

*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**  
**FINAL DECISION AND ORDER**

**Closed Hearing**

**ODR FILE NUMBER:**

File No. 24660-20-21

**CHILD'S NAME:**

E.H.

**DATE OF BIRTH:**

[redacted]

**PARENT:**

[redacted]

**Counsel for Parent:**

Nancy Ryan, Esquire  
238 West Miner Street  
West Chester, PA 19382

**LOCAL EDUCATION AGENCY:**

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**HEARING OFFICER:**

Cathy A. Skidmore, Esquire

**DATE OF DECISION:**

09/24/2021

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student, E.H. (Student),<sup>1</sup> is a mid-elementary school-aged student who previously resided in the Manheim Township School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973<sup>3</sup> under the Autism and Speech/Language Impairment categories.

Student attended school in the District during the 2018-19 and 2019-20 school years before moving to a different Pennsylvania school district. In the spring of 2021, Parent filed a Due Process Complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504, seeking compensatory education from March 2019 through the end of the summer of 2020. The District generally denied the averments raised. The case proceeded to a due process hearing,<sup>4</sup> at which the Parent sought to establish that the District failed to provide Student with FAPE in the least restrictive environment throughout the time period in question. The District maintained that its

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

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

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

<sup>4</sup> The hearing was efficient and convened remotely with agreement of the parties in light of the pandemic. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Citations to duplicative exhibits may not be to all.

special education program, as implemented, was appropriate for Student and that no remedy was due.

Following review of the record and for all of the reasons set forth below, the claims of the Parent cannot be sustained and must be denied.

## **ISSUES**

1. Whether the District's educational program provided to Student between March 2019 and the end of the 2019-20 school year was appropriate under the applicable legal standards; and
2. If the District's program was not appropriate in any respect, whether Student is entitled to compensatory education?

## **FINDINGS OF FACT**

1. Student is a mid-elementary school-aged student who resided in the District beginning in kindergarten through the winter/spring of 2020 but remained in the District until the end of that summer. Student was eligible for special education under the IDEA throughout the time period in question. (N.T. 67-68, 167.)
2. Student was provided early intervention services beginning in October 2013 prior to kindergarten. (N.T. 167; S-5 at 2-4.)
3. Since at least 2016, Student has been provided with behavioral health services in the home and school. Behavioral concerns for Student have been physical and verbal aggression including self-injurious behavior, deficient social skills, and tantrums. Treatment goals have

included requesting wants and needs, complying with directions, adapting to changes in routine, transitioning between activities, maintaining attention to task, and regulating behaviors. (P-10.)

### **Student's Autistic Support Program in the District**

4. In October 2017, the Verbal Behavior – Milestones Assessment and Placement Program (VB-MAPP) was administered when Student was in first grade in a District autistic support program. At that time, Student demonstrated all of the Level 1 skills, more than half of the Level 2 skills, and a few of the Level 3 skills. Student did complete all levels in the area of early reading skills, which are only assessed at Level 3. By the spring of 2018, Student demonstrated a few additional skills at Levels 2 and 3. (S-8; P-1.)
5. Skills assessed by the VB-MAPP are foundational language skills. A student's lack of acquisition of a number of pre-academic skills on that assessment reflects gaps in acquiring and applying language. Completion of a milestone on the VB-MAPP also does not signify mastery of a particular skill without a need to further develop it. For these reasons, it is important for a child to have a solid language base before moving on to more complex instruction. (N.T. 55, 57, 127, 262, 287-88, 290, 310-13, 455-58, 467-70, 474-76, 496; S-8.)
6. The District's autistic support program for Student was based on principles of Applied Behavior Analysis (ABA). The program is also research-based and involves evidence-based interventions. (N.T. 284-85, 446-50, 459-67.)
7. Consultants from the Pennsylvania Training and Technical Assistance Network (PaTTAN) provided consultation as a team for the autistic support programs in the District in addition to ongoing training; they also conducted observations and site reviews to ensure that

competencies were met. They also provided guidance for behavioral supports and program recommendations as needed. (N.T. 264-66, 283-85, 294-96, 351-55, 367-69, 393, 450-55, 480-81, 480-81, 488-91, 511-12, 520.)

