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: 19455 17 18

Child's Name: A. P.

Date of Birth: [redacted]

Dates of Hearing:
08/14/2017, 08/23/2017, 08/30/2017

Grandparents / Guardians:
[redacted]

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Hearing Officer: Brian Jason Ford, JD, CHO

Date of Decision: 09/11/2017

Introduction

This matter concerns the educational rights of a student (the Student) who is transitioning from early intervention (EI) to school age services.[1] The Student is a "child with a disability", specifically Autism, as defined by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.

EI services were provided by the Student's local Intermediate Unit (IU), which was also the Student's local educational agency (LEA) at that time. School age services are provided by the Student's public school district (the District), which became the Student's LEA at the start of the 2017-18 school year.

This hearing was requested by the Student's grandparents (the Grandparents). The Grandparents are the Student's legal guardians, and have the same rights as the Student's parents for IDEA purposes. *See* 20 U.S.C. § 1401.

This dispute primarily is about whether the District must continue certain aspects of the Student's EI Individualized Educational Program (IEP).[2] Those aspects are:

1. The EI IEP provided a full-time Autistic Support (AS) program, meaning that the Student's services were provided by special education personnel for 80% or more of the school day. The District's proposed IEP offers a supplemental level of AS programming, meaning that the Student's services will be provided by special education personnel for more than 20% but less than 80% of the school day.

2. The EI IEP provided speech and language therapy (S/LT), occupational therapy (OT), and a co-treatment session in which OT and S/LT are provided at the same time. The District's proposed IEP removes the co-treatment session.

3. The EI IEP specifies that the Student will be transported to and from school wearing a harness for safety (described below). The District's purposed IEP continues the transportation, but without the harness.

In addition, the Grandparents claim that the District's proposed IEP provides insufficient transition services to enable the Student to move from EI to school age programming. The Grandparents also claim that they were denied an opportunity to meaningfully participate in the IEP development process.

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[1] Except for the cover page of this decision, identifying information is omitted to the greatest extent possible.

[2] The EI IEP is drafted on a form that is also used for Individualized Family Service Plans (IFSPs). The document in question, as discussed below, is an EI IEP, not an IFSP. To paraphrase Justice Kagan, welcome to—and apologies for—the acronymic world of special education. *See Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 749 (2017).

Issues:

1. Must the District place the Student into a full-time AS program?
2. Does the District's proposed IEP provide sufficient transition services?
3. Must the District provide an OT with S/LT co-treatment session?
4. Must the District use the Student's harness when transporting the Student?
5. Were the Grandparents given an opportunity to meaningfully participate in the development of the Student's IEP?

Stipulations

The parties drafted and submitted extensive factual stipulations. I incorporate those stipulations by reference and, *except as noted*, adopt them as if they were my own findings. The stipulations address the Student's residency and custody, educational history up to the start of the hearing, related services provided under the Student's EI IEP, and a chronology of events as the Student transitioned from EI to school age programming.

I reject one aspect of the parties' stipulations. The stipulations incorrectly characterize the Student's EI IEP as an Individualized Family Service Plan (IFSP). As discussed below, IFSPs are plans developed under Part C of the IDEA for children from birth to age three.[3] IFSPs target the *developmental* needs of children with disabilities. After age three, children move into Part B of the IDEA, which applies to students from age three to 21. Those children receive IEPs, which target their *educational* needs. Pennsylvania regulations, also discussed below, keep children between ages three and five in Pennsylvania's EI system.[4] Those regulations do not diminish a child's rights under IDEA Part B. Although those children are still served by the EI system, they receive IEPs. As discussed below, this distinction makes a difference in this case.

To be clear, the Student's EI IEP was drafted on a form promulgated by the Pennsylvania Training and Technical Assistance Network (PaTTAN) that is used for both IFSPs and EI IEPs. That document, P-15, has both labels and refers to IFSPs and IEPs interchangeably at certain points. *See, e.g.* P-15 at 1. Regardless of the form, the substance of IFSPs and IEPs are different because their intent is different. As a matter of law, the Student had an IEP after age three while participating in Pennsylvania's EI system.

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[3] More specifically, IDEA Part C applies to at risk infants and toddlers, who are "individual[s] under three years of age". 34 C.F.R. § 303.5.

[4] Technically, children with disabilities remain in Pennsylvania's EI system until they reach the "age of beginners", which may occur after age five in some cases. *See* 22 Pa. Code § 11.

The Student did not have an IFSP prior to the District's offer. Rather, the Student had an EI IEP. As a matter of law, the EI IEP targeted the Student's educational needs.

