

**Pennsylvania Special Education Hearing Officer
Final Decision and Order**

Closed Hearing

ODR File Number:

22185-18-19

Child's Name:

A. F.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

12/15/2019

INTRODUCTION AND PROCEDURAL HISTORY

The child in this matter (hereafter Child) is a pre-kindergarten-aged child who resides in the area served by the Montgomery County Intermediate Unit (IU). Child is eligible for special education services pursuant to the Individuals with Disabilities Education Act (IDEA) and was ready for the transition from early intervention services to the IU to begin in the fall of 2018. After Child was instead in a private school (Private School) for the 2018-19 school year with additional services privately provided, Child's Parents filed a due process complaint against the IU asserting that its offer of programming denied Child a free, appropriate public education (FAPE) under the IDEA, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act (ADA).

The case proceeded to a due process hearing at which the parties presented evidence in support of their respective positions. The Parents sought to establish that the IU failed to propose a program that offered FAPE for the 2018-19 school year, seeking reimbursement for tuition as well as the cost of private services. The IU maintained that its proposed program was appropriate for Child and that no remedy was due. For the reasons set forth below, the claims of the Parents must be sustained in part.

ISSUES

1. Whether the program proposed for Child for the 2018-19 school year¹ was appropriate for Child's needs;
2. If the program proposed by the IU was not appropriate for Child, whether the Private School program was appropriate for Child; and

¹ There is no dispute for purposes of this decision as to the 2019-20 school year. (N.T. 328.) Child is currently attending an IU program.

3. If the program proposed by the IU was not appropriate for Child and the Private School program was appropriate for Child, whether the Parents should be reimbursed for tuition?

FINDINGS OF FACT

1. Child is a pre-kindergarten-aged child who resides in the area served by the IU. For the relevant time period, Child was eligible for special education services based on an autism classification. (N.T. 27; S-17 at 24.)
2. Child exhibited developmental delay early in life and was provided early intervention services, the extent which gradually increased. Child's communication skills were very limited compared to same-age children. (N.T. 202-06, 215; P-3; S-3.)
3. Child continues to have deficits in language development and across all developmental domains. Child is still acquiring pre-requisite learning skills such as joint attention and imitation, and needs functional communication skills. (N.T. 214, 919, 935, 943, 1012-13; S-48.)
4. Child demonstrates inconsistency using signs to communicate, but has acquired some skills using the Picture Exchange Communication System (PECS). (N.T. 296.)

Early Evaluations and Programming

5. Child was provided services through early intervention infant/toddler program in the home shortly after birth. The most recent evaluation by the early intervention provider was in December 2017. (N.T. 149, 203; P-5.)
6. The Parents obtained private services for Child for some related services while Child was provided early intervention services. Those

private services continued after Child made the transition to IU programming. (N.T. 233, 241, 242-43.)

7. Child was evaluated at Children's Hospital of Philadelphia (Hospital) in the fall of 2017, at which time Child was identified as having autism. (N.T. 208-10.)
8. The Hospital made a number of recommendations focused on Applied Behavior Analysis (ABA) programming, many of which were for private programs including the Private School. These recommendations were repeated in the spring of 2018. (N.T. 256; S-3; S-18).
9. ABA is the science of human behavior, and encompasses a variety of programming approaches that are based on its principles. It is important that ABA principles be applied across settings. (N.T. 595-97, 627, 653, 655, 702-03, 972-73.)
10. Child was also evaluated and determined to be eligible for behavioral health services in the fall of 2017, and home- and community-based ABA services were recommended. By March 2018, those services included ABA programming for twenty hours per week. The behavioral health services continued after Child made the transition to IU programming. (N.T. 217-18, 233, 241-42; P-2; S-4; S-5; S-10.)
11. The Parents began to explore private school-based settings within several months of the Hospital evaluation. (N.T. 216, 258.)
12. As of March 2018, Child's early intervention Individualized Family Service Plan/Individualized Education Program (IFSP/IEP)² provided outcomes/goals in the following areas: functional play (imitating one-step play and gross motor actions); communication of wants and

² An IFSP is the program for an infant or toddler with a disability, a child under three years of age. 20 U.S.C. §§ 1433, 1436.

needs (using a combination of twenty five words/sounds, gestures, and pictures with orientation toward partner); waving hello/goodbye to adults and peers and sustaining play with a sibling; transitioning between activities and following one-step directions; gross motor skills (walking balance); and self-care (feeding, dressing, hand washing, tooth brushing). (S-53.)