8. In addition to the PaTTAN consultants, a District special education consultant who was trained by PaTTAN provided support for the autistic support program. That consultant observed the classrooms and provided training, and was involved in IEP development and implementation. The consultant also provided methodology and programming recommendations at times. (N.T. 248, 263-64, 270-71, 273-74, 283-86.)
9. Student's Individualized Education Program (IEP) team made decisions on Student's inclusion with typical peers based on Student's language skills, engagement and interest in activities, and behaviors in a classroom. Student had a personal care assistant accompanying Student outside of the autistic support class. (N.T. 92-94, 293-94, 403.)
10. The District considers a variety of information to assess progress and growth for children in its autistic support programs, not solely the VB-MAPP. (N.T. 262, 285.)

### **2018-19 School Year**

11. Student entered second grade at the start of the 2018-19 school year. At that time, Student demonstrated several new skills at Levels 2 and 3 on another administration of the VP-MAPP. (S-2; S-8.)
12. Student's second grade special education teacher attended a three-day training by PaTTAN on the ABA program to be implemented in the autistic support classroom. PaTTAN consultants also observed the classroom on a monthly basis. (N.T. 76-77.)

13. An IEP was developed for Student in October 2018. At that time, Student's identified strengths included articulation, and improvement in making requests and labeling objects and actions. Needs were answering questions, comprehension of WH questions, making requests, greeting others, labeling actions, maintaining attention to task, transitioning independently and without problematic behaviors, and improving fine motor and self-care skills. The IEP noted that the Parent had previously shared her interest in Student receiving academic instruction. (S-2.)
14. Annual goals in the October 2018 IEP addressed answering WH questions, making requests, labeling actions, transitioning independently, greeting others, improving fine motor and self-care skills, and decreasing problem behaviors including spitting. The IEP team included the transition goal because Student did not independently move from one location to another within the school building and engaged in behaviors such as elopement when attempting to do so. (N.T. 295, 383-84; S-2 at 18-24.)
15. Program modifications and items of specially designed instruction in the October 2018 IEP included individual and small group instruction, ABA methodology, errorless teaching, direct spelling instruction, transition support, a gradual plan of increased time in the regular education classroom, and behavioral supports. A Positive Behavior Support Plan (PBSP) addressed behaviors of concern, providing antecedent strategies, replacement behavior, and consequences of both concerning and replacement behaviors. (S-2 at 25-26, 35-42.)
16. Student's program in the October 2018 IEP was full time autistic support, with speech/language and occupational therapy and adaptive physical education. The team considered the factors relevant to determining Student's participation in the regular education

environment, and Student would participate in the general education setting for lunch and recess. The Parent approved the accompanying Notice of Recommended Educational Placement (NOREP). (S-2.)

17. Student was still acquiring foundational language skills over the 2018-19 school year. (N.T. 287.)
18. Student was included with typical peers during the 2018-19 school year during the morning routines, a special class, lunch, and recess after a period of gradual transition. During those times, Student exhibited difficulty staying in seat, engaged in spitting, and was off-task. Student was not included for other classes because of Student's lack of interest or success in those environments. (N.T. 92-94, 96-97, 99, 123-24; S-2.)
19. The District helped Student prepare for inclusion in the morning meeting through social stories. That routine was fairly consistent and provided opportunities for structured activities and social interactions. Student's experience in that routine was generally successful. (N.T. 291-92, 404-08.)
20. The Parent did not agree with certain aspects of Student's autistic support program and was concerned that Student was capable of higher level instruction and skills, including academics, and was not challenged in the District's program. (N.T. 171-88, 205, 209, 224-25, 245.)
21. In December 2018, Student was reevaluated with the consent of the Parent. At that time, the IEP team agreed that Student had academic needs based on assessments and other information, as well as Student's progress with language skills. (N.T. 267-68, 289; S-5 at 18, 33-35.)

