

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: 21005-18-19

Child's Name: K. H. **Date of Birth:** [redacted]

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[redacted]

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Hearing Officer: Cathy A. Skidmore, M.Ed., J.D.

Date of Decision: 02/20/2019

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student),¹ is a kindergarten-aged student in the Wissahickon School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² In the spring of 2018, the parties began to plan for Student's transition from early intervention and preschool services into school-aged programming in the District for the fall of the 2018-19 school year. They did not reach a consensus on finalizing an Individualized Education Program (IEP) for Student including placement.

Student's Parents filed a Due Process Complaint against the District prior to the start of the 2018-19 school year, asserting that its offer of programming did not constitute a free, appropriate public education (FAPE) for Student under the IDEA, Section 504 of the Rehabilitation Act of 1973,³ and the Americans with Disabilities Act (ADA),⁴ as well as the federal and state regulations implementing those statutes. Their primary objection was that the proposed program did not comport with least restrictive environment principles embodied in the IDEA and case law interpretations, although they also raised claims with respect to the District's evaluation and its impact on the proposed program, as well as implementation of the pendent IEP. The District countered that its proposed special education program that included services outside of the regular education classroom for a portion of the school day was appropriate for

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

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

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61.

⁴ 42 U.S.C. §§ 12101-12213.

Student. The case proceeded to a due process hearing⁵ at which the parties presented evidence in support of their respective positions, and the record closed upon receipt of written closing statements. Following review of the record and for all of the reasons set forth below, the Parents' claims must be granted in part and denied in part.

ISSUES⁶

1. Whether the District's 2018 evaluation of Student met all IDEA standards of an appropriate evaluation;
2. Whether the spring 2018 IEP was substantively appropriate for Student;
3. Whether the spring 2018 IEP was in compliance with least restrictive environment requirements;
4. If the District's 2018 IEP was inappropriate in any respect, whether the District should be ordered to revise the IEP, including a directive to reflect services in the regular education environment with necessary supplementary aids and services to the maximum extent possible;
5. Whether the District's implementation of special education programming during the 2018-19 school year denied Student a free, appropriate public education; and
6. If Student has been denied a free, appropriate public education by the District, whether Student should be awarded compensatory education?

FINDINGS OF FACT

1. Student is a kindergarten-aged child who resides in the District. (N.T. 44-45.)

⁵ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. References to Parents in the plural will be made where it appears that one was acting on behalf of both.

⁶ The issues have been re-ordered for ease of discussion. In addition, one issue set forth during opening statements was not heard based a written ruling following a motion and response by the parties. (HO-2.)

2. Student is eligible for special education and is a protected handicapped student for purposes of the IDEA and Section 504 and the implementing federal and state regulations. (N.T. 44.)
3. Student has historically demonstrated, and currently exhibits, significant expressive language deficits including with articulation, as well as receptive language needs. (N.T. 262-65, 565-66, 898, 900.)
4. Student has historically looked toward and benefitted from modeling of expectations, including by peers, and continues to do so. (N.T. 162-63, 176, 220, 373-74, 790, 965, 1040; S-24 at 18; S-45 at 18; S-57 at 5-6.)

EARLY EDUCATION-RELATED HISTORY

5. Student began attending daycare full time from approximately eleven months of age before transitioning to a typical preschool program in the morning and an aftercare program in the afternoon, with some level of personal care assistant (PCA) support. During the pre-kindergarten year (2017-18), Student continued the morning and aftercare programs with a full-time PCA. (N.T. 254-57, 313-16, 321-22, 1072-73; S-3; S-7.)
6. Student was provided early intervention services through the local Intermediate Unit (IU) beginning as an infant and toddler by reason of developmental delay. During preschool, Student had related services and specialized instruction that were a combination of pull-out and push-in services, as well as behavior specialist consultation. (N.T. 312-13, 324; S-1; S-3; S-5; S-7.)
7. Student had outside behavioral health services during the aftercare portion of the day during preschool, through Therapeutic Staff Support and a Behavioral Specialist Consultant. Student's DSM-5⁷ diagnoses included Attention Deficit Hyperactivity Disorder, Global Developmental Delay, and a Language Disorder. Those services targeted coping and expressive language skills in place of behaviors (elopement or refusal/noncompliance) and social/interactive play skills with peers. (N.T. 259, 270-71, 316; S-4; S-13; S-17.)
8. Student's Individualized Family Support Plan (IFSP) / Individualized Education Program (IEP)⁸ developed in January 2016 addressed pre-academic, gross motor, fine motor, speech/language (receptive and expressive language), and independent play skills, adaptive skills, and behavioral needs. Speech/language goals included manding (requesting) and tacting (labeling). (S-3.)
9. Student had privately obtained speech/language therapy beginning in approximately the spring of 2017. (S-2; S-20 at 10.)

⁷ Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (2013.)

⁸ The IDEA provides two separate schemes for infant/toddler and older children. The former are provided with IFSPs, while children ages three and older are provided with IEPs. 20 U.S.C. §§ 1401(3), 1432(5)(A); 34 C.F.R. §§ 300.8, 300.22, 303.20, 303.21.

