, and the District clearly needed time to get to know Student and to understand Student's behaviors. Yet, that evaluation lacked objective identification of the behaviors of concern and failed to examine specific antecedents and consequences that maintained those behaviors. Without solid data obtained through a thorough FBA process, the information gleaned was not adequate to guide decisions on providing positive behavioral support.

The PBSP itself contemplated that Student would use coping strategies, but omitted the critical element of providing instruction to Student to acquire those skills needed to identify and select an appropriate replacement behavior. It is possible that the social skills group might have touched on this topic, but Student clearly had a distinct need for targeted, individualized

instruction to remedy a clear skill deficit. Had a complete FBA been conducted, revision to Student's IEP and PSBP based on the data collected would have logically followed.

The Parent made the decision to place Student in a partial, then inpatient, hospitalization program in October, and the District properly responded by holding a series of meetings to plan for Student's program following discharge. The IEP and treatment team members explored various options for Student, including outside placements, with the Parent and Student both expressing reservations about Student returning to the District elementary school.

Nevertheless, the team gave no consideration in early December to whether Student could, with supplementary aids and services, be successfully educated in the regular education environment to any extent; and, even assuming that Student required a more intensive level of support than regular education, did not reflect on whether Student would be included to the maximum extent possible. On the contrary, Student returned to full time emotional support, with no thought as to whether and how Student might participate with typical peers for some portion of the school day. The regular education teacher attended only one IEP meeting in October 2015 and, therefore, was not a true participant in the process of making decisions for Student's return in November/December. Moreover, the Parent had requested on several occasions that Student be provided with a one-on-one aide to provide support across environments, yet there did not appear to be any meaningful consideration of this or any other supplemental service as options. Taken as a whole, the record overwhelmingly supports a conclusion that the District did not comply with its LRE obligations upon Student's return in December 2015 through the date that Student began the Other School placement. *Oberti, supra*, 995 F.2d at 1216 (explaining that a failure to give serious consideration to inclusion in a regular

class with supplementary aids and services with modification to the curriculum “most likely” violates LRE obligations).

Other School Placement

The District continued to propose an out-of-District placement for Student very soon after Student returned in December. While clearly the District and Student were not successfully managing Student’s behaviors at that time, the leap from full-time emotional support in a District elementary school to an outside placement for children with significant behavioral needs presents the type of circumstance that the federal Office of Special Education and Rehabilitative Services and OSEP, U.S. Department of Education, recently strongly discouraged, reiterating the longstanding principle that LEAs must make behavioral support available throughout a continuum of placements and avoid overly restrictive environments for provision of those supports. *Dear Colleague Letter (Ensuring Equity and Providing Behavioral Supports to Students with Disabilities)*, 116 LRP 33108 (OSERS August 1, 2016)⁶ at 10. As with the December 2015 decision to return Student to full-time emotional support, the record lacks any indication that any options other than an out-of-District special school were contemplated for the remainder of the 2015-16 school year and ESY in 2016.

LRE TEST

Having concluded that the District failed to comply with its obligations to appropriately consider LRE principles, it is prudent to do so here. To reiterate, *Oberti* instructs that the first prong of the test, whether the child can, with supplementary aids and services, be successfully educated in the regular education classroom, be assessed by considering the efforts the school

⁶ Also available at <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/index.html?exp=0>.

has made to include the child, a comparison of the benefits to the child of regular and special education placements, and potential negative effects on other students.

Student began the 2015-16 school year with the majority of time spent in regular education where Student exhibited few problematic behaviors. In the prior school district, Student completed the school year successfully participating in regular education for a majority of the school day. Moreover, Student wanted to be in the regular education classroom in the District. Nevertheless, the District's efforts to include Student with typical peers were minimal, spanning only a two-week period of time in September 2015.

It is therefore difficult to conduct a comparison of benefits in the regular and special education environments given Student's limited time in the regular classroom at the very beginning of the 2015-16 school year. The segregated emotional support classroom, on the other hand, was not a successful setting for Student before or after the hospitalization. While Student has thrived at Other School (discussed more fully below), this placement outside of the District is extremely restrictive; as such, that setting lacks the opportunity for integration with typical peers, a consideration the *Oberti* Court found to be "fundamental" in the IDEA. 995 F.2d at 1216-17. Thus, the benefits of a segregated special education placement do not outweigh those in the regular education environment in this case.⁷

Lastly, consideration must be given to potential negative effects on other students. Here, again, Student did not exhibit anything other than minor behaviors during the short period of time Student was in the District regular education classroom. At Other School, Student was no longer demonstrating aggressive behaviors towards others or to property. In short, there is no

⁷ Moreover, by the end of the 2015-16 school year, Student's behaviors of concern at Other School were essentially limited to maintaining focus and completing tasks, which Student could accomplish with redirection and prompting. This type of support is easily and routinely provided in a regular education environment, and there is no reason to believe Student could not similarly receive prompting and redirection in a District elementary school classroom.

evidence that Student's inclusion in the regular education classroom would have negative impact on peers, particularly if appropriate supports were provided to Student.