22. Cognitive assessment for the December 2018 Reevaluation Report (RR) reflected scores in the very low range on one measure; results of a second measure were not reported due to Student's distractibility in complying with tasks. (S-5 at 10-11.)
23. Assessment of academic achievement for the December 2018 RR yielded variable results, with a high average range score on the Decoding Composite, a very low range score on the Mathematics Composite, and an average range score on the Spelling Composite. The examiner discontinued assessment of Student's reading comprehension skills. (S-5 at 11-12.)
24. Speech/language assessment for the December 2018 RR revealed receptive language skill weaknesses and better developed (average) expressive language skills. Direct speech/language therapy was recommended for both receptive and expressive language. (S-5 at 15-17.)
25. Assessment of adaptive functioning for the December 2018 RR reflected low to very low-range scores across domains as rated by the Parent and teacher. (S-5 at 12-13.)
26. Student's behavioral functioning was assessed for the December 2018 RR through autism spectrum rating scales completed by the Parent and teacher. Scores were overall consistent with Autism Spectrum Disorder with slightly to very elevated concerns with social communication, unusual behaviors, self-regulation, socialization, social/emotional reciprocity, atypical language, stereotypy, behavioral rigidity, sensory sensitivity, and attention. (S-5 at 13-14.)
27. The December 2018 RR identified Student as eligible for special education on the bases of an Intellectual Disability, Autism, and a Speech/Language Impairment. New identified strengths were for



reading decoding and spelling; and a need for academic skill development in reading, mathematics, and written expression were added to those previously identified in the October 2018 IEP. Recommendations for the IEP team included independent movement and functional academic skills. (S-5.)

28. Student's IEP was revised in January 2019. At that time, Student was reportedly demonstrating growth on the IEP goals, but was still challenged by transitions and required prompting and reinforcement. Assessment of reading and mathematics skills reflected needs to develop reading comprehension and functional mathematics computation skills (single digit addition), which were added. The Parent reiterated her concerns with Student's academic skills at that time. (S-6.)
29. The January 2019 IEP revised the annual goals based on Student's then-current functioning and progress toward all goals. Those goals addressed answering WH questions, making requests, labeling actions, matching pictures of objects, transitioning independently, self-advocacy and self-regulation, greeting others, fine motor and self-care skills, reading comprehension of kindergarten-level text, and mathematics computation (single digit addition). (S-6 at 21-28.)
30. Two new program modifications/items of specially designed instruction were added to the January 2019 IEP related to the reading comprehension and functional mathematics needs. Student was also determined to be eligible for extended school year (ESY) services. (S-6.)
31. Student was provided individualized reading and mathematics instruction after the January 2019 IEP meeting. (N.T. 110-11.)

32. Student's IEP was revised again in February 2019 to reflect Student's mastery of the goals for answering WH questions and behavior. Those goals were removed, and three new speech/language goals addressed location concepts, association of objects, and use of pronouns. (S-7.)
33. A new reevaluation report issued in April 2019 with the consent of the Parent. At that time, Student's autistic support teacher reported that Student was above average when compared to peers in that classroom. Student maintained basic reading skills but still lacked reading comprehension and was not able to perform single digit addition. Written expression, behavioral regulation, and self-care skills were also still needs at that time. (S-9.)
34. A new assessment of Student's cognitive ability was attempted for the April 2019 RR. The results were not considered to be a valid estimate of Student's ability, but all Composite and Index scores were at or below the first percentile with the exception of one subtest each of visual spatial and fluid reasoning skills. (S-9 at 18-21.)
35. Assessment of adaptive functioning for the April 2019 RR through rating scales completed by the Parent and teacher were overall deficient across domains with the exception of the area of motor skills. (S-9 at 21-23.)
36. Newly identified strengths the April 2019 RR included Student's reading fluency and inquisitiveness. Identified needs were improving language skills including answering questions, comprehension of WH questions, making requests, greeting others, and labeling actions; social skills; fine motor skills; increasing mathematics computation, reading comprehension, and written expression skills; maintaining attention to task; transitioning independently and without problematic behaviors; and improving fine motor and self-care skills. (S-9.)