I decline to copy the stipulations (eight pages of 66 numbered stipulations, many including multiple sub-parts, most in need of redaction) here. Rather, I will restate some stipulations within my findings below, as necessary for context. However, I write for individuals who are familiar with the stipulations.

Importantly, both parties agree that the Student is properly diagnosed with autism spectrum disorder, and has significant needs. The stipulations, in conjunction with the evidence presented during the hearing, form a clear picture of the severity of the Student's needs. There is no dispute about that severity. Rather, the parties disagree about how the Student's needs should be addressed, and about the scope of the District's obligations to the Student.

I commend both parties and their attorneys for their excellent work in drafting the stipulations. No time was wasted during the hearing with the presentation of facts that are not in dispute.

Findings of Fact

All documentary evidence and testimony was carefully considered. I make findings of fact, however, only as necessary to resolve the issues presented. Consequently, not every document and not every aspect of every witnesses' testimony is referenced.

Amount of Autistic Support and Participation in Regular Education

1. During the 2016-17 school year, the Student received EI services in a building that houses an AS support classroom, other special education classrooms, a regular education Head Start program, and a vocational-technical program for high school students and high school graduates. Stip ¶ 12.

2. The EI IEP placed the Student in full-time AS support. P-15. More specifically, the Student was assigned to a self-contained verbal behavior program throughout the school day. Stip ¶ 12.

3. The Student was accompanied by therapeutic staff support (TSS) throughout the school day. The TSS was assigned to the Student by a third-party agency. NT *passim.*

4. The Student attended the EI program four (4) days per week, six and one half (6.5) hours per day. Stip ¶ 14.

5. The EI IEP does not specify the number of hours that the Student received special education. Rather, the EI IEP specifies that the Student was "integrated into activities in the Head Start setting for a minimum of 1 hour per month…" P-15 at 25; S-1 at 23.

6. The Student attended a program in the EI building called "the Big Day" one time per month for one hour. During that time, all of the EI classes in the building would participate in structured activities with the Head Start students. *See, e.g.* NT at 42-43.

7. Starting in February 2017, the Student would participate in programming in the Head Start classroom, with the TSS, for 30 minutes, two to three times per week.

8. The Student participated in recess with students from all of the EI classes and the Head Start program. *See, e.g.* NT 45.

9. Except for recess, participation in Head Start two or three times per week, and the monthly Big Day, the Student received all services in the AS classroom (including lunch). NT 101.

10. Based on the foregoing, from February 2017, the Student received 6.5 hours of EI programming per day, 4 days per week. Of those, approximately 5.5 hours were spent in the AS classroom, two to three days per week. The other days, approximately 6.0 hours were spent in the AS classroom.[5] This comes to 26 hours per week of service. Of those, the Student spent either 22.5 or 23.5 hours in the AS classroom. Consequently, the Student spent 86.5% or 90.3% of the day in the AS classroom. I find that, on average, the Student spent 88.4% of the day in the AS classroom from February 2017 through the end of the 2016-17 school year.

11. The District's proposed IEP calls for the Student to attend school 5 days per week, 7 hours per day. Of those, the District proposes that the Student spend 5 hours per day in a verbal behavior AS classroom, and 2 hours per day outside of the AS classroom. That time includes recess and "specials" (art, music, etc.). S-20 at 32; NT *passim*.

12. Under the District's proposal, the Student would spend 25 hours per week in the AS classroom, and 10 hours per week elsewhere. Stated as percentages, the Student would spend 71% of the day in the AS classroom.[6]

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[5] The record does not reveal exactly how long recess was. I assume half an hour. One time per month, approximately 4.5 hours were spent in the AS classroom when the Student participated in the Big Day. I do not factor that monthly occurrence into my calculation.

[6] As a technical matter, school-age IEPs calculate the amount of time that students spend inside the regular classroom, not the amount of time that students spend in special education. Also, and importantly, special education is not a place, as discussed below.

Co-Treatment

13. The Student was evaluated at a children's hospital on September 6 and July 14, 2016. Stip. ¶ 25.

14. The September 2016 evaluation resulted in an "Outpatient Occupational Therapy Initial Evaluation" report from the hospital. P-6. The report recommended 60-minute OT and S/LT co-treatment sessions, for an unspecified number of sessions over an unspecified period. P-6 at 4. In context, the recommendation is for outpatient treatment through the hospital, with parent education to carry over skills into natural environments (home and school). *Id.*

15. The July 2017 evaluation resulted in an "Occupational Therapy Assessment" report from the hospital. P-7. That report also recommended OT and S/LT co-treatment, but at a rate of one session per week for 15 minutes per session. P-7 at 9.