13. The IFSP/IEP progress on the outcomes/goals reflected that by June 2018, Child still needed to work on those addressing communicating wants and needs, waving hello/goodbye, and gross motor and self-care skills. (S-53.)
14. Early intervention services as of March 2018 were special instruction in the home and community (three hours per week); behavioral specialist consultation (one hundred fifty minutes per week); speech/language therapy (one hour per week); physical therapy (two hours per month); and occupational therapy (two hours per week). (S-53.)
15. The transition plan in the early intervention IFSP/IEP provided the following information and recommendations regarding Child's outcomes/goals: continuation of PECS Phase 1 with a variety of pictures; continuation of reinforcement for responding to name; and continuation of two verbal and gestural prompts for transitions and directions. Child reportedly was beginning to engage in parallel play with the sibling. (S-53.)
16. In February 2018, the Parents toured and applied to the Private School for Child's admission. (N.T. 229, 259; S-43 at 1-15.)
17. As of February 2018, Child was using PECS Phase 1 through early intervention services in the home, but with decreasing accuracy. Continuation of Phase 1 PECS was recommended at that time. (S-10.)

The IU Evaluation

18. The IU initiated its evaluation of Child in February 2018 with the consent of the Parents. At the time, Child was provided with three hours per week of special instruction, two hours per week of occupational therapy, one hour per week of speech/language therapy, and one hour per month of physical therapy, all through early intervention. ABA services through behavioral health services were provided twenty hours per week along with behavioral specialist consultation. This information was documented in the initial Evaluation Report (ER). (S-14; S-17 at 4, 7.)
19. The initial evaluation was begun by the IU earlier than is usually the case, at parental request. (N.T. 146, 218-19.)
20. Parent input into the ER reflected their priority of Child learning to communicate both expressively and receptively. (S-17 at 5-6, 12.)
21. The ER summarized results of an administration of the Battelle Developmental Inventory – Second Edition (BDI-2). Child attained scores reflecting significant delay in the areas of attention and memory; significant delay in the areas of perception and concepts; and mild delay in the areas of reasoning and academic skills. (S-17 at 10.)
22. Social/emotional development was also assessed through the BDI-2 for the ER. Child’s scores were well below age expectations across those subtests and composites. Autism rating scales completed by one of the Parents were consistent with that diagnosis. (S-17 at 12-13.)
23. On an administration of the Developmental Assessment for Young Children – Second Edition (DAYC-2) for the ER, Child demonstrated

significant delay in receptive and expressive language skills. (S-17 at 11.)

24. Assessment of physical development for the ER reflected needs in balance and strength, control and coordination, and overall participation in gross motor activities. (S-17 at 15-16.)
25. Occupational therapy assessment for the ER revealed a strength with grasping but needs in visual motor integration, sensory processing and regulation (especially imitation and visual attention), and adaptive skills across areas assessed. (N.T. 729-31; S-17 at 16-17.)
26. A Functional Behavior Assessment (FBA) was conducted for the ER, which identified elopement from non-preferred tasks, protests when preferred items were removed, and mouthing items as behaviors of concern. The hypothesized functions of those behaviors were to escape/avoid less preferred demands, to gain access to preferred items, and automatic positive reinforcement, respectively. (S-17 at 18-20.)
27. The ER identified needs for Child throughout the ER across domains: expressive and receptive language; imitation; play skills; improved balance, strength, control, and coordination; visual motor integration skills; attention to and participation in adult-directed activities; and adaptive skills. (S-17.)
28. The ER concluded with a determination that Child was eligible for specially designed instruction/intervention on the basis of autism. (S-17 at 24-25.)