37. Student was identified as eligible for special education based on Autism and a Speech/Language Impairment in the April 2019 RR. An Intellectual Disability could not be confirmed or ruled out due to the invalidity of the cognitive assessment results. The psychologist conducting the assessments had observed Student in various school environments and suggested further cognitive assessments in the future. (S-9.)
38. A new IEP was developed for Student in April 2019. At that time, Student's strengths included better-developed receptive language skills, and Student exhibited growth on all IEP goals except in the area of mathematics where Student lacked some foundational skills. The identified needs were writing name, receptive and expressive language, comprehension of WH questions, making requests, greeting others, labeling actions, developing early mathematics skills (identifying and writing numbers), maintaining attention to task, transitioning independently and without problematic behaviors, and social skills. Parental concerns related to Student's success in regular education opportunities and increasing inclusion to include academic instruction. (S-10.)
39. Annual goals in the April 2019 IEP addressed answering location concepts, association of objects, and use of pronouns; making requests, answering WH questions, and labeling actions; transitioning independently; greeting others; fine motor and self-care skills; reading comprehension at a first grade level; early numeracy; and maintaining attention to task. (S-10 at 25-34.)
40. Program modifications and items of specially designed instruction in the April 2019 IEP included visual prompts and cues; errorless learning; speech/language therapy; individual and small group instruction; ABA methodology; direct instruction in spelling, early

numeracy, and reading; transition support; behavioral supports; adaptive physical education; accommodations for instruction and assessment; and an assistive technology consultation. A PBSP addressed behaviors of concern, providing antecedent strategies, replacement behavior, and consequences of both concerning and replacement behaviors. (S-10 at 33, 35-37, 46-51.)

41. Student's program in the April 2019 IEP was full time autistic support, with speech/language and occupational therapy. The team considered the factors relevant to determining Student's participation in the regular education environment, and Student would be included with typical peers in the regular education setting for morning meeting, lunch, recess, assemblies, music class, and transitions through the building. The Parent approved the accompanying NOREP. (S-10.)
42. Student made steady incremental progress toward IEP goals over the 2018-19 school year. (P-6.)

### **2019-20 School Year**

43. Student's IEP was revised in August 2019 after the team met the review ESY that summer. The team agreed to add a provision for movement breaks and to plan for gradually increased time in the regular education setting. (S-11.)
44. Student's third grade special education teacher attended a three-day training by PaTTAN on the ABA program implemented in Student's autistic support classroom. She also received additional training and consultation before that event. (N.T. 329, 365-67.)
45. On another administration of the VB-MAPP at the start of the 2019-20 school year, Student demonstrated several additional skills at Levels 2 and 3. A number of Level 2 skills had not yet been mastered, as well as a majority of Level 3 skills, by that time. (S-8.)

46. The IEP was again revised in September 2019 at a meeting to discuss Student's performance at the start of the school year. The team agreed to consider Student's listening comprehension skills, incorporate social stories and times or schedules, try an assistive technology application, and continue to plan for increased inclusion. The team would also assess language skills for participating in regular education for content area instruction. The Parent approved the NOREP. (S-12.)
47. An assistive technology consultant attended the September 2019 IEP meeting and made a few recommendations for Student. (N.T. 275, 306-07.)
48. At the start of the 2019-20 school year, Student engaged in aggression and other problematic behaviors. Those behaviors decreased over the course of the school year in the autistic support classroom until approximately February 2020. (N.T. 296, 331-33, 391-92, 411.)
49. Student's IEP was revised again in November 2019. At that time, Student was successful attending morning meeting (approximately thirty minutes), lunch, recess, and music with regular education peers, and would also add physical education and a read aloud session in the general education setting. Student was making progress with transitioning independently. Student's occupational therapy and speech/language goals were revised due to progress on some of those skills; and short term objectives were created for the reading comprehension goal to make the targets more incremental. Additional provisions for promoting generalization of skills were also added, and occupational therapy services increased. The Parent approved the NOREP. (N.T. 344-45; S-14.)