16. The Grandparents gave the July 2017 report to the IU on July 17, 2017. Stip. ¶ 24.

17. The Student's EI IEP was revised to include one, 15-minute OT and S/LT co-treatment session per week. P-15 at 23.

18. The District's proposed IEP does not include an OT and S/LT co-treatment session. S-20.

The Harness

19. Throughout early intervention, the Student was transported to and from school by the IU in a van. Stip. ¶¶ 31, 32.

20. One way that the Student interacts with others is by playing "chase". The Student will run away from others so that others will chase the Student. *See* NT 45, 245, 278, 325-326, 376, 400, 420, 467, 488, 615.

21. In November or December 2015, the Student ran between the IU's van, which was moving, and another vehicle when exiting the van at the end of the day. *See, e.g.* NT 397-398. It is not clear if this elopement was a form of the Student playing chase, or if it served some other function.

22. In response to this incident, the Grandparents requested, and the IU provided a 1:1 aide on the van for the Student. Stip. ¶¶ 31, 32.

23. Also in response to this incident, the Grandparents researched and purchased a harness and lead for the Student. The harness and lead were shown as demonstrative evidence during the hearing. NT 390-393. Photographs of the

Student wearing the harness were entered into evidence at H-2. A printout of the harness manufacturer's website was entered into evidence at S-18.

24. The harness consists of four strips of thick but flexible polypropylene that are sewn together with plastic clips and a metal ring. Each strip is approximately one inch wide. When secured, two strips wrap around the front of the Student's torso. Two strips go from the lower torso strip over the Student's shoulders. The torso strips and shoulder strips are sewn together in the front where they cross. The torso strips connect at the Student's back with the plastic clips. The shoulder strips attach at the Student's back to the metal ring. The torso strips and shoulder strips are sewn to each other in the back where they cross. An additional strip is formed into a loop at the Student's back. The strips are size-adjustable. NT 390-393, H-2, S-18.

25. The above description, although accurate, cannot describe the harness as well as the photographs at H-2. The photographs reveal that the harness is worn very much like a vest that fastens at the back.

26. The lead is a five-and-a-half-foot strip of the same material, with a metal clip at one end and a loop of material at the other. The metal clip fastens to the metal ring on the back of the harness. NT 390-393, H-2, S-18.

27. The loop on the back of the harness can be used to hold the Student, but the intention is to clip on the lead. The intended function of the harness and the lead is to prevent elopement. NT *passim.*

28. From December 2015 onward, the Grandparents sent the Student to school wearing the harness. The lead stayed at home. The harness was removed when the Student arrived at school. The harness was put back onto the Student shortly before the Student boarded the van back home. The Grandparents and the Student's van aide worked together to clip the lead onto the harness as the Student exited the van. Stip. ¶ 34, *See, e.g.* NT 181.

29. The Student's grandfather is typically not home when the Student returns from school. The Student's grandmother uses a wheelchair for mobility. NT 178. The Grandparents frequently depend on a neighbor to secure the lead and help bring the Student into their home at the end of the school day. NT 178-179.

30. In February 2017, the IU revised the Student's EI IEP by adding an accommodation that requires the Student to "wear [the] harness to and from the bus for safety." Stip. ¶ 35, P-15 at 14, 22.

Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to their demand by preponderant evidence, and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the Grandparents are the party seeking relief and must bear the burden of persuasion.

Transition to School-Age Programming

The outcome of much of this case depends on the District's obligation to implement the EI IEP, and the circumstances under which the District can change that document. The leading Third Circuit case concerning a child transitioning from early intervention to school-age services is *Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181 (3d Cir. 2005), *cert denied* 547 U.S. 1050, 126 S. Ct. 1646 (2006). *Pardini* considers the application of the IDEA's "stay put" provision, 20 U.S.C. § 1415(j), when a dispute arises during that transition. In this case, the parties agree that the Student's EI IEP is "pendent" and so *Pardini* is not squarely on point. However, some aspects of *Pardini* are instructive.

Pardini concerned a child who was transitioning from IDEA Part C services (for children from birth to age three) to IDEA Part B services (for children age three to age 21). Under IDEA Part C, children receive an Individualized Family Service Plan (IFSP), not an IEP. While transition from Part C to Part B services is intended to be smooth, the court recognized differences between the IFSP and IEP service models. *Pardini*, 420 F.3d 181, 185-187 (3d Cir. 2005). In doing so, the court described IFSPs as programs targeting the developmental needs of children with disabilities, and IEPs as targeting the educational needs of students with disabilities. *See, id* at 188, 190.