2017-18 SCHOOL YEAR: PRESCHOOL

10. Student's most recent IEP was last reviewed and revised in November 2017. Specific needs were identified as decreasing elopement and refusal behaviors, increasing initiation of and participation in play with peers, participating in group activities, and communication with peers; however, other needs across domains were also noted in that IEP. (S-7.)
11. The November 2017 IEP contained outcomes/goals addressing fine motor skills; gross motor skills; speech/language skills (expressive and receptive language including functional communication); pre-academic skills (identifying letters, colors, shapes, and numbers); independent play skills; and behavior (elopement and refusal). (S-7.)
12. In preschool, Student exhibited behaviors considered to be work refusals when demands were placed on Student: yelling, saying "no," pushing materials away, or attempting to leave the area. Student had significant communication needs during that time period. (N.T. 601-02, 1086-90; S-5.)
13. In preschool, Student exhibited difficulty maintaining attention to tasks. (N.T. 610-11.)
14. As of July 2018, Student was reportedly demonstrating the following pre-academic/academic skills: identifying the letters in Student's name and labeling most letters of the alphabet. Student continued to need to work on matching sounds with letters; labeling colors consistently; identifying shapes; identifying numbers; and rote counting. (S-7.)
15. As of July 2018, Student was reportedly making progress toward goals for fine motor skills; gross motor skills; and reciprocal play skills. Student continued to need to work on many of the IEP goals. (S-7.)

REGISTRATION IN DISTRICT

16. In November 2017, the Parents indicated an intent to register Student for entry into kindergarten in the fall of 2018. They formally registered Student with the District in January 2018. (S-8; S-10.)
17. A transition meeting was held in January 2018, when the District was provided records from the IU. (N.T. 91-95, 261; S-11.)

DISTRICT REEVALUATION: SPRING 2018

18. The District conducted a reevaluation in the spring of 2018 with the consent of the Parents. The proposed psychoeducational assessment was to include cognitive ability, academic achievement, and social/emotional functioning through rating scales; a functional behavioral assessment (FBA); and occupational, physical, and speech/language therapy-related evaluations. (N.T. 591; S-14; S-20.)

19. Parent input into the 2018 Reevaluation Report (RR) noted strengths to include motivation, creative play, and better developed receptive language skills compared to expressive language. They also identified needs as behavioral support for attending to tasks and maintaining focus, communication skills, and academic skills. The Parents indicated an overall expectation that Student would do well in the regular education classroom in the neighborhood elementary school. (S-14 at 4; S-30 at 3.)
20. The 2018 RR incorporated results of a previous evaluation by the IU that, among other things, obtained a cognitive ability score (Battelle Developmental Inventory – Second Edition) for Student that was in the range for a mild developmental delay. (S-30 at 2-3.)
21. Teacher input into the 2018 RR reflected some progress on attending to activities, following directions and rules, interactive play skills, and understanding emotions; however, inattention and elopement behaviors remained a concern. (S-20 at 5.)
22. The District school psychologist conducted an observation of Student participating in a variety of activities at the preschool for the 2018 RR. (N.T. 598-99; S-20 at 4.)
23. The District school psychologist attempted to conduct cognitive and achievement assessment of Student for the 2018 RR that did not yield any accurate results “due to the impact of [Student’s] behavior and/or understanding of the directions of the test items” (S-20 at 4). The District school psychologist concluded that any score obtained would have been an underrepresentation of Student’s ability and skills. (N.T. 606-09; S-20 at 4, 18.)
24. The 2018 RR summarized Student’s pre-academic skills based on the most recent IEP, with Student reportedly demonstrating an ability to match basic colors and shapes, and emerging skills in labeling colors. It also noted that Student’s progress on the IEP goals could be ascertained by reviewing those documents in Student’s special education file. (S-20 at 3-5.)
25. The Adaptive Behavior Assessment System – Third Edition (ABAS-2) was utilized for the 2018 RR using rating scales from the preschool teacher and the Parents. Student’s scores from the teacher were generally in the low to below average range, although relative strengths were noted with social and school living skills. (S-20 at 14-15.)
26. The Parents’ ABAS-2 ratings received after the RR issued in April 2018 reflected low to average adaptive behavior skills with relative strengths in the areas of leisure, social, and self-care skills, and overall low range skills. These results were not considered by the District school psychologist to be significantly different from those of the teacher on that measure. (N.T. 613-14; S-35.)
27. Occupational therapy assessment for the 2018 RR reflected needs in the areas of fine motor, visual motor, and sensory motor skills. Student’s performance for this portion of the reevaluation was impacted by attention, maintaining focus, and behaviors. Student was determined to be eligible for occupational therapy services. (S-20 at 11-12.)