50. The Parent and Student relocated in approximately February 2020 to a neighboring school district, and the District was notified of the move. After a brief interruption, Student remained enrolled at school in the District. (N.T. 188-90, 303-06, 332, 530-32.)
51. Student was provided individualized reading and mathematics instruction one on one with the special education teacher over the 2019-20 school year. Student did not have the early learning skills to participate in regular third grade content instruction even with modifications. (N.T. 335-38, 375, 429-31.)
52. The District developed a plan for continuation of educational programming on April 1, 2020, after schools were closed in March due to the COVID-19 pandemic.<sup>5</sup> The plan was intended to provide flexibility for families through asynchronous learning supplemented by synchronous activities and regular contact with each student's teachers. Parents of children in special education programs were encouraged to contact District staff with any questions or concerns. (P-5 at 7-8, 11-14; S-16.)
53. Student's IEP was revised in April 2020 to update present levels; some of the annual goals were revised to reflect Student's progress that also changed some baselines. (S-19.)
54. After schools were closed, Student had both synchronous and asynchronous instruction along with weekly consultation with the teacher. Student was also able to participate in the morning meeting remotely but did not do so regularly. The Parent found it challenging to work with Student at home, and other family members substituted at times. Student was not accepting of remote learning via videoconferencing, but the teacher attempted to work with the family

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<sup>5</sup> All Pennsylvania schools were closed by Order of the Governor.

to resolve difficulties and Student successfully attended a number of remote sessions with the teacher and speech/language and occupational therapists. The Parent only attended one of the consultation sessions. (N.T. 191-93, 195-96, 356-58, 385-86, 388, 395, 432-33; S-19; S-20; P-5 at 7-8, 15, 18-19, 23; S-26 at 4-8.)

55. The District was not able to administer the VB-MAPP assessment at the end of the 2019-20 school year due to the pandemic. (N.T. 281.)
56. Student made steady incremental progress toward IEP goals over the 2019-20 school year through the school closure in March 2020. Progress monitoring was not conducted during that period because of the closure. (P-6.)
57. The ESY program offered to Student for 2020 was restricted to remote services. Student continued to experience difficulty with the videoconferencing for ESY but successfully attended a number of remote sessions addressing reading skills. (N.T. 197-200, 303; S-21; S-26 at 1-2, 9-10.)

### **2020-21 School Year**

58. Student transferred to a different school district for the 2020-21 school year. District professionals at first knew only that the family was moving. (N.T. 22-23, 276-77.)
59. During the 2020-21 school year, Student was in an autistic support program in the other district and was included with typical peers each school day for one of the special classes and at recess. (N.T. 26, 31, 37, 47; P-11; S-24.)
60. In September 2020, the VB-MAPP was administered in the other District, and Student demonstrated the skills necessary to score 170 out of 170 milestones, which are all skills assessed by that instrument. Student continued to work reading comprehension at a first grade

level and early numeracy skills at that time (single digit addition).  
(N.T. 28-29, 55; P-11; S-24.)

61. In the fall of 2020, Student also needed to continue toward work goals for meeting behavioral expectations and writing letters of the alphabet. (P-11; S-24.)
62. The District utilized the COVID-19 Compensatory Services (CCS) process in the fall of 2020 and concluded that no CCS were necessary for Student based on information provided by the other school district, some of which was incomplete or different from the District's program. (S-25.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **General Legal Principles**

In general, the burden of proof may be viewed as consisting of two elements: the burden of production and the burden of persuasion. 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 must rest with the Parent who filed for this administrative hearing. Yet, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, who assume the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d



256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible as to the facts. The testimony was overall not inconsistent among witnesses; any variations are better attributed to lapse in memory or recall, or to differing perspectives, rather than an intention to mislead. The weight accorded the evidence, however, was not equal.