For clarity, IDEA Part C regulations are found at 34 C.F.R. § 303 *et seq.*, and IDEA Part B regulations are found at 34 C.F.R. § 300 *et seq*. There is an intentional division between the two. *See* 34 C.F.R. § 300.2(2) (clarifying that IDEA Part C regulations do not apply to students receiving services under IDEA Part B). The regulation requiring IFSPs for children under Part C is 34 C.F.R. § 303.20.

In this case, the Student is *not* transitioning from IDEA Part C to IDEA Part B. The Student turned six during the 2016-17 school year and now is almost seven. The transition in this case is a function of Pennsylvania law, not federal law. In Pennsylvania, under the Early Intervention Services System Act ("Act 212"), 11 Pa. Cons. Stat. Ann. §§ 875-101 *et. seq.* (Purdon 2002), the Pennsylvania Department of

Education (PDE) is responsible for providing special education for children age three to five. PDE discharges that duty through Pennsylvania's intermediate units, which function as LEAs. After the school year in which a child turns six, responsibility shifts to local educational agencies (the District in this case).

In sum, the Student was *not* transitioning from an IDEA Part C IFSP to an IDEA Part B IEP. Rather, the Student had an IEP from an IU, and is transitioning to an IEP from the District. This transition is happening because the Student turned six, and has aged out of early intervention under Pennsylvania law. As such, the Student is not moving from a "developmental" model to an "educational" model. The Student is already in an educational model, and is moving from one agency to another.

Carry Forward of Obligations Under the EI IEP

In February 2017, the Student was receiving services under IDEA Part B. Consequently, all IDEA requirements for evaluating the Student's educational needs, and drafting an IEP to meet those needs, were in place. *See* 20 U.S.C. § 1414. There is no dispute about the appropriateness of the EI IEP. Both parties agree that the Student made progress under the EI IEP. Any changes to the EI IEP, therefore, are subject to the same procedures and standards as any other Part B IEP. This means that changes must be driven by data that is either collected through the IEP's implementation or through an educational evaluation. *See, e.g.* 20 U.S.C. §§ 1414, 1415.

The only wrinkle in this case is that the Student is moving from one agency (the IU) to another (the District). The IDEA includes rules about interstate and intrastate transfers. 20 U.S.C. § 1414(d)(2)(C). The rule for transfers within the same state is 20 U.S.C. § 1414(d)(2)(C)(i)(I). That section applies when a child "transfers school districts within the same academic year". *Id.* In this case, the Student did not transfer during the same academic year, but the rule is instructive. When a child with an IEP transfers from one LEA to another, the new LEA "shall provide such child with a [FAPE], including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law". *Id.*

PDE publishes Basic Education Circulars (BECs), which provide PDE's guidance on the implementation of laws, regulations and policies. BECs do not have the force of law, but do represent PDE's official interpretation of laws and regulations. In 2003, PDE published a BEC titled "Transition of Preschool Children to School Age Programs". The BEC was revised in 2009, and is still current. It is PDE's official guidance to IUs, school districts, and charter schools for students transitioning from EI IEPs to school age IEPs.

The BEC establishes clear procedures leading up to the transition, and considerations for the transition itself. The BEC lists five different considerations and options for parents and schools. First, the school can adopt the EI IEP. Second, parents and the school can agree to adopt the EI IEP with revisions. Third, parents and schools can

decide whether a reevaluation is necessary, use existing data for the reevaluation, and then go through the regular IEP development process. Fourth, parents and schools can decide whether a reevaluation is necessary, use new testing for the reevaluation, and then go through the regular IEP development process. Fifth, parents and schools can decide to waive a reevaluation. In practice, the only option in the BEC for the receiving school that does not require parental consent is adoption of the EI IEP.

Although the BEC does not have the force of law, I agree with PDE's interpretation of the District's obligations under the IDEA and Act 212. Both the IDEA and Act 212 are crafted to provide a smooth transition for children who are moving from EI IEPs to school-age IEPs. The IDEA's rules for intrastate transfers within the same school year are a prime example of procedures that ensure the intended smoothness. As applied to this case, PDE has interpreted Pennsylvania regulations to require the same procedure when children age into school-age services. This interpretation fosters the purpose of the IDEA, and provides much needed clarity to both schools and parents. I adopt PDE's interpretation as my own.

An IEP must change only in response to data. Such data may reveal a change in a student's needs, or indicate the efficacy of the special education that a student is receiving. *See, e.g.* 20 U.S.C. § 1415. Given the foregoing, I find as a matter of law that the District was obligated to either adopt the EI IEP, modify the EI IEP with the Grandparents' consent, propose a reevaluation (either with or without new testing) and then develop a new IEP based on that reevaluation, or obtain the Grandparents' consent to waive a reevaluation.