The IU Proposed Program

29. The process of transitioning Child to the IU program was initiated prior to Child reaching the age for that transition. The IU and the Parents

attended a transition meeting in January 2018 to plan for Child's entry into preschool programming. (N.T. 144-46; S-6; S-7; S-20 at 6.)

30. When a child transitions to the IU, one focus is to provide opportunities for the child to prepare for entry into kindergarten, with an emphasis on language and prerequisite learning skills. If a child was not previously provided services outside of the home, it is important to consider such services that include peers whenever possible. (N.T. 125-26, 149-50, 849-50.)
31. The IU developed a draft initial IFSP/IEP in April 2018 (April 2018 IEP).³ It was noted in the special considerations section that Child exhibited behaviors impeding learning and had communication and assistive technology needs. Deficits were noted in a variety of areas, including awareness of peers; imitation of peers; identifying self in a mirror; reacting and responding to others; attention; impulse control; Other identified needs were to: attend and participate in adult-directed activities; develop expressive and receptive language skills; develop cooperative play skills and initiation of play; imitation of play activities; gross motor skills (balance and strength, control and coordination, and participation in activities); visual motor integration skills; and improved sensory processing. (S-20.)
32. Annual outcomes/goals in the April 2018 IEP addressed gross motor skills (jumping (with Child not then demonstrating that skill), reciprocal ball play (with Child minimally then exhibiting such play with cues and prompts), and using stairs with rail support (with Child then using stairs with both rail and adult support)); functional play with a peer (with Child then not imitating or playing with peers); following

³ Since child would no longer be three years of age at the time the IU proposal was to be implemented, the reference will be only to an IEP.

one-step directions with physical prompting (with Child then only minimally exhibiting that skill with physical prompting); making communicative attempts through actions, gestures, or sounds (with Child then demonstrating only a few attempts); use of PECS Phase 1 with five different pictures (with Child then giving a picture to a partner and holding out hand for a reinforcer); completing non-preferred activities (with Child then attending to such tasks for less than one minute); using a more developmentally appropriate grasp to draw shapes (with Child then using a more basic grasp with a marker to draw lines); independently self-feeding with a utensil for 80% of a meal (with Child using utensils for less than half of a meal); and self-regulating and participating in activities (with Child then self-directing). (S-20 at 17-33.)

33. IU services specified in the April 2018 IEP were for physical, occupational, and speech/language therapy (for thirty to forty five minutes each week); specialized instruction (for forty five minutes each week); and behavior support (for ninety minutes each week). A SETT⁴ process was recommended within the first four months of service. All services individually-provided at an educational site location outside of the home. (S-20; S-21.)
34. An IEP meeting convened in April 2018 with parental participation by telephone. Invited to attend but excused were a school psychologist, related service providers, and a behavior specialist. (N.T. 223; S-19.)
35. The Parents disapproved the initial Notice of Recommended Educational Placement (NOREP) because they did not believe adequate

⁴ SETT is a process for considering the Student, Environment, Tasks, and Tools to determine possible assistive technology services.

services were included in the proposal, and most specifically intensive behavioral services using ABA. (N.T. 227; S-21.)

36. The IEP was revised in May 2018 to reflect that Child would attend an elementary school within the IU's geographic boundaries in an autism support classroom. Specialized instruction increased to three hours per day, four days a week; speech/language and occupational therapy were revised to reflect group services; and the behavioral support was removed. (N.T. 123-24, 515, 554, 622; S-23.)
37. The goals in the revised IEP were not determined based on the placement but rather based on Child's needs. (N.T. 131, 168.)
38. A telephone conference was held in late May 2018 to review the IU's revised proposal. Once again, the related service providers, psychologist, and behavior specialist were excused. The IU did not explain how Child's programming would be individualized for Child, would address Child's significant language deficits, or would be based on ABA principles. (N.T. 161, 164, 231-34; S-23 at 4.)
39. The Parents visited the IU proposed autistic support classroom in early May 2018. (N.T. 236, 265; S-43 at 16.)
40. The Parents disapproved the NOREP accompanying the May 2018 revised IEP, explaining that they wanted to discuss a different autistic support placement that would provide services five days each week for four hours per day, individual related services, and intensive individualized ABA services with inclusion opportunities. A letter from a psychologist working with Child in July 2018 supported the individual related services and ABA-focused classroom. (N.T. 159, 237; S-24; S-27.)