Most particularly, the testimony of the experienced consultant from PaTTAN (N.T. 438-526) was powerful, knowledgeable, and exceptionally persuasive, and has thus been given significant weight. By contrast, the testimony of the special education teacher in the other school district (N.T. 22-66), while important from the Parent's perspective and not lacking in credibility, was overall of limited probative value to the programming provided to Student by the District during the school years at issue.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

### **General IDEA Principles: Substantive FAPE**

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

States, through local educational agencies (LEAs), meet the obligation of providing FAPE to eligible students through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court has confirmed, an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

Individualization is, thus, the central consideration for purposes of the IDEA. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands services are reasonable and appropriate in light of a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Endrew F.*, *supra*; *Ridley*, *supra*; *see also Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *see also Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same).

### **General IDEA Principles: Least Restrictive Environment**

The IDEA contains a crucial mandate that eligible students are to be educated in the “least restrictive environment” (LRE) that also satisfies meaningful educational benefit standards.

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 U.S.C.S. § 1412(a)(5)(A); see *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993). 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).

The Third Circuit in *Oberti* identified a two-pronged test for making a determination of whether a student’s placement is in conformity with the LRE mandate in the IDEA. The first prong involves consideration of whether the child can, with supplementary aids and services, be educated successfully within the regular classroom. 995 F.2d at 1215. If placement outside of the regular classroom is determined to be necessary, the second prong requires an assessment of whether the child has been included with non-disabled children to the maximum extent possible. *Id.*

The U.S. Supreme Court’s *Endrew* decision further recognized that educational benefit for a child with a disability is wholly dependent on the individual child, who should be challenged by his or her educational program. *Endrew, supra*, 137 S. Ct. at 999. Also crucial to the LRE analysis is a recognition that its principles “do not contemplate an all-or-nothing educational system” of regular education versus special education. *Oberti*,

*supra*, 995 F.2d at 1218 (quoting *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1050 (5th Cir. 1989)). Rather, LEAs are required to have available a “continuum of alternative placements” in order to meet the educational and related service needs of IDEA-eligible children. 34 C.F.R. § 300.115(a); 22 Pa. Code § 14.145. Furthermore, the “continuum” of placements in the law enumerates settings that grow progressively more restrictive, beginning with regular education classes, before moving first toward special classes and then toward special schools and beyond. 34 C.F.R. § 300.115. However, the failure to adhere to LRE principles does not automatically mean that the student has been denied FAPE. *A.G. v. Wissahickon School District*, 374 Fed. App’x 330 (3d Cir. 2010)(citations omitted). The issues of FAPE and LRE are related, but they are discrete concepts.

### **General IDEA Principles: Procedural FAPE**

From a procedural standpoint, the family has “a significant role in the IEP process.” *Schaffer, supra*, 546 U.S. at 53. Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). Procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E).

### **General Section 504 Principles**

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. §

104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). Thus, in this case, the coextensive Section 504 claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

### **The Parent’s Claims**

A major focus of the Parent’s Complaint and contentions throughout the hearing were that the District’s program was not sufficiently challenging for Student, and that Student did not have adequate opportunity to participate in the general education setting. A related assertion was that the District’s failure to conduct benchmark and other assessments of Student left the IEP team not fully informed to make programming decisions, especially with regard to academic skills.

The testimony as a whole, and in particular the testimony of the PaTTAN consultant, provided more than ample evidence that the District’s program for Student was appropriately ambitious for the relevant time period, given Student’s unique circumstances, to confer meaningful educational benefit. There is no evidence that the program for Student, as implemented, was not in accordance with the then-current IEP at any given time during the 2018-19 or 2019-20 school year prior to the March 2020 school closures. There is also nothing in the record to suggest that the Parent was denied the opportunity to participate in programming decisions for Student.