In this case, the District attempted the second option. It proposed a modified version of the Student's EI IEP, and sought the Grandparents' consent for the proposed changes. The Grandparents withheld consent and, ultimately, requested this hearing. Consequently, I will determine whether the evidence supports the changes in the District's proposed IEP.[7]

Parental Participation – Legal Standard

The IDEA requires schools to afford parents an "opportunity ... to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child..." 20 U.S.C. § 1415(b)(1). Similarly, parents must receive prior written notice whenever a school district proposes to change the educational placement of a child. 20 U.S.C. § 1415(b)(3). The IDEA explicitly details the type of information that must be contained in such prior written notice. *See, e.g.* 20 U.S.C. § 1415(c)(1)(A)-(B), (E)-(F). This includes an explanation of why the change is proposed, what other options were considered and why those other options were rejected. *Id.* These participation requirements are in

[7] Given the Grandparents' burden, it is their obligation to show either that the evidence does not support the District's proposed changes, or that no evidence supports the District's proposed changes.

addition to the procedural safeguards notice requirements found at 20 U.S.C. § 1415(c)(1)(C).

Most cases concerning these provisions concern prior written notice. *See Honing v. Doe*, 484 U.S. 305, (1988), *P.V. v. Sch. Dist. of Phila*., 289 F.R.D. 227 (E.D. Pa. 2013). In this case, there is no dispute that the Grandparents received prior written notice of the District's proposed IEP.[8] This case does not concern the Grandparents' procedural right to notice, but rather concerns their substantive right to participate in IEP development.

Parents play "a significant role in the IEP process". *Schaffer v. Weast*, 546 U.S. 49, 53 (2005). A major tenet of the IDEA is creation of a collaborative model for IEP creation. Collaboration can happen only when parents are given an opportunity to participate meaningfully in making decisions about their children's education. Indeed, a denial of meaningful parental participation in IEP development may result in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

Both the Supreme Court and the federal Office of Special Education Programs (OSEP) have similarly concluded that parents are not just entitled to attend meetings and receive forms, but are entitled to substantive participation in the formulation of their child's educational program. The Supreme Court has held that the IDEA requires the IEP Team, which includes the parents as members, to consider any "concerns" parents have "for enhancing the education of their child" when it formulates the IEP. *Winkelman v. Parma City School District*, 550 U.S. 516, 530 (2007). That holding is consistent with earlier guidance from OSEP, explaining that LEAs cannot unilaterally make placement decisions about eligible children to the exclusion of their parents. *Letter to Veazey*, 37 IDELR 10 (OSEP 2001).

As such, parental participation does not exclusively concern the parents' right to speak, but also concerns schools' obligation to listen. LEAs have no obligation to accept every request the parents make, and may not adopt an inappropriate program only to quell insistent parents. Declining a parental request is not necessarily evidence that participation was denied. Rather, LEAs must seriously consider parental concerns and suggestions, and must have a rational, contemporaneous reason when rejecting parental input. Fortunately for Pennsylvania LEAs, the standardized NOREP provides an opportunity (and a literal space) for schools to say what they have considered and rejected, and why.

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[8] The Grandparents allege that the District failed to use transition forms, and that they were initially told that the District would "roll over" the EI IEP. However, there is no claim that the District failed to provide notice of its proposed IEP.

Discussion

Full-Time Autistic Support

The District's proposed IEP takes the Student from full-time autistic support to supplemental autistic support by reducing the percentage of time that the Student will spend in the AS classroom from 88.4% on average to 71%. In this case, these percentages and labels are misleading. Under the District's proposal, the Student will spend *more* time per week in the AS classroom (25 hours per week, up from 22.5 or 23.5 hours per week). The "decrease" from full time to supplemental autistic support is the result of a larger total amount of autistic support making up a smaller percentage of a longer educational program.

More importantly, special education is not a place. Special education is the specially-designed instruction (SDI) and related services that the Student receives, pursuant to an IEP, to achieve the goals written into that IEP. *See* 20 U.S.C. § 1401(29). The Student receives special education whenever the Student receives SDIs and related services, not just when the Student is physically within the AS classroom.

The Grandparents are technically correct that the District proposal changes the Student's placement from full-time to supplemental autistic support. The Grandparents are also correct that no evaluation specifically or explicitly recommends that change. This technical argument fails, however, when examining the substance of the District's proposal. The District proposes more time in an AS classroom, not less. More importantly, the District proposes more verbal behavior instruction (that is, more of the actual special education that the Student will receive) not less. I reject the Grandparents' argument that the District unilaterally proposed a reduction in the Student's special education because the opposite is true.