28. Physical therapy assessment for the 2018 RR reflected a continued need for those services to address basic gross motor functioning and skills. (S-20 at 13-14.)
29. Speech/language assessment for the 2018 RR could not be completed because Student exhibited a lack of attention and refused to comply with testing demands. For that same reason, baselines for the IEP goals in that area could also not be determined. However, the speech/language pathologist determined that Student continued to be eligible for speech/language services for receptive and expressive language in addition to speech production. (N.T. 558-62, 567-68; S-20 at 10-11.)
30. Student's social/emotional/behavioral functioning was assessed using the Behavior Assessment System for Children – Third Edition (BASC-3) with the teacher completing a set of rating scales. The teacher ratings reflected clinically significant concerns with hyperactivity, depression, atypicality, and attention problems; and at-risk concerns with aggression, adaptability, and functional communication. (S-20 at 15-18.)
31. The Parent BASC-3 ratings received after the 2018 RR issued in April 2018 reflected clinically significant concerns with hyperactivity and attention problems; and at-risk concerns with aggression, atypicality, social skills, and functional communication. These results were not considered by the District school psychologist to be significantly different from those of the teacher on that measure. (N.T. 615-16; S-35.)
32. A District Board Certified Behavior Analyst (BCBA) conducted an FBA of Student in the preschool as part of Student's transition to school-age programming. The targeted behaviors for the FBA were non-compliance with demands and elopement from the area, which were described as low-intensity but not typical in a school environment. The hypothesized function of the non-compliance behaviors was to escape or delay a demand; the hypothesized function of the elopement behaviors was to gain access to preferred items or activities. (N.T. 743, 759-60; S-30 at 7-10.)
33. The 2018 RR concluded that Student was eligible for special education under the classification of Other Health Impairment. Needs were identified for gross motor skills, expressive and receptive language and speech production, focus/attention, coping skills, and following directions/compliance. Recommendations to the IEP team included inclusion with typical peers and the general education curriculum as much as possible; consideration of an assistive technology assessment; and a number of items of specially designed instruction such as a highly structured environment, multisensory instruction, previewing and re-teaching of concepts, and a behavior plan. (S-20 at 19-20.)

PROPOSED IEP FOR THE 2018-19 SCHOOL YEAR

34. The proposed IEP incorporated results of the 2018 RR including its identified needs. Annual goals addressed fine and visual motor skills; gross motor skills; self-care/adaptive behavior skills; speech production; tacting; following directions; noncompliance and elopement behaviors; and identifying colors. Program modifications and items of specially designed instruction provided for repeated/rephrased directions; echoic practice; a Positive Behavior Support Plan (PBSP); multisensory speech/language therapy; adapted

physical education modified as needed; physical supports for seating and transportation; and adult supervision during transitions and unstructured activities. (S-24.)

35. Related services in the proposed IEP were for occupational, physical, and speech/language therapy in addition to adaptive physical education and special transportation. (S-24 at 29.)
36. The BCBA developed a PBSP based on the FBA, and it was set forth in the proposed IEP. The PBSP operationally defined the targeted behaviors (non-compliance and eloping), and identified a variety of interventions including close proximity to allow for frequent reinforcement and necessary prompting as well as safety, and instruction in social skills. Consequences for engaging in the targeted and alternative behaviors were also specified. (N.T. 762; S-24 at 13-16.)
37. The PBSP does not have baselines because Student had to be observed in the actual District school environment in order for that data to be collected. (N.T. 766, 805-06, 831.)
38. The proposed IEP provided for a supplemental level of autistic support, with Student participating in the regular education classroom for morning routine, science and social studies classes, a portion of mathematics and language arts instruction, and encore classes.⁹ Some related services would be provided through a pull-out model. (N.T. 111-13; S-24 at 31.)
39. The proposed IEP provided that Student would use an alternate curriculum for language arts and mathematics and would not participate in the general education curriculum for that core instruction. (N.T. 112-13; S-24 at 31.)
40. The proposed IEP specified that the services to be provided at an elementary school in the District that is not Student's neighborhood school. (S-24 at 28-32.)
41. A meeting convened in May 2018 to review the 2018 RR and develop an IEP for Student. (N.T. 47, 98-99, 101-02, 278, 327-28; S-22; S-23.)
42. At the May 2018 meeting, the Parents expressed an interest in Student attending the neighborhood elementary school. (N.T. 102-03, 572-73, 771; S-45 at 7.)
43. The IEP team including the Parents agreed that Student's academic skills would be assessed after entry into kindergarten. (N.T. 67-68, 278, 281-82, 333-34, 338; S-45 at 7-8.)
44. The IEP team discussed consideration of an assistive technology device for communication after Student began attending school in the District. (N.T. 569-70.)

⁹ Student would also participate in adaptive encore classes, which provide opportunities for students who may lack foundational skills to have an introduction to activities that will be presented in the encore classes, with pre-teaching of skills if needed (N.T. 104-05).

45. Though not in any structured way, the IEP team did hold some discussion on supplementary aids and services that could be provided to enable Student to access the curriculum in a regular education classroom.¹⁰ However, at the meeting, a District professional “explained a typical instructional day in the kindergarten classroom and provided times that the team may want to consider for inclusion” (S-24 at 17). The IEP itself does not provide specific responses to the “Questions for IEP Team” on educational placement. (N.T. 84-88, 106-07, 113-14, 297, 772-73, 807-11; S-24.)
46. The Parents toured the proposed autistic support classroom soon after the May 2018 meeting. (N.T. 123-25, 361-62, 367, 369, 382-83.)
47. The Parents did not approve the Notice of Recommended Educational Placement (NOREP) issued in May 2018 and requested an informal meeting. (S-25; S-45 at 3-4.)
48. An informal meeting was held in June 2018. The parties discussed the IEP further including the regular education and proposed autistic support components reflected in the IEP and NOREP, as well as the location of services. The parties did not reach a consensus. (N.T. 126-27, 299-300.)
49. The District’s proposal was that Student would be in the proposed autistic support classroom for approximately 2.5 hours each day. (N.T. 133, 192.)