Student began the 2018-19 school year lacking a significant number of foundational language skills. A majority of Student’s identified needs were the result of those deficits, and the District proposed and implemented a

program of ABA-based autistic support for Student. By January 2019, the IEP team agreed with the Parent's request to add individualized reading and mathematics instruction for Student. It is important to recognize that Student was at that time expected to begin acquisition of early learner skills in each of those areas. Yet, Student struggled with reading comprehension. Student also was not able to be successful with the mathematics goal, and the team responded by introducing early numeracy concepts that Student lacked before resuming computation. Rather than supporting the Parent's contentions, Student's performance with the academic skills that were individually addressed during the 2018-19 school year confirmed that Student lacked necessary foundational early learning skills. Those deficits were appropriately targeted through the autistic support program for Student.

In the fall of 2019, the team responded to Student's continued challenges with reading comprehension with the development of four short term objectives to provide a framework for incremental progress. Overall, Student made gradual progress in early reading and mathematics skills over the 2019-20 school year. And, for both school years, Student continued to develop language skills that were appropriately addressed in the program that was implemented. The testimony relating to grade-level content instruction in light of Student's language skill acquisition (N.T. 467-74, 483-85, 498, 501-04, 506-10, 513-20, 523-24) was quite convincing, and supported the appropriateness of the District's program as implemented. The fact that Student had moved to higher-level skills and instruction in the 2020-21 school year does not establish that Student could have done so earlier; on the contrary, Student's acquisition of foundational language skills first was crucial to Student's educational growth. When the record is viewed in its entirety, the contention that the implemented program was not sufficiently challenging must fail.

Student's incremental progress in the District is, of course, likely disappointing from a parent's perspective. However, the law demands an appropriate program, not a perfect one, based on a student's individual circumstances. Student's needs while in the District were such that, at Student's stage of acquiring early learning skills, progress would reasonably be expected to be gradual.

The Parent also contends that Student was not afforded the opportunity to participate in the regular education setting to the maximum extent appropriate. The IEP team considered the relevant factors necessary to make this determination. And, recognizing that Student had difficulty adapting to changes in routine and environment (behavioral rigidity), it developed a plan of gradual additional inclusion, including exposure to reading materials; it then monitored Student's ability to participate in the regular education environment and made adjustments as necessary. Although the Parent characterizes this process as requiring Student to "earn" time with typical peers, Student's success or lack of success in different environments with the plan that permitted Student to adapt to changes and be prepared for them was unquestionably appropriate and necessary. The testimony that Student's skills were not sufficiently developed for grade level academic instruction further supports the conclusion that the District's decision not to include Student for content area subjects was eminently reasonable. Even without Student's performance on all grade-level benchmarks,<sup>6</sup> the IEP team had a firm understanding of Student's early learning skills. Reading decoding and fluency were areas of strength but comprehension of what Student read was a clear deficit; Student also needed more foundational mathematics skills before moving toward

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<sup>6</sup> This assertion is also belied by the record. The District did conduct curriculum-based assessments at Student's level in reading and mathematics. (See, e.g., S-7 at 9; S-10 at 10.)

computation. Based on a review of the entire record, this hearing officer cannot conclude that LRE principles were disregarded in this case.

Programming after the school closure in March 2020 must be considered differently. Even in the middle of the COVID-19 pandemic, there was no suspension or other alteration of IDEA obligations: “no matter what primary instructional delivery approach is chosen, [State Educational Agencies (SEAs)], LEAs, and individualized education program (IEP) Teams remain responsible for ensuring that a free appropriate public education (FAPE) is provided to all children with disabilities.”<sup>7</sup> Nonetheless, the world faced a global pandemic that necessarily resulted in extended school closures for health and safety reasons, and LEAs were challenged to balance the importance of providing an education with protecting its “school community.”<sup>8</sup> The Pennsylvania Department of Education (PDE) recognized that students would almost certainly experience a regression in skills during the lengthy period of continuity of education using a remote model of instruction, and offered guidance for assessing loss of skills after a period of recoupment.<sup>9</sup> Pursuant to the most recent PDE guidance, CCS means “services as determined by an IEP team needed to remedy a student’s skill and/or behavior loss and/or lack of progress that resulted from [an LEA’s] inability to provide Free Appropriate Public Education (FAPE) while using alternative instructional models due to the COVID-19 pandemic.”<sup>10</sup> Importantly, again according to the same guidance, “CCS should be

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<sup>7</sup> U.S. Department of Education, Question and Answer document, September 28, 2020, at 2, addressing Implementation of IDEA services, available at <https://www.ed.gov/coronavirus/program-information#speced> (last visited September 23, 2021).