Transition

The District's proposal increases the amount of time that the Student will spend in the AS classroom. However, the District's proposal also increases the amount of time that the Student will spend with typically-developing peers in regular education classrooms. The Grandparents' objection to this inclusion should not be conflated with their objection to the change in the Student's status from full-time to supplemental autistic support. This objection concerns the Student's ability to transition into more regular education classes.[9]

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[9] The Grandparents agree that it is appropriate to include the Student in recess with the assistance of a TSS or an aide assigned by the District.

Both parties agree, at least implicitly, that the Student is expected to have difficulty attending regular education classes, particularly specials.[10] There is no good, systematic data establishing the Student's baseline level of tolerance for regular education classes, even though the Student has been included in a Head Start classroom for 30 minutes per day, 2 to 3 days per week, since February 2017. In the absence of this data, the District proposes to place the Student in regular education for specials with the assistance of a District-provided aide. Under the proposed IEP, the aide will monitor the Student, and remove the Student if the Student becomes frustrated.

The Grandparents agree with inclusion as a goal. The Grandparents are concerned that the Student's aide may not perceive the Student's frustration, and may not remove the Student at the right time. The Grandparents argue that such an oversight will create a negative association with regular education classes for the Student, which will hinder the ultimate goal of inclusion. No evidence was presented in support of this hypothesis other than the presentation of the hypothesis itself through the Grandparents' testimony. The hypothetical negative consequences of the District's proposal do not render the proposal inappropriate. However, other evidence was presented to establish that the District's proposal is out of line with the Student's transition needs. That evidence, not the Grandparent's unsubstantiated hypothesis, renders the District's proposal inappropriate regarding transition.

Evidence in this case, mostly presented in the form of testimony, unambiguously demonstrates that the District and the Grandparents both agree that the Student requires a slow, methodical approach to transition into some regular education classes. In the words of District personnel, it is not the District's intention to "just throw [the Student] to the wolves". NT at 624. Rather, it is the District's intention to bring the Student to regular education classes for short periods of time, gauge the Student's ability to tolerate that setting, and then very gradually increase the amount of time that the Student spends in regular education, as guided both by data and insights from the Student's aide and TSS. *See, e.g.* NT 580, 624. This testimony was highly credible, and is consistent with the type of transition that the Grandparents want. It is unfortunate that this transition is nowhere in the District's proposed IEP.

District personnel testified credibly that the Student requires transition services that are not in the District's proposed IEP. More specifically, accepting testimony from District personnel, the District and the Grandparents both agree that the Student should be exposed to regular education classes a little at a time, and with the assistance of an

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[10] Testimony from some District witnesses suggests a belief that the Student is not expected to have trouble in regular education classes because there is no data to suggest that the Student will have trouble. This sort of testimony was couched in the language of presumed competency, a pedagogical philosophy that starts with the assumption that children with disabilities are capable in the absence of evidence to the contrary. This testimony was undermined by other District witnesses who, as described herein, advanced a more cautious approach to transition.

aide, TSS, or both. The District and the Grandparents both agree that the Student's tolerance for this minimal exposure should be assessed and documented, creating data. The District and Grandparents both agree that this data should be used to establish a baseline for the Student's ability to attend regular education classes. The District and Grandparents both agree that this data should also be used when slowly increasing the Student's time in regular education. This plan is not drafted into the Student's IEP.

The proposed IEP is the District's proposal. The things that the District says it will do above and beyond the proposed IEP are not the District's proposal. My task is to assess the appropriateness of the IEP that the District offered. That IEP does not appropriately address the Student's transition needs. Both parties agree that the Student has significant transition needs. Both parties agree about how those needs must be addressed. That agreement must be reflected in the Student's IEP.[11]

In reaching this conclusion, I acknowledge that an IEP need not dictate every moment of a child's day. Nothing herein is intended to suggest that the IEP spell out in detail how many minutes the Student will spend in regular education classes each moment of the school year. I also acknowledge that best teaching practices, things that good teachers do for all students, do not necessarily have to be drafted into a child's IEP. But when a transition program that requires data collection and analysis is necessary for the provision of FAPE, that transition program must be reflected in the IEP.

In reaching this conclusion, I also acknowledge some discrepancy in case law about how I may consider evidence beyond the four corners of the IEP. The Second Circuit has rejected a rigid four corners rule, and permits testimony "that explains or justifies the services listed in the IEP". *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 186 (2d Cir. 2012). The Third Circuit has not definitively resolved the issue, but District Courts within the Third Circuit "have found the *R.E.* reasoning persuasive". *Jalen Z. v. Sch. Dist. of Phila.*, 104 F. Supp. 3d 660, 677 (E.D. Pa. 2015)(citing *T.E. v. Cumberland Valley Sch. Dist.*, No. 13-643, 2014 U.S. Dist. LEXIS 1471, 2014 WL 47340, at *3 (M.D. Pa. Jan. 7, 2014)).