41. On June 5, 2018, the IU issued another NOREP proposing the same program and placement as in May. The Parents did not respond. (S-25; S-26.)
42. Another IEP meeting was scheduled in late July 2018/August 2018 at the request of the Parents. The related service providers, psychologist, and behavior specialist did not attend this meeting. The IEP remained virtually identical to that in May 2018. At that meeting, the Parents asked that Child be placed in the Private School. (N.T. 165-66, 169, 239, 243-44; S-29; S-30; S-32.)
43. The Parents provided notice to the IU in early August 2018 of their intention to enroll Child in a private school and seek reimbursement. (N.T. 245-46; P-1 at 4.)
44. In late September, the Parents disapproved the NOREP accompanying the August 2018 IEP, reiterating their previous reasons and providing notice that they intended to place Child in a private school and would seek reimbursement. (S-34.)
45. The autistic support program proposed by the IU was based on ABA principles. The classroom had four staff members in the classroom: a special education (autistic support) teacher and three assistants. A Board Certified Behavior Analyst (BCBA) and a behavioral specialist consultant also spent several hours in the classroom each week, overseeing the classroom; related service providers (for speech/language, occupational, and physical therapy) were also present several days each week providing individual and group settings. All services were coordinated among the professionals. (N.T. 448-50, 458, 485, 533-36, 702-03, 819-22, 848.)
46. Children attended preschool in the autistic support classroom for three hours per day, four days per week. There were opportunities for

inclusion with typical peers on a regular basis. (N.T. 453, 459-61, 467.)

47. The autistic support classroom assessed students using the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) on which instruction was based in order for the children to learn skill sets. The VB-MAPP was administered twice each year. (N.T. 450, 702-03, 832-33, 835.)
48. The autistic support classroom provided a highly structured classroom environment with opportunities for social interaction with behavioral services throughout the day. The classroom provided four specific stations for the children to rotate through twice each day. One was for core learning targeting skills assessed by the VB-MAPP; another was for intensive teaching that also focused on VB-MAPP skills; and the other two were for play skills and manding. Group activities were also provided daily. (N.T. 60-62, 151, 153, 451-52, 460-61, 463, 468-70, 487, 504, 841-42, 881-82.)
49. Children presented at each station in pairs or sometimes individually. When in pairs, children were matched to a peer with similar skills, and the instructor worked individually with each child. One child worked directly with the instructor then was provided reinforcement⁵ while the instructor was working individually with the other child. The child who was engaged in reinforcement was also exposed to incidental learning and social engagement. When a child presented individually at a station, reinforcement was still a component of the session. (N.T. 79-81, 454-56, 486-87, 693-94, 710, 847-49, 876-79, 892-93.)

⁵ The IU BCBA provided a well-reasoned explanation of reinforcements and how they differ from rewards at N.T. 714-16.

50. Reinforcements in the autistic support classroom were based on preferences and interests of the individual child. (N.T. 83-84, 456-57, 835.)
51. The learning stations in the autistic support classroom were provided so that each child would twice rotate through each of them four days per week for fifteen minutes at a time, for a total of one hour each time the stations ran. (N.T. 452-54.)
52. The autistic support classroom used a picture exchange system for communication and some children used sign language. Augmentative communication devices and assistive technology were available for children needing those. (N.T. 89-91, 497, 541-43, 545-46.)
53. Data was collected daily and throughout the school day in the autistic support classroom. (N.T. 856-57, 894.)
54. Ongoing training and competency assessments were conducted regularly for staff in the autistic support program. (N.T. 71-72, 476-77, 481, 483, 814, 817, 822-26, 835-36.)

The Private School and the 2018-19 School Year

55. Child was admitted to the Private School for the 2018-19 school year in a preschool program. Child attended the Private School for that school year and was also provided privately-obtained services in the home including ABA services through a behavioral service provider. (N.T. 247-49, 276-77, 336-37.)
56. The Private School serves children with autism using principles of ABA throughout the day and each child has an IEP. Reinforcement based on an individual child's preferences is built into programming. (N.T. 338, 343-44, 363, 370; S-44 at 1-2.)

57. The preschool program at the Private School was staffed by a certified special education teacher and five instructional assistants, in addition to related service providers. Two BCBA professionals were also on staff along with three Registered Behavior Technicians, all of whom worked in Child's preschool classroom during the 2018-19 school year. (N.T. 340-41.)
58. The Private School preschool program was a half day five days per week. The program emphasized language and expectations of behavior, and had opportunities for reverse inclusion activities with typically developing preschool children. Related services (speech/language therapy and occupational therapy/sensory motor skills) were provided individually as well as weekly in groups to all children. Weekly group physical therapy was also provided. (N.T. 338-40, 369, 427; S-44 at 1-2.)
59. Children at the Private School had development of social and play skills incorporated throughout the preschool day. Child also had direct instruction in simple play skills. (N.T. 367-69.)
60. Child was assessed with the VB-MAPP when starting at the Private School.⁶ At that time, Child had some beginner level one skills in imitation and listener response, scoring a total of seven points. That instrument was used to guide instruction. (N.T. 344-45, 353; S-44 at 44, 118.)
61. The Private School creates IEPs for children using the model form in Pennsylvania, and provides progress monitoring reports three times each year. (N.T. 404, 407.)

⁶ By December 2018, the behavioral health services provider was also assessing Child with the VB-MAPP. (P-7; S-46.)

62. The Private School developed an IEP for Child in October 2018. (P-6; S-44 at 40-75.)
63. Needs identified for Child in the Private School October 2018 were for improvement in manding skills, communication of wants and needs, receptive identification of items, matching, following directions, visual attention and group attention, fine and gross motor skills, functional play skills, and adaptive skills (feeding). (P-6 at 9; S-44 at 48.)
64. Goals in the Private School IEP addressed manding, communication and language skills, identifying objects, matching identical and non-identical pictures and objects, following directions, visual attention, focus and attention, fine and gross motor tasks, functional play, and feeding self. (P-6 at 10-26; S-44 at 49-65.)
65. Program modifications/items of specially designed instruction in the Private School IEP included a sensory diet; generalization of mastered skills; modeling and reinforcement; a prompt hierarchy; interaction with peers; and behavior strategies. Related services included speech/language therapy (individual and group); occupational therapy (individual and group); and physical therapy. (P-6 at 27-34; S-44 at 66-73.)
66. When Child entered the Private School, Child exhibited deficits in areas of instructional control and joint attention/social engagement, which are prerequisite learning skills. (N.T. 349, 412, 413, 430.)
67. Child used the PECS system at the Private School in addition to some sign language and Augmentative Assistive Communication to make requests (mand). (N.T. 366.)
68. The VB-MAPP was re-administered in February 2019. At that time, Child scored twenty five points with some skills exhibited at the second level. (N.T. 402-03; S-44 at 118-19.)

69. Child was provided individual speech/language, occupational, and physical therapy each week, as well as daily (one hour) individualized instruction based on the ABA principles at the Private School. (N.T. 339-40.)
70. The Private School worked to find reinforcers for Child that were motivating. (N.T. 363-64.)
71. The Private School takes data on all IEP goals including individual targets toward specific goals on a daily basis. (N.T. 353; P-22; P-23.)
72. Child exhibited growth over the course of the 2018-19 school year in developing social skills to interact with peers. Despite inconsistency in the data, Child also demonstrated some progress on the Private School IEP goals. (N.T. 385-86, 646-47; P-10; P-11; S-44.)
73. As of the summer of 2019, Child was able to make requests (mand) using PECS in the home. (N.T. 250.)
74. The contract the Parents signed with the Private School in early September 2018 was irrevocable. (N.T. 387; P-18; S-43 at 29, 34.)

Preparation for 2019-20 School Year

75. In May 2019, the IU sought permission from the Parents to conduct a reevaluation of Child. The Parents provided consent. (S-41.)
76. The IU developed an IEP for Child in May 2019. (S-48.)
77. An IU BCBA conducted a Functional Behavioral Assessment (FBA) of Student at the Private School in June 2019. (N.T. 599-60.)
78. The IU administered the VB-MAPP for Child in September 2019. (N.T. 1076; S-49.)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that the burden of persuasion in this type of case 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 Parents who requested this administrative hearing. Nevertheless, 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, as is the case here.

Special education hearing officers, in 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, with none evincing an intent to deceive. However, the weight of individual testimony was not equally accorded.

Both the Parents' expert and IU BCBA, both of whom have experience with children with autism and a wide range of ABA experience, testified persuasively about how Child's needs could be met in the educational environment. The witness from the IU, however, provided more persuasive testimony in his area of expertise that was accorded significantly more weight for several reasons. First, the IU witness has experience in providing

services in public education settings, something that the Parents' expert lacked and whose single observation in the IU classroom contrasted sharply with, but did not overcome, the record evidence as a whole. The testimony of the Parents' expert, moreover, was premised in significant part on research studies and clinical treatment models compared to educational programming,⁷ which is not and should not be the focus of this type of administrative proceeding relating to FAPE. Third, it is also noteworthy that the Parents' expert seemingly endorsed the inclusion of lengthy, detailed "protocols" in an IEP document that are not necessary under the law, and could further be construed as presupposing an inability on the part of the IU's educated and experienced staff to apply the principles of ABA in daily program implementation and consultation, a conclusion that this hearing officer does not find supported in the record. Fourth, this witness expressed concern with the use of rewards that may not be reinforcing to Child (N.T. 953-54), which disregarded the extensive and credible testimony of the IU witnesses that ongoing preference assessments are conducted in order to avoid such a result. Fifth and finally, the Parents' expert was particularly critical of the IU's evaluation and IEPs because it did not administer assessment tools that were "fine-tuned" enough to gauge progress such as the VB-MAPP (N.T. 939-43), which as explained below is not a purpose of an evaluation. In addition, her testimony that suggested that Child should be expected to essentially close the gap between Child and peers (N.T. 1014) in a relatively short period of time, as also discussed below, is not grounded in the law. For all of these reasons, while her insight into Child's education-related needs was knowledgeable and also supported to some extent by a

⁷ Notably, the Parents' expert was also critical of the Private School, while at the same time making recommendations for Child for purposes of this hearing that were aligned with its offerings.

wealth of other evidence, her opinions on the IU's program and recommendations were not credited.

It should be further noted that, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties' well-written and focused closing statements.

General IDEA Principles: Substantive FAPE

The IDEA requires that the states to provide a "free appropriate public education" (FAPE) to children who qualify for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that the FAPE requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed.

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." *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Fairly recently, the U.S. Supreme Court observed that 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).

A focus on the particular child is at the core of the IDEA. * *

* As we observed in *Rowley*, the IDEA "requires participating States to educate a wide spectrum of handicapped children,"

and “the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.”

Endrew F., ___ U.S. ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017)(italics in original)(citing *Rowley* at 206-09)(other citations omitted). The Court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.*, 137 S. Ct. at 1001, 197 L.Ed.2d 352. Thus, individualization is a core component of the IDEA particularly where a child has significant deficits that are widely discrepant from that of peers. This standard is not inconsistent with the above interpretations of *Rowley* by the Third Circuit. See *Dunn v. Downingtown Area School District*, 904 F.3d 248, 254 (3d Cir. 2018).

Pursuant to *Endrew*, *Rowley*, and the IDEA, the primary focus of a child’s IEP is to be responsive to his or her identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, the 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). Stated another way, the law does not demand that LEAs provide services beyond those that are reasonable and appropriate in light of a child’s unique circumstances, such as 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). Also critical is the recognition that, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993); see also *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010) (same). Nonetheless, the IEP team is required to monitor the student’s response to the programming that is

provided, including progress toward IEP goals, in order to make appropriate revisions as may be necessary. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320, 324.

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family including parents have “a significant role in the IEP process.” *Schaffer, supra*, at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b); *see also Letter to Veazey*, 37 IDELR 10 OSEP 2001) (confirming the position of OSEP that LEAs cannot unilaterally make placement decisions about eligible children to the exclusion of their parents). 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); *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 565 (3d Cir. 2010).

The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program. Among other things, IDEA requires the IEP Team, which includes the parents as members, to take into account 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).

General Section 504 and ADA 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 above-described 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); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Further, the substantive standards for evaluating claims under Section 504 and the ADA are essentially identical. *See, e.g., Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those two statutes, particularly when considered together with claims under the IDEA. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

Tuition Reimbursement

Parents who believe that an LEA is not providing or offering FAPE to their child may unilaterally place him or her in a private school and thereafter seek reimbursement for tuition. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). Such is an available remedy for parents to receive the costs associated with their child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T., supra*, 575 F.3d at 242. Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009)(explaining that a tuition reimbursement award may be

reduced on an equitable basis such as where parents fail to provide the requisite notice under 20 U.S.C. § 1412 (a)(10)(C)(iii)); *C.H. v. Cape Henlopen School District*, 606 F.3d 59 (3d Cir. 2010).; *Carter, supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

The Parents' Claims

Before turning to the merits of the issues, it is necessary to address an overarching theme of the Parents that was reiterated in their closing statement. Specifically, they contended that the hearing officer should not consider testimony about any IEP that was not in the document itself and, instead, must limit review of their claims to the four corners of the IEPs. *See, e.g., R.E. v. New York City Department of Education*, 694 F.3d 167 (2d Cir. 2012)(rejecting retrospective testimony about services beyond those contained in the IEP or that would suggest an alteration to its terms, but accepting evidence that explains or justifies its provisions). This “four corners” principle cannot be construed so narrowly in the manner they suggest, where the law dictates a meeting of the IEP team in order to discuss the document. 20 U.S.C. §§ 1414(d)(1)(B) and (C); 34 C.F.R. §§ 300.321, 300.322. Accordingly, review of a proposal cannot wholly disregard information that is beyond the IEP content itself.

The first issue is a relatively narrow one: whether the IU’s proposed program for Child for the 2018-19 school year was reasonably calculated to meet Child’s needs in light of Child’s unique strengths and needs. This analysis requires examination of both the procedural and substantive aspects of the proposed IEP.

Substantively, the proposed IEP followed an evaluation by the IU. The Parents make an assertion that the IU evaluation was not sufficiently comprehensive to develop an appropriate IEP. The IDEA sets forth two purposes of a special education evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1)(C)(i).

In conducting an evaluation or reevaluation, the law imposes certain requirements on LEAs to ensure that sufficient and accurate information about the child is obtained:

(b) Conduct of evaluation. In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

(i) Whether the child is a child with a disability under § 300.8; and

(ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. §§ 300.304(b); *see also* 34 C.F.R. § 303(a). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3). Any evaluation or reevaluation must also include a review of existing data including that provided by the parents in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a).

The record does not support the Parents’ contention in this respect. The IU evaluation set forth information from the Parents that included Child’s then-current services and their concerns; a review of existing record information; results of standardized assessments; results of rating scales; assessment of gross and fine motor skill development; assessment of speech/language skill development; and an FBA. All areas of suspected disability that a preschool evaluation must consider were examined to identify Child’s needs, which were set forth in the ER and incorporated into the proposed IEP. The ER served the required purpose.

The IEP proposed was appropriately responsive to the identified needs with annual goals, program modifications and specially designed instruction, and related services crafted to enable Child to make meaningful educational progress in light of Child’s unique circumstances and based on information reasonably known to the team at the time. The proposed program was to be

implemented in a structured autistic support classroom that was based on ABA principles, with coordination of services among the various professionals including significant BCBA involvement. The VB-MAPP was to be administered at the start and end of the school year to guide instructional programming decisions. Child would attend four days each week with programming that had ongoing opportunities for inclusionary activities, and was devised to complement that already provided by the Parents privately. It is also important to keep in mind that the 2018-19 school year was Child's first experience with formal educational programming in a new environment with peers. Substantively, the proposed program that was to be implemented met all requisite criteria under the law for Child.

However, despite its overall substantive appropriateness, it cannot be disputed that the Parents did not grasp a full understanding of the IU's proposal, and through no fault of their own. They had made clear their interest, and even insistence, on programming with intensive ABA support. Yet, the only behavioral support that was set forth in the IU's initial IEP was removed when the revisions were made that were focused on a school-based setting. The final IEP fails to even mention consultation by the BCBA, and no such professional had attended any of the IEP meetings to apprise the Parents of the actual programming that was to be implemented. The mere reference to ABA in passing, as occurred in this case, falls far short of adequately describing the program and allaying the Parents' concerns with what appeared to be a plan with no BCBA support and little if any intensive ABA-driven services. Unlike in *Ridley, supra*, 680 F.3d at 275, the circumstances here plainly operated to deprive the Parents of meaningful participation in the IEP development process in order to make an informed decision with respect to the NOREP, and thereby served to deny a program of FAPE to Child. That significant flaw in this case is fatal and cannot be remedied at this juncture by the extensive testimony at the hearing.

Having found a denial of FAPE by the IU proposal on procedural grounds, the next question under the *Burlington-Carter* test is whether the Private School was appropriate for Child. The Private School provided an ABA-based program for children with autism. It developed and implemented an IEP for Child. Behavioral support was a key component of the program with a number of professionals directly involved in the classroom. Child was provided with related services and participated in a variety of activities that included early learning skills, social and play skills, and self-care skills. The VB-MAPP was administered to identify deficits and Child's score on that instrument improved over the course of the school year. That Child may not have made significant progress across all domains is not determinative; this is a child who lacked many fundamental early learning skills and for whom the experience was the first in a formal setting. The Private School is not held to IDEA standards, and in this hearing officer's view, was appropriate for Child⁸ for purposes of the test for tuition reimbursement.

The final prong of the test is equitable considerations. The record lacks any rational basis for finding that the amount of reimbursement should be reduced or denied, and accordingly full tuition shall be awarded.

Finally, the Parents make a demand in their closing statement that the IU be ordered to provide intensive programming consistent with their expert's recommendations. This hearing officer declines to address this further because the 2019-20 school year was not presented as an issue for purposes of this decision; indeed, even the most tangential reference during the hearing to programming for the current school year was met with immediate objection by the Parents. (N.T. *passim*.) As such, it would be wholly

⁸ Indeed, the IU final proposal as described at the hearing was remarkably similar to that provided by the Private School for the same school year.

improper to order, or even consider, relief that was explicitly excluded from her consideration.

ORDER

AND NOW, this 15th day of December 2019, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The program proposed by the IU for Child for the 2018-19 school year was substantively appropriate under the applicable law.
2. The program proposed by the IU for Child for the 2018-19 school year deprived Child of FAPE on procedural grounds under the applicable law.
3. The Parents are entitled to reimbursement for tuition at the Private School for the 2018-19 school year within ten business days of proof of payment by the Parents.
4. Nothing in this decision and order should be read to preclude the parties from mutually agreeing to alter any of its terms.

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

Cathy A. Skidmore

Cathy A. Skidmore, M.Ed., J.D., C.H.O.
HEARING OFFICER
ODR File No. 22185-1819AS