<sup>8</sup> *Id.* at 1.

<sup>9</sup> Pennsylvania Department of Education, Guidance and Answers to FAQs on COVID-19 Compensatory Services, available at <https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/COVID-19-Compensatory-Services.aspx> (last visited September 23, 2021).

<sup>10</sup> *Id.*



considered only after the student receives services as set forth in their IEP for a period of time ('recoupment period')."<sup>11</sup> The multi-step process is intended to "give the student an opportunity to recoup the lost skills or behavior or to make progress to the level(s) determined appropriate" as well as provide a mechanism for remedying any deprivation.<sup>12</sup>

There was, of course, a significant reduction of Student's special education services for the 2019-20 school year after schools were closed as a result of the District's inability to implement Student's program as written. Student's 2020 ESY program provided virtually similarly was less than ideal. Student was entitled to a continuation of the opportunity "to meet challenging objectives" even during the closures,<sup>13</sup> but consideration must also be given to the District's need to develop a plan for remote instruction for all of its students and take necessary steps to implement that plan within a reasonable period of time. This hearing officer has already concluded that Student's programming over the 2019-20 was reasonably calculated to provide FAPE based on Student's unique circumstances. Because the school closures prevented a traditional model of in-person instruction for the remainder of Student's tenure in the District, consideration of this time period requires an assessment of what skills Student lost.

Quite unfortunately, the school closures also prevented accurate progress monitoring data and an end-of-year administration of the VB-MAPP, neither of which is the fault of either party. Still, Student in the fall of 2020 demonstrated all 170 milestones on the VB-MAPP administered by the other school district, and maintained skills needed to continue to work on reading comprehension at a first grade level, early numeracy skills, writing letters of the alphabet, and meeting behavior expectations. Student's growth in

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> U.S. Department of Education, *supra* n. 6, at 3.

developing foundational language skills as of September 2020 is remarkable; indeed, even the experienced PaTTAN consultant appeared to be impressed that Student demonstrated skills for all 170 VB-MAPP milestones in the fall of 2020 a compared to those attained in previous administrations of the instrument (N.T. 524). Moreover, had Student remained in the District, there is no reason to conclude that any services, including those for ESY, that could not be provided during the closures and remote instruction would not have been considered by the District for the 2020-21 school year if necessary.<sup>14</sup> Given all of these circumstances, this hearing officer concludes that Student did not fail to recoup skills from the spring of 2020 as of early in the 2020-21 school year. Accordingly, the Parent has not established any basis for a remedy from the District for the time period after schools closed in March 2020.<sup>15</sup>

## **CONCLUSIONS OF LAW**

1. Student was not denied FAPE during the 2018-19 school year of the 2019-20 school year through the school closures in March 2020.
2. The District was unable to fully implement Student's special education program after the March 2020 school closures, but Student did not fail to recoup any lost skills as of September 2020.

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<sup>14</sup> *Id.* at 4.

<sup>15</sup> This conclusion is also consistent with case law describing a "make whole" remedy for a traditional FAPE denial, where the award of compensatory education is crafted "to restore the child to the educational path he or she would have traveled" absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). The Parent has not established that Student would have traveled a different educational path, or needed to be made whole through compensatory education, as a result of the pandemic-related school closure.

## **ORDER**

AND NOW, this 24<sup>th</sup> day of September, 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Parent's claims are **DENIED** and **DISMISSED**.

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

/s/ Cathy A. Skidmore

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Cathy A. Skidmore, Esquire  
HEARING OFFICER  
ODR File No. 24660-20-21