Based on the foregoing analysis, the record supports a conclusion that Student can be educated in the regular education environment with appropriate supplementary aids and services in the District, although Student will almost certainly also require some emotional support. The IEP team will be directed to convene prior to the start of the 2016-17 school year⁸ to discuss Student's program and revise the IEP to reflect Student's return to the District elementary school that Student previously attended⁹ with inclusion in regular education to the maximum extent appropriate. The IEP team will also be directed to use 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,¹⁰ at that meeting. Additionally, the IEP team should consider providing Student with a full-time one-on-one aide (of Student's gender) at the start of the school year, to facilitate Student's transition from the small environment at Other School with significant individualized attention back to the District, to be faded as may be appropriate. Finally, the IEP team will be directed to arrange for a complete and thorough FBA conducted by a BCBA following Student's return, allowing for a period of time to observe any

⁸ At the request of this hearing officer, the parties identified at least one mutually agreeable date after this decision and prior to the start of the 2016-17 school year in the event that an IEP meeting would be ordered.

⁹ Although the Parent did appear to want Student to attend the neighborhood elementary school, the IEP team has concluded that Student requires emotional support that can be provided in a different elementary school. This determination is not contrary to the IDEA requirement of placement in "the least restrictive *appropriate* educational environment." *S.H. v. State-Operated School District*, 336 F.3d 260, 272 (3d Cir. 2003) (citation omitted) (emphasis in original).

¹⁰ This document is available at

<http://www.pattan.net/category/Resources/Instructional%20Materials/Browse/Single/?id=4de7a28fcd69f969196400>.

challenging behaviors and identify those needing careful assessment in order to revise the PBSP based on Student's then-current needs.

FREE, APPROPRIATE PUBLIC EDUCATION

The next, related issue is whether Student was denied FAPE for any part of the 2015-16 school year, with the Parent specifically claiming the time period from November 10, 2015 through the summer of 2016. As noted, FAPE is related to, but different from, LRE.

The time period from November 10 through December 1, 2015 must be excluded from this claim. Although the Parent contends that the District should have been prepared with a program to be provided on November 10, 2015, the record establishes that a number of meetings/conferences took place to discuss Student's program and placement following discharge from the hospitalization program. The delay between the November 9, 2015 discharge and Student's return to school on December 2, 2015 was caused by a variety of factors, including the time necessary for the Parent and District to consider options including outside placements, and the Parent's request to reschedule a November 2015 meeting.¹¹ While it is indeed unfortunate that Student was out of school for that period of time, and even assuming Student was ready and available to attend school on November 10, 2015, the Parent and District were still working together to agree on a program going forward that would be appropriate for Student, giving consideration to the Parent's and Student's reservations before ultimately developing a plan for a transition back to the District elementary school. The District simply cannot be faulted for what is technically a denial of any educational program under circumstances where the team had not yet determined what FAPE should be, and the Parent had declined the proposal of instruction in the home while the program was determined.

¹¹ There was also a Thanksgiving holiday during that short three-week period.

Within a few days of returning to school in December, Student developed a new concerning behavior, elopement, and required restraint in addition to being subject to discipline. Various revisions to the IEP and PBSP simply added more recent information on behavior without making substantive changes, including the provision of specific instruction for Student to acquire the skills needed to manage behaviors. The data that was collected convincingly establishes that Student was provided little meaningful educational benefit between December 2, 2015 and January 15, 2016. Despite Student's continuing behaviors of concern that increased to also include elopement, the District's behavioral support was not significantly revised to any meaningful degree; rather, restraint and discipline resumed and Student successfully avoided most academic demands throughout that time period. "A school district that knows or should know that a child has an inappropriate Individualized Education Program (IEP) or is not receiving more than a *de minimis* educational benefit must, of course, correct the situation." *M.C. ex rel. J.C. v. Central Regional School District*, 81 F.3d 389, 391-392 (3d Cir. 1996). The District certainly recognized that its program was not effectively addressing Student's needs, and it failed to take immediate steps to correct the shortcomings, and, thus, denied FAPE to Student for that period of time.

The final period to consider is January 15, 2016 through the end of the school year when the IEP team agreed to an out-of-District placement. Despite the District's failure to adequately consider its LRE obligations, the record establishes that Student required more intensive behavior supports than those provided at the District at least as of early January 2016. Other School is a small, licensed school for children with emotional needs, and Student was provided significant individualized attention and support in that placement. Student had an IEP with a PBSP that addressed Student's academic and social/emotional/behavioral needs. Student was

provided small group academic instruction in reading, mathematics, social studies, science, and special classes. Most significantly, Student engaged in physical aggression only rarely, and was successfully following directions and completing tasks while learning to manage emotions.

While it is of concern that the data provided from Other School monitoring Student's behavioral goal progress did not track the number of prompts Student needed until early May 2016, and baselines were not included in the IEP until late in the school year, Student completed second grade at Other School with admirable grades and, critically, was able to successfully manage Student's behavior at school. On balance, this hearing officer is compelled to conclude that Other School provided an appropriate program for Student notwithstanding its position on the spectrum of restrictive placements. *See T.R., supra*, 205 F.3d at 578 (finding proposed program and placement were appropriate under the IDEA, but remanding for determination of whether it also complied with LRE principles).

Consideration of the FAPE claim for ESY in 2016 merits further elaboration. The District proposed that data be collected over the summer at Other School so that the IEP team could make an informed determination on program and placement for the fall of 2016. The Parent did not agree, and Student attended a program familiar to Student where Student was apparently happy and successful. (N.T. 473-75) While the IEP team may just as easily have concluded that the summer would be an ideal time to transition Student back to the District and collect data on how its program did or did not support Student's needs, the Parent's election to not send Student to Other School for the summer renders moot any further discussion of that program, particularly since she did not seek any remedy for the ESY program Student attended.

Finally, the Parent contends that the District acted contrary to Student's right to FAPE with respect to transportation to and from Other School, particularly in light of the September 29,

2015 van incident about which the District was made aware (though not an event under the District's control). The lengthy commute for the first approximately seven weeks at Other School is unfortunate, and was likely a difficult experience for Student. Because transportation was included as a related service in Student's IEP, the team should have considered and addressed how to provide that service, 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a), including the length of time Student would spend commuting in this rural area of the Commonwealth. As such, a procedural flaw in development of that IEP does exist. However, the record does not establish a correlation between the van transportation and Student's academic and social/emotional/behavioral success (or lack of success) at school, and any inference that Student was likely negatively affected during the seven-week period would be speculative. *Cf. M.T. v. Methacton School District*, Spec. Ed. Op. 1670 (2005) (concluding that ninety minute bus ride was excessive over three-year period, particularly in light of its negative impact on Student). This hearing officer concludes that the transportation circumstances in this case simply do not rise to the level of a substantive denial of FAPE or lack of meaningful participation by the Parent such that a remedy would be warranted. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a). (providing that a denial of FAPE may be found based on a procedural violation of the IDEA if the LEA denied or impeded the child's right to FAPE or interfered with a parent's ability to meaningfully participate in FAPE decisions).

Finally, having reached all of the above conclusions with respect to the IDEA, the same determinations are made with respect to a denial of FAPE under Section 504. There is, therefore, no reason to address Section 504 separately.

COMPENSATORY EDUCATION

It is well settled that compensatory education is an appropriate remedy where an LEA

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 district 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 district to correct the deficiency. *Id.* Other courts have adopted an approach favoring a qualitative remedy. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015) (concluding compensatory education may be awarded “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE); *Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE); *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Cmwlth. 2006) (rejecting the *M.C.* standard for compensatory education, and holding that “where there is a finding that a student is denied a FAPE and ... an award of compensatory education is appropriate, the student is entitled to an 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.”). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). “Appropriate remedies under the IDEA are determined on a case by case basis.” *D.F. v. Collingswood Borough Board of Education*, 694 F.3d 4888, 498 (3d Cir. 2012).

The Parent sought compensatory education from November 10, 2015 through the summer of 2016; however, only those periods during which this hearing officer concluded FAPE was denied may be the basis for a remedy. There was no evidence presented from which this hearing officer might derive a qualitative award; hence, an hour-for-hour remedy will be provided in accordance with the FAPE determinations. Having concluded that the District denied Student

FAPE from December 2, 2015 through January 14, 2016, Student shall be awarded 6.5 hours of compensatory education (the length of Student's school day as indicated by the District's September 29, 2015 IEP (S-15 pp. 27-28)) for each day that school was in session during that period of time. No deductions will be made for days that Student was suspended, or for partial school days, because those measures were merely part of the largely ineffective program implemented over that approximately five week period. There will also be no deduction for any reasonable rectification period because the IEP team was well aware of Student's behavioral challenges and had been planning for Student's program following discharge from the hospitalization program for many weeks, and that period of time has been excluded from the FAPE determination above.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parent 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 educational, including social/emotional/behavioral, and related service needs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age fourteen (14).

CONCLUSION

Based on the foregoing findings of fact, and for all of the above reasons, this hearing officer concludes that the District failed to comply with its LRE obligations; that Student was

denied FAPE for a period of time; and that Student is entitled to compensatory education. Student's IEP team will also be directed to convene prior to the start of the school year to develop a plan for Student to return to the District elementary school Student previously attended for the start of the 2016-17 school year.

ORDER

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

1. Within ten calendar 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 program and placement in the District elementary school where Student previously attended, utilizing the SAS Toolkit to determine appropriate supplementary aids and services for inclusion in the regular education environment to the maximum extent possible.
 - a. The IEP shall consider provision of a full-time one-on-one aide for Student at the start of the school year, to be faded as the team determines is appropriate.
 - b. The IEP shall include a specific plan to conduct a comprehensive FBA by a BCBA to begin within fifteen school days of the start of the school year or written consent of the Parent, whichever occurs later, and concluding within fifteen school days of initiation; and thereafter revise Student's PBSP within ten calendar days of completion of the FBA.
2. The District shall provide Student with compensatory education in the amount of 6.5 hours per day for each school day that school was in session from December 2, 2015 through January 14, 2016. The 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: August 12, 2016