The District's evidence in this case would not change the outcome even under the Second Circuit's permissive standard. Hypothetical examples from the same case are instructive:

> For example, if an IEP states that a specific teaching method will be used to instruct a student, the school district may introduce testimony at the subsequent hearing to describe that teaching method and explain why it was appropriate for the student. The district, however, may not introduce

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[11] Often, it is not helpful to send an issue back to an IEP team, when the IEP team's inability to resolve that issue was the impetus of the due process hearing. In this case, the parties agree about the Student's transition needs. That agreement is very easily reduced to an IEP goal. The parties' general agreement makes me confident that the IEP team will be able to collaboratively draft an appropriate transition goal.

> testimony that a different teaching method, not mentioned in the IEP, would have been used. Similarly, if a student is offered a staffing ratio of 6:1:1, a school district may introduce evidence explaining how this structure operates and why it is appropriate. It may not introduce evidence that modifies this staffing ratio (such as testimony from a teacher that he would have provided extensive 1:1 instruction to the student).

R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 186-87 (2d Cir. 2012). Under the Second Circuit standard, an LEA may present evidence from beyond the IEP to explain something in the IEP. An LEA may not, however, present evidence from beyond the IEP to show that it would do something that is not in the IEP at all. In this case, the transition services that the District says it will provide are an example of the latter.

Co-Treatment

The Grandparents are correct that an independent evaluation recommended a co-treatment model for OT and SL/T, and that the IU accepted that recommendation and provided a 15-minute per week co-treatment session, starting in February 2017. The Grandparents are also correct that no evaluation after February 2017 assesses the effectiveness of co-treatment in the school setting, or recommends discontinuation of co-treatment in the school setting.

Above, when considering the change from full-time to supplemental autistic support, nearly identical factors were unavailing once the District's proposed IEP was carefully examined. The Grandparents objected to an apparent reduction in AS support but, in fact, the District had proposed to increase AS support. This aspect of the proposed IEP is different. Here, the District is truly proposing a discontinuation of services. The proposed IEP eliminates the OT and SL/T co-treatment session.

Some testimony suggests that the OT and SL/T co-treatment sessions were not effective in the school setting, or that those sessions had a negative impact upon the Student. I have no reason to doubt this testimony. I am certain that it accurately reflects the insight and opinions of skilled therapists (the same therapists who served the Student during the 2016-17 school year, a period during which both parties agree that the Student made considerable progress). Even so, given the legal standard that applies when schools wish to change a student's IEP unilaterally over parental objection (described above), I cannot substitute the informed opinions of therapists for objective data.

To be clear, the Grandparents did not present evidence proving that the OT and SL/T co-treatment session is necessary for the provision of FAPE. The evaluation report recommending co-treatment does not speak to the Student's needs in the school setting. If the Student was not already receiving co-treatment, I would not order the District to provide it. The question I must answer, however, is not whether co-treatment is necessary for the provision of FAPE, but rather whether it is appropriate to remove co-treatment from the Student's IEP. The Grandparents have satisfied their burden by

showing the District's decision to remove co-treatment was not based on an evaluation or objective data. Consequently, co-treatment must remain in the IEP until data indicates that it can be removed.[12]

The Harness

The most contentious issue between the parties is use of a harness for the Student's transportation to and from school. Testimony from District personnel on this issue, particularly from the District's Supervisor of Special Education, revealed that the District's refusal to place the harness onto the Student is a matter of dogma, and has nothing to do with consideration of the Student's needs.

At the first session of this hearing, District personnel described the harness as a restraint. By the second day of the hearing, District personnel had backed off this position, saying instead that the harness could be used to restrain the Student. The initial statement is outright false. The harness itself restricts the Student's movement no more than a shirt. The subsequent statement is true, but only in the most literal way. The whole point of the harness is to prevent the Student's elopement. However, the harness serves that function only when used with the lead. Without the lead, the harness is little more than a sturdy vest.[13] The lead itself never comes to school. Removing the harness from the Student when the Student arrives at school, and placing the harness onto the Student before the Student boards the van home does not constitute a restraint of any kind.