THE PROPOSED AUTISTIC SUPPORT CLASS

50. The proposed autistic support classroom is heavily focused on developing language. It is based on principles of Applied Behavior Analysis and is evidence-based. (N.T. 454-56, 823.)
51. The autistic support classroom has six staff members in addition to the special education teacher. (N.T. 406-07.)
52. The autistic support classroom has instructional areas for each individual student that contains materials and reinforcers for that student. (N.T. 405-06.)
53. The autistic support classroom has a number of reinforcers that Student prefers that are not available in the kindergarten classroom, primarily because they would be distracting to other students. (N.T. 411-13, 449-52, 478-79, 519-20, 527-28, 530, 813-16, 831-32.)
54. The District typically administers the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) to students who have deficits in functional communication and language, even if the student is not receiving autistic support services. (N.T. 62-63.)
55. The District members of Student’s IEP team concluded that Student needed the proposed autistic support for a portion of the school day because of Student’s language deficits and

¹⁰ One of the Parents testified that there was discussion based on Student’s needs, although she did not recall certain specific examples of supplementary aids and services at the meeting (N.T. 297-98).

behaviors. Student would be provided intensive, individualized, explicit direct instruction by staff with experience and training in language and communication skill development, with a low student-to-teacher ratio, consistency of programming, and opportunities for learning and practicing skills in contrived situations that may not be present in the regular education setting. (N.T. 68-69, 108, 112-13, 114, 118-19, 571-72, 768-74, 811-12.)

2018-19 SCHOOL YEAR: KINDERGARTEN

56. The parties agreed that the 2017 IEP was the pendent program for Student at the start of the 2018-19 school year. (N.T. 239-40.)
57. Student's kindergarten teacher sent a survey to parents before the start of the 2018-19 school year. Student's Parents completed the survey, relating some of Student's strengths, interests, and needs, as well as their expectations for the kindergarten school year. They also provided some strategies that they have tried that were and were not successful. For example, as is particularly relevant to this matter, they shared that Student "strongly prefers to do things independently" after a model, and disliked help such as a watchful eye of an adult before it was needed (S-45 at 18). (N.T. 185; S-45 at 17-19.)
58. The District's kindergarten program is a full day. When kindergarten students begin the school year, the children are provided breaks throughout the day with a gradual transition to a full day routine of school programming. (N.T. 49-51.)
59. There are approximately twenty three students in Student's kindergarten classroom with one teacher. Some children have aides in the classroom and related service providers also provide services there. (N.T. 191-92.)
60. Student's attendance at the start of the 2018-19 school year was inconsistent, with Student missing a significant number of days due to illnesses and similar reasons. (N.T. 48, 131-32, 181, 190-91, 334-35, 404, 413-14, 644, 646; S-49 at 1; S-53 at 1; S-54.)
61. The District implemented the 2017 IEP for Student during the 2018-19 school year. Student was provided with occupational, physical, and speech/language therapy and weekly thirty-minute periods of specialized instruction that were either pull-out or through push-in support.¹¹ (N.T. 132-33, 169, 193-94, 408-15, 422-23, 427-32, 650-51, 656-57, 697, 736-38, 794-95, 1061.)
62. Student has participated in centers in the kindergarten classroom, sometimes with push-in by the special education teacher. During center time, which occurs twice each day, the students practice skills previously taught working independently or in small groups. (N.T. 416-19, 501-02, 678-79, 685-86.)

¹¹ The Parents expressly do not challenge the combination approach with respect to related services. (N.T. 663-65, 1064-65.)

63. Student's work has been modified in the kindergarten classroom to address the pendent IEP goals and to match Student's skills and needs. Examples of modifications include Student identifying numbers while the other children are working together to solve a mathematics word problem, and identifying letters and sounds while the other children are reading words or sentences. (N.T. 419-20, 501, 508, 656-57, 675-76, 686, 725.)
64. Student has a full time one-on-one aide in the kindergarten classroom. (N.T. 117, 688-89, 692.)
65. Student uses adaptive seating in the classroom. (N.T. 210, 694.)
66. The Parents communicate with the kindergarten teacher at the start of each week about what Student did over the weekend so that the teacher or aide can prompt Student to talk about those activities during circle time. (N.T. 345-46, 439-40, 716-17.)
67. The special education teacher has worked with Student a few times in the proposed autistic support classroom in order to pair with Student, a process involving the development and maintenance of rapport and a positive relationship. (N.T. 409-14.)
68. The special education teacher uses errorless teaching with Student, where correct responses are reinforced. (N.T. 414-15.)
69. The District holds inclusion team meetings weekly for children in kindergarten, at which Student's program is among those discussed. The team members are the kindergarten teacher, special education teacher, a BCBA, related services providers, and sometimes others, who together identify various accommodations and strategies to use to help students who need additional support in the kindergarten classroom. (N.T. 135, 137-38, 145-49, 159-62, 207-08, 420, 443-48, 460, 493-95, 692-93, 703, 720-21, 743, 1054-56; S-52; S-59.)
70. Specific "accommodations" identified for Student (S-55 at 1) by the inclusion team included modeling, repetition of directions, a token economy, prompt hierarchies, pairing, preference checks for reinforcers, variable reinforcement, antecedent strategies to reduce behaviors, errorless teaching, supportive seating, modifications for physical education, and phonemic cues. (S-55.)
71. Student's kindergarten teacher and the aide have utilized a variety of strategies recommended by the District BCBA as part of her consultative role, in order to promote positive behavior. (N.T. 690-92, 776-79, 795, 803.)
72. At the start of the 2018-19 school year when Student was able to attend school, Student engaged in crying, throwing objects in the classroom, task refusal, and elopement behaviors to escape demands and activities (both within and outside of the classroom). Student required a significant degree of prompting and reinforcement. (N.T. 136, 167, 179-80, 186, 188, 196, 198, 208-09, 219-21, 223, 227-28.)

73. Through the middle of January 2019, Student at times resisted interacting with peers in the kindergarten classroom and in unstructured settings. (N.T. 423-27, 431, 487, 503-04, 683-84.)
74. Through the middle of January 2019, Student exhibited difficulty following directions without prompting. (N.T. 432-33, 676.)
75. Through the middle of January 2019, Student has had difficulty with attending to large and small group instruction even with prompting. (N.T. 677-79, 709-10.)
76. Through the middle of January 2019, Student continued to exhibit elopement to other areas of the classroom as well as refusal to perform tasks by loud crying, yelling, and engaging in physical aggression, all requiring significant prompting. These behaviors occurred more frequently during large group instruction. However, Student's crying (which was particularly concerning and distracting to other children) was not nearly as extensive in January 2019 as it had been at the start of the school year. (N.T. 196-97, 219, 435-38, 676, 679-80, 682-83, 687-88, 694-95, 754-55, 777-79; S-58.)
77. Student has eloped toward or refused to leave the autistic support classroom at times. (N.T. 440-41, 817.)
78. The District sent out Permission to Evaluate forms to the Parents several times in the fall of 2018 to conduct cognitive and academic achievement assessments, but consent was not provided. (N.T. 57, 60, 138, 337-38, 395; S-42.)

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 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 will determine 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, providing his or her recollections and impressions to the best of his or her ability based on his or her perspective. With the exception of the parties' expert witnesses, discussed next, none of the witness testimony was accorded significantly more or less weight.

Each party presented a witness who was qualified as an expert, observed Student at school for a portion of a single school day, and gave an opinion on the program proposed by the District with recommendations. The Parents' expert, who holds undergraduate and graduate degrees in special education and a doctoral degree in educational leadership, has provided educational consulting services for a number of years and has conducted research in Student's specific type of disability (P-10). However, most of her recommendations were based on research on students with Student's form of disability rather than specific to Student. The District's expert, who holds a doctoral degree in psychology, has significant experience in evaluating children as a developmental neuropsychologist and determining education-related needs (S-44). The opinion of the Parents' expert was accorded slightly more weight than that of the District's expert on the narrow question of whether Student needs the type of intensive autistic support proposed by the District, particularly since the District's expert stopped short of

recommending that proposal over more generalized individual special education instruction outside of the regular education classroom. However, neither expert witness was particularly compelling in terms of evaluating the District's proposed program for Student based on Student's individual strengths and needs in light of the applicable legal principles set forth below, although both provided insightful recommendations that the IEP team should consider when it next convenes.

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' comprehensive yet succinct closing statements.

GENERAL IDEA PRINCIPLES: SUBSTANTIVE FAPE

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

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). Recently, the U.S. Supreme Court considered anew the application of the *Rowley* standard, observing 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).

The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA[.] * * * A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child's circumstances should come as no surprise. 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 explained that, "an educational program must be appropriately ambitious in light of [the child's] circumstances... [and] every child should have the chance to meet challenging objectives." *Id.*, 137 S. Ct. at 1000, 197 L.Ed.2d at 351. This is especially critical where the child is not "fully integrated into the regular classroom." *Id.* 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. This standard is not inconsistent with the above interpretations of *Rowley* by the Third Circuit.

As *Andrew, Rowley*, and the IDEA make exceedingly clear, the IEP must be responsive to the child's 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). In other words, 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 "loving parents" might desire. *Andrew F., supra; Ridley, supra; see also Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Critically, "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). Finally, a child's educational placement must be determined by the IEP team based upon the child's IEP, as well as other relevant factors. 34 C.F.R. § 300.116.

GENERAL IDEA PRINCIPLES: PROCEDURAL FAPE

From a procedural standpoint, the family plays "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). Indeed, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

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 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.

LEAST RESTRICTIVE ENVIRONMENT

Also crucial is the IDEA obligation for eligible students to be educated in the “least restrictive environment” (LRE) which permits them to derive meaningful educational benefit. 20

U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000).

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

20 USCS § 1412(a)(5)(A). The federal Office of Special Education Programs has explained this principle as requiring “first consideration” of the regular education classroom with supplementary aids and services. *Letter to Cohen*, 25 IDELR 516 (OSEP August 6, 1996).

In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993), the Third Circuit adopted a two-part test for determining whether a student has been placed into the least restrictive environment as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, be educated successfully within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the child has been included with non-exceptional children to the maximum extent possible. *Id.* In evaluating the first prong, the efforts the LEA has made to include the child (which must be more than “token gestures” and include modification of the regular education program), a comparison of the benefits to the child of placement in a regular classroom versus a separate special education setting, and “possible negative effects” of inclusion on the other students, must be considered. *Id.* at 1215-18. As an essential aspect of the analysis of the comparison of educational benefit, the mere fact that a child might progress better academically in a segregated setting than in an inclusive setting is not determinative, since one must evaluate the unique

benefits of the typical environment for the individual child, such as social skills and peer interactions. *Girty v. School District of Valley Grove*, 163 F.Supp.2d 527, 536 (W.D. Pa. 2001), *aff'd mem.*, 60 Fed. Appx. 889 (3d Cir. 2002) (quoting *Oberti* at 1217). The U.S. Supreme Court's *Endrew* decision further recognized that educational benefit for a child with a disability is wholly dependent on the individual child, who should be challenged by his or her educational program. *Endrew, supra*, 138 S.Ct. at 1000, 197 L.Ed.2d at 351. Furthermore, the reflection on potential negative consequences of inclusion such as disruptions must also consider that an appropriate IEP with supplementary aids and services and other necessary supports can diminish or even altogether prevent their impact on the classroom. *Oberti* at 1217. With respect to the second *Oberti* prong, it is helpful to keep in mind that the “ ‘regular educational environment’ encompasses regular classrooms and other settings in schools such as lunchrooms and playgrounds in which children without disabilities participate.” 71 Fed. Reg. 156 at 46,585 (2006).

Importantly, LRE principles “do not contemplate an all-or-nothing educational system” of regular education versus special education. *Oberti, supra*, 995 F.2d at 1218 (quoting *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1050 (5th Cir. 1989)). All LEAs are required to make available a “continuum of alternative placements” to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa. Code § 14.145. However, as set forth above the least restrictive environment mandate does not contemplate a mere comparison of lesser and more restrictive settings; on the contrary, it begins with the premise that a child can be educated in the regular education classroom with appropriate supplementary aids and services. Furthermore, FAPE and LRE are related, but separate, concepts; indeed, an LEA can be in noncompliance with the LRE mandate but still provide

FAPE. *A.G. v. Wissahickon School District*, 374 Fed. App'x 330 (3d Cir. 2010) (citing *T.R.*, *supra*, at 575, 578); *see also H.L. v. Downingtown Area School District*, 624 Fed. App'x 64 (3d Cir. 2015).

EVALUATION AND CHILD FIND PRINCIPLES

The IDEA and state and federal regulations obligate LEAs to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. The statute itself sets forth two purposes of the required 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).

The IDEA further defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). Thus, merely having a disability does not automatically mean that a child is eligible, since it is a two-part test. With respect to the second prong of IDEA eligibility, “special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). More specifically,

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child’s disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

In conducting an evaluation or reevaluation, the law further 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). Upon

completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1).

THE PARENTS’ CLAIMS

The Parents presented six discrete issues that are set forth above. They shall be addressed in that order; however, some of the issues will be addressed together, and disposition of the fifth renders the final claim moot.

DISTRICT EVALUATION

The first issue presented is whether the District’s evaluation was appropriate under the applicable law. The Parents assert that it was not sufficiently comprehensive, particularly with respect to failing to identify Student’s pre-academic and academic abilities, and further that such an omission necessarily led to an inappropriate IEP.

The District’s 2018 RR did utilize a variety of assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student. Specifically, the District obtained and reported input provided from the Parents and the preschool; included an observation by the District school psychologist; incorporated a summary of results of previous evaluations; and utilized rating scales to evaluate, in both the home and school settings, Student’s social/emotional/behavioral and adaptive functioning. An FBA was conducted as part of the process. Occupational therapy, physical therapy, and speech/language therapy strengths and needs were fully examined and, indeed, were not contested by the Parents at the hearing. Nevertheless, even with the unsuccessful administration of cognitive and achievement testing, the absence of any specific information on Student’s then-current academic skills is of serious concern, particularly since there is evidence in the record that Student was

demonstrating many such skills in the preschool. Exploration of those abilities would have prepared the IEP team to develop academic-related annual goals and specially designed instruction based on Student's unique strengths and needs by the time of the May 2018 IEP meeting.¹² Since one of the purposes of an evaluation is to gather sufficient data to determine the child's educational needs, such a glaring omission cannot be overlooked, even with the IEP team's apparent agreement that academic skill assessments would take place in the fall.

The usual remedy for an evaluation that does not meet the requisite criteria is an Independent Educational Evaluation (IEE). *See generally* 34 C.F.R. § 300.502. In addition, and notwithstanding the parties' agreement to defer cognitive and achievement assessments to the fall of 2018 and the lack of any indication in the record that the District is unable or unwilling to do so competently, a hearing officer also has the authority to order an IEE at public expense as part of a due process hearing, 34 C.F.R. § 300.502(d). This hearing officer concludes that this remedy of a publicly funded independent evaluation will not only inform the academic skill-related aspects of Student's IEP, but also serve the crucial function of "guarantee[ing] meaningful participation [of the Parents] throughout the development of the IEP" and the placement decision. *Phillip C. v. Jefferson County Board of Education*, 701 F.3d 691, 698 (11th Cir. 2012); *see also Schaffer, supra*, at 61 (noting that an IEE can afford parents "a realistic opportunity to access the necessary evidence" and information relating to an appropriate program and placement for their child). This remedy is intended to provide objective and unbiased expertise for the parties to consider in making a determination of how to meet all of Student's

¹² Although there was some anecdotal input by the Parents regarding some pre-academic skills that Student reportedly exhibited at home, such as that Student "knew" the alphabet and colors (S-18 at 17-19), that type of subjective input, while certainly valuable, is not sufficiently objective or specific to inform a summary of present levels in the IEP or development of measureable goals.

needs appropriately,¹³ as well as to provide continued forging of the relationship between them that is especially crucial given Student's very young age with a long educational career ahead. Finally on this claim, there being no disagreement with the majority of the 2018 RR, the IEE shall be limited to a psychoeducational evaluation conducted by a qualified independent psychologist. That evaluation shall include assessments of Student's cognitive ability, academic achievement, and social/emotional functioning in the elementary school environment, as well as any other assessments determined by the independent evaluator to be necessary.

THE PROPOSED IEP

The results of the independent psychoeducational evaluation will provide the team with the type of ability and achievement data that will be necessary to develop a new IEP that is responsive to all of Student's needs, including pre-academic and academic skills. The absence of such information necessarily renders the proposed IEP substantively inappropriate, such that the second issue set forth above favors the Parents. The related third issue is based on the *Oberti* analysis: whether the District's proposed IEP is in compliance with LRE principles. Here, despite the clearly genuine opinions of the various experienced District professionals who testified to the benefits of the proposed program of autistic support, the answer to that LRE question must unquestionably be answered in the negative.

As noted, the first prong of the *Oberti* test requires a determination of whether the child can, with supplementary aids and services, be educated successfully within the regular education setting. Accordingly, as *Oberti* instructs, this hearing officer must now engage in consideration of (1) the efforts the District made to include the Student, including modification of the regular education program; (2) a comparison of the benefits to Student in a regular kindergarten

¹³ Neither of the parties' expert witnesses actually assessed Student in any respect.

classroom versus a separate special education setting; and (3) any possible negative effects on the other students. *Oberti, supra*, 995 F.2d at 1215-17.

With respect to the first of these factors, there was evidence presented that the District has attempted in a variety of ways during the 2018-19 school year to modify the general education curriculum for Student throughout the school day based on Student's abilities and needs (such as asking Student to identify letter sounds while other children are reading words or sentences), as contrasted with accommodations that do not amount to a change to expectations. However, the proposed program must be evaluated based on information known at the time it was offered. There is a section of the form IEP in Pennsylvania that guides the team through a discussion of the *Oberti* factors. Those questions are not answered in that section of Student's IEP. However, and while not binding, the annotated IEP available through the Pennsylvania Training and Technical Assistance Network (PaTTAN)¹⁴ provides guidance suggesting that memorialization of those discussions be inserted into the IEP section devoted to the explanations of the extent to which the student will not participate with students without disabilities in the regular education setting and in the regular education curriculum. Student's proposed IEP does not include such language, and, critically, the evidence in the record does not establish that the team had those discussions in any structured and rationale-based way that permitted the Parents to understand whether and how the team fully considered if Student could be educated successfully within the regular education classroom with supplementary aids and services. Rather, the Parents understood that the District was proposing an autistic support program for a significant portion of the school day, without a robust dialogue by the entire team on whether and how Student's inclusion in the general education classroom was possible with appropriate

¹⁴ Available at www.pattan.net/forms (last visited February 18, 2019).

supports. Thus, evidence of full consideration of this first factor as part of the foundational IDEA premise that regular education be the starting point with informed participation of the Parents in May 2018 is lacking in this record. Moreover, without adequate exploration of Student's academic strengths and needs in the 2018 reevaluation, the team clearly lacked a foundation to engage in a true discussion of whether and how Student's program of general education would require modifications and, if so, to what extent. Even if the inclusion team considers the modifications that are being made to be extensive, they are permitting Student to access the general education curriculum but at a level commensurate with Student's skills.

Next, the benefits of the typical kindergarten environment for Student (such as continued development of social skills, ongoing typical peer interactions, and the opportunities for peer modeling from which Student has historically benefitted) outweigh the availability of more individualized attention, more intensive language-based instruction, and an array of tangible ongoing reinforcements in the autistic support classroom. This conclusion is consistent with the recommendation in the 2018 RR for as much exposure to typical peers and the general education curriculum as possible. Even more critically, as explained above, whether Student may make less progress in a regular education setting over a specialized setting is not determinative. Furthermore, there are clearly some very understandable concerns that Student may not be motivated to perform in a setting outside of the autistic support classroom that does not provide those desired reinforcers, which would not serve to promote generalization of skills across environments.

Lastly, it does not appear that the team engaged in any meaningful consideration of the possible negative impact on other students in May 2018 in light of an appropriately supportive, cohesive, and coordinated special education program with supplementary aids and services and a

PBSP to address what was described as “low intensity” behavior. That Student requires behavioral support is not in dispute, and the District was monitoring and responding to those challenges as needed throughout the 2018-19 school year through the final session of the hearing. In addition, the evidence of Student’s overall performance during the 2018-19 school year is that the most disruptive behavior (crying) was reduced significantly by January 2019 after Student began to attend school regularly and become acclimated to the schedule and demands of a full day of kindergarten.¹⁵ And, there was certainly reason to anticipate during the planning for the fall of 2018 that there would be a period of transition with Student moving to a new environment of school-based programming and its demands for full-day attendance in a curriculum with academic and other rigors.

For all of these reasons, the evidence is preponderant that the District failed to adequately consider whether Student can, with supplementary aids and services, be appropriately educated in the regular classroom to satisfy the first *Oberti* prong. Despite this conclusion, the record does not similarly establish that the proposed program and placement were predetermined by the District.

The second prong of the *Oberti* test is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the child has been included with non-exceptional children to the maximum extent possible. There is no need to address this prong at this time based on the above conclusion. *See Girty, supra*, 163 F.Supp.2d at 536-37. However, there does not appear to be any dispute in the record that Student requires some level of support outside of the general education environment, so the IEP team will almost certainly need to consider all facets of the *Oberti* analysis. As the Parents point out, a resource developed by

¹⁵ There was also testimony throughout the hearing that kindergarten classrooms are not generally calm, organized environments where all children are always complying with directives.

PaTTAN together with the Pennsylvania Department of Education and its Bureau of Special Education is available to assist in that process, the Supplementary Aids and Services (SAS) Toolkit.¹⁶ The attached Order will require the parties to reconvene the IEP team and to use that toolkit to guide its discussions of Student's program and placement to ensure meaningful consideration of all of the above factors in the decision making that will follow completion of the IEE.

DISTRICT IMPLEMENTATION OF STUDENT'S PENDENT IEP

The next issue is whether the District's implementation of the pendent IEP has denied Student FAPE in any respect. There is no dispute that Student was provided specialized instruction and related services in preschool through a combination of push-in and pull-out services. The evidence is preponderant that the District has complied with its obligations to continue that same level and format of special education programming during the 2018-19 school year until these proceedings are concluded. Although the Parents specifically challenge the few occasions when Student was taken to the autistic support classroom for specialized instruction, this hearing officer cannot conclude that doing so operated to deny Student FAPE based solely on the environment to which Student was removed pursuant to the IEP, especially for the limited number of times that it occurred. Accordingly, there is no basis on which to award compensatory education.

Finally, on the issues presented, they have been fully addressed under the IDEA and there shall be no further discussion of application of Section 504 or the ADA.

¹⁶ Though apparently no longer available for easy download online, a version of the toolkit is at P-8. PaTTAN also offers the services of a facilitator for this process.

ADDITIONAL OBSERVATIONS

The process of obtaining an IEE and thereafter developing a new IEP will, of course, take a not insignificant amount of time. The parties previously agreed that the District would conduct cognitive and achievement assessments in the fall of the kindergarten year, and they may agree that it would be beneficial to do so at this time for purposes of making appropriate revisions to Student's pendent IEP, with current baselines in the elementary school, until a new IEP may be developed. In addition, the parties may also determine that a VB-MAPP assessment would yield useful information about Student's skills with Student continuing to exhibit needs to develop and practice language skills. The parties, of course, are free to agree to any assessments and changes to the pendent program while the processes set forth in the attached order may be completed.¹⁷

ORDER

AND NOW, this 20th day of February, 2019, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's 2018 RR was not appropriate to the extent that it lacked specific information related to Student's academic skills and functioning.
2. The proposed IEP and NOREP for Student for the 2018-19 school year was not appropriate for Student with respect to academic programming and the least restrictive environment mandate.
3. The 2017 IEP remains the pendent program to the extent that the parties have or may agree to revise it until a new IEP consistent with the foregoing discussion is developed and finalized as approved by a NOREP.
4. Student is awarded an independent psychoeducational evaluation at public expense to assess cognitive ability, academic achievement, and social/emotional functioning in the elementary school environment as determined by the independent evaluator.

¹⁷ See 20 U.S.C. § 1415(j).

- a) Within seven calendar days of the date of this Order, the District shall provide to the Parents a list of not less than five qualified professionals within the geographic area of the District to perform a comprehensive psychoeducational evaluation of Student.
 - b) Within five business days of receipt of the lists of qualified individuals to perform the Independent Educational Evaluation, the Parents shall notify the District of their selection.
 - c) The selected evaluator shall determine the scope of his/her psychoeducational evaluation including what assessments and observations are necessary.
 - d) The arrangements with the selected evaluator shall include a requirement that he/she shall provide a written report of his/her psychoeducational valuation within a reasonable time not to exceed sixty calendar days from the date of engagement.
5. At the discretion of the District administrators, related service professionals, and/or BCBA, updated assessments of Student in those areas that were conducted for the 2018 RR may be completed at the same time as the independent psychoeducational evaluation, to be shared with the team. In the absence of the Parents' consent for any updated evaluations, their previous agreement to those assessments conducted for the 2018 RR shall remain in effect for purposes of this Order.
 6. Following completion and receipt of all new or updated evaluation reports, and within ten business days of receipt by the District and Parents, Student's IEP team shall meet to review its results and to develop a new IEP.
 7. The IEP team shall consider all relevant information at the meeting to review the new and/or updated evaluation reports, and proceed to development of an IEP and a discussion of placement based on that IEP. The team shall utilize the SAS Toolkit available through PaTTAN to determine appropriate supplementary aids and services for Student's inclusion in the regular education environment to the maximum extent possible.
 8. There is no award of compensatory education.
 9. Nothing in this Order should be read to prevent 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
HEARING OFFICER
ODR File No. 21005-18-19/KE