In the end, the District does not argue that the harness must be removed because it is a restraint. Rather, the District argues that the harness is only for the Grandparents' benefit, and not for the Student's benefit. I reject this argument because transportation is a related service under the IDEA, and unsafe transportation cannot be appropriate. The Grandparents' ability to physically control the Student as the Student exits the school van is a factor in this analysis. Similarly, students who are protected by the IDEA are also protected by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.*, and by Title 22, Chapter 15 of the Pennsylvania Code (Chapter 15), 22 Pa. Code § 15 *et seq*. If the Student's disability interferes with the Student's ability to come to school, and if a reasonable accommodation enables the Student's attendance, that accommodation is necessary under Section 504 and Chapter 15, even if it is not a mandatory component of FAPE under the IDEA.

The question before me, however, is not whether the harness is a restraint, and is not whether the Student can be safely transported without the harness. The question is whether the District can remove the harness from the Student's IEP. The analysis is

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[12] The ultimate decision about if or when to remove co-treatment from the IEP must be made by the IEP team. The team may determine what data to use in its decision-making process.

[13] The District's insistence on calling the lead a "leash" is indicative of the attitude of its personnel. The term, in the context of this case, is deliberately pejorative.

identical to the analysis regarding co-treatment. There is a dearth of evidence concerning the Student's need for a harness. What little evidence there is, however, suggests that the Student has not eloped during transportation since the Student started using the harness, and that the Student is starting to accept safe behaviors, like holding hands. That same evidence also suggests that the harness has become a signal to the Student to use safe behavior. As with the evidence regarding co-treatment, none of this evidence comes from an evaluation or constitutes objective data supporting a discontinuation of IEP services. I cannot permit subjective opinions, no matter how well informed, to take the place of a thorough evaluation or objective data. The harness must remain in the Student's IEP until an evaluation or data suggests that it is appropriate to remove this accommodation.[14]

Parental Participation – Discussion

The Grandparents were denied an opportunity to meaningfully participate in the development of the Student's IEP. The District refused to consider the Grandparents' input regarding co-treatment and the harness. Particularly regarding the harness, the District did not make an evidence-based decision contrary to the Grandparents' wishes. Rather, District personnel allowed a visceral negative reaction to the thought of a child on a leash subsume what should have been a collaborative decision-making process. Testimony from District personnel revealed an absolute disinterest in any information supporting the Grandparents' position, and an unequivocal belief that the harness is somehow inappropriate *per se*.

It is theoretically possible that some types of parental input warrant no serious consideration. For example, if parents asked a school to include corporal punishment in a student's IEP, the school could safely ignore that input (mandatory reporting notwithstanding). In this case, the Grandparents asked the District to continue an accommodation that was already drafted into the Student's EI IEP, and that had been used successfully for a significant period of time. The District's staunch refusal to consider the Grandparents' input ultimately caused the District to overlook an important question: does data suggest a change to the Student's IEP? This is true not only for the harness, but also for the proposed discontinuation of the co-treatment session.

The Grandparents are entitled to declaratory judgement on this issue.

Conclusion

Preponderant evidence supports most of the Grandparents' claims. Regarding the harness and co-treatment, the Grandparents established that the District's decision to remove services from the Student's IEP was not evidence based. Regarding transition, the Grandparents established that the District's proposed IEP does not meet the

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[14] As with co-treatment, the ultimate decision about if or when to remove the harness from the IEP must be made by the IEP team. The team may determine what data to use in its decision-making process.

Student's needs, because it does not include the type of transition plan that both parties agree that the Student requires. Regarding the change from full-time to supplemental autistic support, the Grandparents did not establish that the District unilaterally proposed a reduction in service. The District's proposed IEP increases the amount of autistic support that the Student will receive.

An order consistent with the foregoing follows.

ORDER

Now, September 11, 2017, it is hereby **ORDERED** as follows:

1. Within 15 school days of this Order, the Student's IEP team shall reconvene, and shall revise the Student's IEP as follows:

    a. The IEP team shall draft a transition plan that is consistent with the accompanying Decision, and shall incorporate that transition plan into the Student's IEP.

    b. The IEP team shall incorporate a Speech and Language Therapy and Occupational Therapy co-treatment session into the Student's IEP. The co-treatment session shall be 15 minutes per week, unless the IEP team agrees otherwise.

    c. The IEP team shall incorporate use of the harness into the Student's IEP. The task of removing the harness upon the Student's arrival at school, and securing the harness as the Student leaves school may be completed by the Student's TSS, but must be completed by District personnel if the TSS is not available.

2. Nothing in this decision precludes the parties from collecting data or conducting additional assessments of the Student's needs regarding transition, co-treatment, or the harness. Nothing in this decision precludes the parties from revising the Student's IEP in response to such data.

3. The District violated the Grandparents' right under the IDEA to meaningful parental participation during the development of the proposed IEP.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER