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Pennsylvania Special Education Hearing Officer

Final Decision and Order

CLOSED HEARING
ODR File Number: 21033-18-19

Child's Name: E. C. **Date of Birth:** [redacted]

Parents:
[redacted]

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

Date of Decision: 02/28/2019

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, currently based on the classifications of Intellectual Disability, Autism Spectrum Disorder, and Speech/Language Impairment. In the spring of 2018, the parties met on several occasions for development of a plan for transitioning Student from preschool to school-aged programming in the fall of the 2018-19 school year, including a new Individualized Education Program (IEP). The parties did not reach an agreement on the IEP including the proposed placement.

Student's Parents thereafter filed a due process complaint against the District in the summer of 2018, asserting that the proposed program failed to present Student with a free, appropriate public education (FAPE) under the IDEA, Section 504 of the Rehabilitation Act of 1973,³ and the Americans with Disabilities Act (ADA),⁴ and the applicable federal and state regulations. The matter proceeded to a due process hearing with the parties presenting evidence in support of their respective positions. The Parents' overarching contention was that the proposal did not conform to the law with respect to the least restrictive environment. In addition, they challenged the District's evaluation of Student, other substantive aspects of the IEP, and the implementation of the pendent IEP. The District maintained that the offered special education

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.

program that contemplated services both inside and outside of the regular education classroom was appropriate for Student.

For the reasons set forth below, the claims of the Parents must be granted in part and denied in part.

ISSUES⁵

1. Whether the District's 2018 evaluations 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 student who resides in the District and attends kindergarten in one of its elementary schools pursuant to a pendency order. (N.T. 79-81; HO-1.)

⁵ The issues stated on the record by this hearing officer at N.T. 103-04 inadvertently omitted claims that were raised in the Complaint and at the start of the hearing session at which they gave their opening statements, as well as addressed by both parties in their closing statements. The issues presented are accurately stated above.

2. Student is eligible for special education under the IDEA based on a classification of Intellectual Disability, Autism Spectrum Disorder Autism, and Speech/Language Impairment. (N.T. 80; S-49.)
3. Student has been evaluated on a regular basis since infancy by a developmental pediatrician from a local hospital for children who leads a clinic serving children with Student's specific disability. (N.T. 23, 33.)
4. Student's receptive language skills are better developed than expressive language skills. Student has used augmentative communication devices and also uses some sign language. (N.T. 329-30, 346-47, 660, 675, 698.)
5. Student's tendency to elope is a concern in the community for safety reasons. (N.T. 372-73.)

EARLY EDUCATIONAL HISTORY

6. Student was evaluated in the summer of 2015 by the local Intermediate Unit (IU) with an initial Evaluation Report (ER) issued in October of that year. (S-2.)
7. At the time of the 2015 ER, the family's main concern was with Student's communication skills. (S-2.)
8. The Battelle Developmental Inventory – Second Edition was administered for the 2015 ER. That instrument reflected significant developmental delay on the cognitive section, and additional weaknesses were noted in the areas of attention, academic, and perception skills. Social/emotional development was reportedly in the mild developmental delay range with needs relating to initiation of social communication and demonstration of age-appropriate behavior. At that time, emerging imitation of others was noted. (S-2 at 10, 12.)
9. Assessment of adaptive development revealed delayed range skills (Developmental Assessment of Young Children – Second Edition), with needs to improve self-help skills and for maintaining attention to and participating in the educational environment. On the Adaptive Behavior Assessment System – Third Edition (ABAS-3) rating scales by the Parents, Student's functioning was in the extremely low range on all Composites. (S-2 at 16-17.)
10. Speech/language assessment for the 2015 ER (Preschool Language Scale – Fifth Edition) revealed weaknesses in both expressive and receptive language. Communication needs were identified as following directions, and expanding vocabulary expressively and receptively. (S-2 at 11.)
11. Assessment of occupational and physical therapy skills was also conducted for the 2015 ER, with strengths and weaknesses identified in both areas. Needs relating to occupational therapy were for improvement of visual motor and fine motor skills; gross motor skill needs were for improvement in balance and strength and improvement in control and coordination. (S-2 at 13-15.)

12. The 2015 ER concluded that Student was eligible for special education under the classification Other Health Impairment. (S-2 at 17, 21.)
13. A reevaluation report (RR) issued by the IU in the fall 2017 included input from the special education teacher, physical therapist, occupational therapist, speech/language therapist, and the Parents. (S-4.)
14. Parent concerns at the time of the 2017 RR included communication, safety awareness (elopement), and behaviors (refusals). (S-4.)
15. Autism Spectrum Rating Scales were completed by Student's preschool personal care assistant (PCA) for the 2017 RR. Those ratings and interviews with the preschool teacher and Parents confirmed a diagnosis of Autism Spectrum Disorder by Student's pediatrician. Student reportedly exhibited delays in social skills and behaviors that were characteristic of children with Autism. (S-4 at 13-14.)
16. A Functional Behavioral Assessment (FBA) was conducted for the 2017 RR. Interfering behaviors identified were for mouthing objects, elopement (leaving the group/expected area/classroom or building), and hitting others. The perceived functions of those behaviors were for automatic reinforcement (mouthing); to gain access to preferred items or activities (elopement); to escape a demand or situation (elopement and hitting); and to gain adult attention (elopement). (S-4 at 17-20.)
17. The 2017 RR determined that Student remained eligible for special education based on the Other Health Impairment classification. (S-4 at 22, 24.)
18. Identified needs at the time of the 2017 RR related to attention span, following directions, academic and perception skills, development of play skills and social interaction skills, communicating wants and needs, expansion of vocabulary, self-help skills, improved physical strength and coordination and other gross motor skills, and visual motor and fine motor skills. Student was using an augmentative communication device for expressive language. (S-4.)
19. An Individualized Education Program (IEP) was reviewed and revised in November 2017 following the 2017 RR. (S-5.)
20. Annual goals in the 2017 IEP addressed participation in adult-directed activities and non-preferred tasks, imitation of engagement in purposeful play with others, requesting (manding) for wants and needs, labeling (tacting) pictures or objects, gross motor skills, and fine motor skills. (S-5 at 16-28.)
21. Specified early intervention services in the 2017 IEP were for weekly specialized instruction; occupational, physical, and speech/language therapy; behavioral support; and a PCA. A majority but not all of the special education and related services were provided in the typical preschool environment. (S-5.)

PREPARING FOR TRANSITION IN FALL 2018

22. The Parents signed a form intending to register Student with the District in January 2018. A meeting convened to plan for Student's transition from preschool to kindergarten programming in the District. (N.T. 352-53; S-2 at 30; S-6.)
23. The Parents registered Student with the District and submitted the required information to do so in January 2018. (S-8.)
24. The developmental pediatrician made recommendations in April 2018 that Student attend a developmental kindergarten program followed by a second year of kindergarten. She also recommended continued Applied Behavior Analysis (ABA) interventions. (N.T. 28-30, 40-41, 63; S-19.)
25. The developmental pediatrician made a second recommendation in June 2018 that Student attend a typical kindergarten program for the 2018-19 school year. Specifically, the recommendation was for participation in the regular education kindergarten setting for a majority of the school day, with some time outside of that classroom for special education and related services. The physician concluded that ABA services were appropriate for Student provided across settings, and also recommended that the Verbal Behavior Milestones Assessment for Placement and Programming (VB-MAPP) be used for educational purposes. (N.T. 29-30, 41-42, 44-45, 52-53, 57-59, 66, 67; S-26.)
26. Student has been and is provided outside behavioral health services including a Board Certified Behavior Analyst (BCBA) and a Registered Behavior Technician. The VB-MAPP was administered by those service providers. (N.T. 108, 111-12.)
27. Student's private BCBA has continued to update Student's VB-MAPP,⁶ and has recommended that Student continue to be provided with intensive ABA-based services in addition to the opportunity to participate with typical peers at school. (N.T. 123, 133, 155, 157-58, 175.)

2017-18 SCHOOL YEAR

28. Student attended a preschool program two full days a week beginning at age three. During the 2017-18 school year, the peers at the preschool were generally a year or two younger than Student (the classes were grouped in age ranges). (N.T. 323, 327-29, 335, 364-65, 369.)
29. Student was provided early intervention services at the preschool through the local IU. Those services included individual specialized instruction for thirty minutes each week as well as occupational, physical, and speech/language therapy. The second half of the day was less structured, and Student had time for a nap in between. (N.T. 364-66.)
30. In preschool, Student was provided the outside behavioral health services both in the school and home environments. The hours at school were in the afternoon after early

⁶ This version of the VB-MAPP was not introduced at the hearing.

intervention services had concluded and the PCA was no longer provided. (N.T. 111-14, 133-35, 367.)

31. In the home portion of the program, which is continuing, Student has been working on pre-academic, functional play, and communication skills similar to those that the children were doing in the preschool. Some of those skills were ABA-based skills assessed by the VB-MAPP in both intensive teaching sessions and the natural environment. (N.T. 121-23, 144-45, 151-53, 154-55, 370.)
32. In the preschool portion of the program, Student worked on functional play skills and social/peer interaction skills, and also participated in intensive teaching that included ABA-based skills assessed by the VB-MAPP. Behaviors targeted by the BCBA and technician were task refusal and elopement. (N.T. 137-42.)
33. In preschool, Student used a visual schedule and had an augmentative communication device. (N.T. 115-16.)

SPRING 2018 REEVALUATION

34. The District conducted a reevaluation of Student with the Parents' consent in the spring of 2018. The proposed evaluation was to include psychoeducational assessments (cognitive functioning, academic achievement, and social/emotional behavioral functioning through ratings scales); a new FBA; and occupational, physical, and speech/language therapy-related assessments. (S-10; S-17.)
35. The resulting spring 2018 RR summarized results of previous evaluations by the IU and Student's private providers including the developmental pediatrician. (S-17 at 2-3.)
36. Input from the most recent IEP was incorporated into the spring 2018 RR, including that from the special education teacher that Student (in November 2017) was demonstrating the ability to label basic colors and some animals, was demonstrating the ability to match unspecified objects and shapes, and was beginning to identify random letters of the alphabet. However, Student required some level of prompting in order to "complete learning activities." (S-17 at 5 (*see* S-5.))
37. The District school psychologist observed Student in several settings at the preschool for the spring 2018 RR. (N.T. 499; S-17 at 15-16.)
38. The Parents provided input into the spring 2018 RR that identified several strengths for Student as well as needs with respect to safety (elopement) and activities of daily living. (N.T. 500; S-10 at 4; S-17 at 2.)
39. Cognitive and achievement testing were attempted but could not be completed for the spring 2018 RR because Student was not able to provide responses that could be scored. The school psychologist determined that continuing administration would not yield results that were representative of Student's functioning. (N.T. 501-02, 507-08).

40. An FBA was conducted for the spring 2018 RR identifying three targeted behaviors: elopement, task refusal, and hitting others. Student's behaviors were operationally defined and were described as low intensity but not expected in a school setting; they were more likely to occur with difficult or non-preferred tasks and activities or removal of a preferred item. The hypothesized functions of the identified behaviors was to escape demands (task refusal and elopement); gain access to preferred activities (elopement); and automatic reinforcement (hitting others). (S-17 at 10.)
41. The District conducted an occupational therapy evaluation at the preschool for the spring 2018 RR. The occupational therapist observed Student and also performed testing. The occupational therapist recommended continuation of those related services to address fine motor, visual motor, and self-help skill deficits. (N.T. 389, 393, 395-96; S-17 at 11-12.)
42. The District conducted physical therapy assessment for the spring 2018 RR. Those related services were recommended to address gross motor skills and core strength. (S-17 at 14-15.)
43. The District conducted informal speech/language assessment for the spring 2018 RR. The speech/language recommended continuation of that support to address receptive and expressive language deficits. (N.T. 653-54; S-17 at 12-13.)
44. Rating scales from the Parents and preschool teacher were returned after the spring 2018 RR was completed. (N.T. 497; S-17 at 15-16; S-49 at 8.)
45. The spring 2018 RR concluded that Student remained eligible for special education under the classifications of Autism Spectrum Disorder, Other Health Impairment, and Speech/Language Impairment. Although an Intellectual Disability was also suggested by previous evaluations, the District determined that more current assessments of cognitive and adaptive functioning were necessary. (S-17 at 17.)
46. Needs identified in the spring 2018 RR were to improve fine motor, self-help, gross motor, pre-academic, expressive and receptive language, and social skills, in addition to improving attention and focus and following directions. Strengths included some self-care tasks and matching skills. (S-17 at 16.)
47. Recommendations in the spring 2018 RR included a highly structured educational environment to support academic learning needs and a modified curriculum, with a focus on language development. (S-17 at 17.)
48. The District school psychologist recommended further assessments after Student transitioned into the District in the fall of 2018. (N.T. 498, 508.)

THE PROPOSED IEP

49. A draft proposed IEP was developed in May 2018 and revised after a meeting. (S-20; S-21.)

50. Annual goals in the proposed IEP addressed speech/language (requesting items/actions and following directions); imitation of actions; independence with routines and self-care skills; occupational and physical therapy-related deficits; and behavior (decreasing refusal, elopement, and hitting behavior). (S-21 at 28-31.)
51. The goals for speech/language, independence with routines, gross motor skills, and behavior had no baselines. Those goals lacked baselines because the District intended to assess Student at the start of the 2018-19 school year, including using the VB-MAPP. Another reason was the inability of the District school psychologist to determine cognitive and achievement functioning for the spring 2018 RR. The District's BCBA also needed to collect baseline data in the District environment for that information to be meaningful. (N.T. 191-92, 194-96, 201, 217, 229, 419-20; S-21.)
52. The proposed IEP included a number of program modifications/items of specially designed instruction: a modified curriculum; a highly structured environment; previewing and pre-teaching of concepts; movement breaks; prompting for focus and attention; opportunities to make choices; positive reinforcement; visual supports and schedules; noise reduction tools; adapted scissors and utensils; modified physical education and adapted physical education; seating adaptations; a paraprofessional throughout the school day; and adult supervision during unstructured times and transitions. That section of the IEP also provided for administration of the VB-MAPP twice during the school year as well as continuous review of the PBSP. (S-21 at 33-34.)
53. The proposed IEP provided for occupational, physical, and speech/language therapy as well as adapted physical education as related services. (S-21 at 34.)
54. The proposed IEP included a Positive Behavior Support Plan (PBSP) to address the behaviors identified by the most recent FBA (elopement, refusal, and hitting). The PBSP identified skills Student needed to be taught (including expressing wants and needs, social skills) and interventions including schedules for reinforcement. (S-21 at 11-18.)
55. The proposed IEP did not provide specific responses to the "Questions for IEP Team" on educational placement, and does not otherwise describe how the team considered Student's access to the general education setting and curriculum with supplementary aids and services. (S-21.)
56. The proposed IEP was for a supplemental level of autistic support, with Student not participating in the regular education classroom for a majority of the school day. Student would instead spend that time in the autistic support classroom for academics. Student would participate with peers for homeroom, lunch, recess, encore classes,⁷ assemblies, and special activities. (S-21.)
57. The proposed IEP provided for Student to attend an elementary school that was not the neighborhood elementary school. (S-21.)

⁷ Adapted encore classes are also provided for children with developmental needs to preview and practice skills to be used in an encore class. (N.T. 412-13, 467.)

58. A meeting convened in May 2018 to review the spring 2018 RR and the proposed IEP. The Parents expressed an interest in Student attending the neighborhood school at that meeting. (N.T. 188, 216, 336-38, 408, 510; S-18.)
59. Although the team discussed some supplementary aids and services at the May meeting, the overall premise of that discussion from the Parents' perspective centered on reasons that certain of those could not be provided in the general education setting for Student. Those reasons were primarily based on Student's behaviors including elopement and difficulty maintaining focus and attention, but also included the needs for significant modification to the curriculum and for individualized instruction. (N.T. 204-10, 339-43.)
60. The District members of Student's IEP team concluded that Student could not participate in regular education for the full day because Student had attended preschool only two days each week and had time to take a nap in that setting. They also determined that Student needed to have autistic support outside of the regular education classroom to effectively address Student's behaviors, to allow Student to develop language skills, and to provide more individualized attention free of distractions. (N.T. 206-07, 225-26, 425-26, 443-44, 585-87, 1005-06, 1048.)
61. After the IEP meeting, the Parents visited the autistic support classroom with Student, who remained inside for approximately ten minutes. (N.T. 181-82, 217-21, 337, 343-44.)
62. An informal meeting occurred in June after the Parents visited the proposed autistic support classroom. The District proposed that Student would participate in the regular education kindergarten classroom for thirty more minutes daily for both language arts and science. The District also indicated a willingness to use the Supplementary Aids and Services Toolkit⁸ after the school year began. (N.T. 181, 217, 223-24, 341, 344-45; S-21 at 36.)
63. The Parents did not approve the Notice of Recommended Educational Placement (NOREP) for implementation of the proposed IEP. (S-24; S-28.)

FALL 2018 REEVALUATION

64. The District completed additional assessments in the fall of 2018 to determine Student's cognitive ability and academic achievement after obtaining the Parents' consent. (N.T. 512-13; S-31; S-49.)
65. The fall 2018 RR provided updated information on Student's then-current program and incorporated results of the rating scales that had not been provided prior to completion of the spring 2018 RR. The Parents did not provide other new input for this RR. (S-31; S-49.)
66. Input from Student's kindergarten teacher for the fall 2018 RR was that Student was "minimally" participating in class activities with the aide's assistance; was not engaged in

⁸ The Supplementary Aids and Services (SAS) Toolkit is available through the Pennsylvania Training and Technical Assistance Network (PaTTAN).

lessons; and was provided with modifications to, or accommodations for participating in, the curriculum. The special education teacher reported working with Student on turn-taking, attention, and functional play. (S-49 at 15-16.)

67. The fall 2018 RR reported the results of the Gilliam Autism Rating Scale – Third Edition completed the previous spring by the preschool teacher and Parents. Both the Parents and teacher’s rating scales indicated a very high likelihood of Autism, with Student exhibiting repetitive stereotypical behaviors, extreme emotional responses, and deficits in social skills and social communication in both environments. However, the teacher’s rating scales were more extreme than that of the Parents. (S-49 at 8-11.)
68. The fall 2018 RR reported the results of the ABAS-3 from the previous spring. The ratings of Student’s teacher reflected low to below average scores on all Composites, with some skill areas in the extremely low range and the General Adaptive Composite in the low range (4th percentile). The Parents’ ratings were in the extremely low range on all composites (General Adaptive Composite score below the 1st percentile) and most skill areas, with the exceptions of leisure skills (below average range) and self-direction and social skills (low range). (S-49 at 11-12.)
69. The fall 2018 RR also reported results of the Behavior Assessment System for Children – Third Edition completed by the Parents. Those rating scales reflected clinically significant concerns with functional communication and activities of daily living; and at-risk concerns with attention problems, atypicality, withdrawal, adaptability, and social skills. (S-49 at 12-14.)
70. Cognitive assessment for the fall 2018 RR (Pictorial Test of Intelligence – Second Edition) reflected scores below or at the 1st percentile in the very poor range across skills with accommodations. (S-49 at 19-10.)
71. Assessment of Student’s academic skills (Bracken Basic Concept Scale – Third Edition – Receptive) yielded very delayed scores below the 1st percentile. (S-49 at 20.)
72. Student’s eligibility classification was changed from Other Health Impairment to Intellectual Disability, Autism, and Speech/Language Impairment in the fall 2018 RR. (N.T. 515; S-49 at 20.)
73. Needs identified in the fall 2018 RR were the same as those in the spring, but a new strength was noted in working well for reinforcements. (S-49 at 21.)

THE PROPOSED AUTISTIC SUPPORT CLASSROOM

74. The proposed autistic support program is focused on language development and behavioral interventions, and it based on principles of Applied Behavior Analysis including verbal operants assessed by the VB-MAPP. (N.T. 574-75, 974-76.)
75. The autistic support classroom has individual instructional areas for each student with dividers separating the spaces. Those areas are where intensive teaching sessions occur. (N.T. 581, 968-69, 974.)

76. Natural environment teaching also occurs in the autistic support classroom in other areas of the classroom. Natural environment teaching promotes generalization and, for the kindergarten children, can also occur in the regular classroom such as during center time. (N.T. 582-83, 969-70, 975, 977-78.)
77. The autistic support program is monitored regular at the state and local levels, with oversight of and coaching on fidelity of implementation. (N.T. 575-76, 663-64.)
78. The District administers the VB-MAPP to students who exhibit significant developmental delays and/or language deficits. That assessment is not limited to children in the proposed autistic support program. (N.T. 537, 986-87.)

2018-19 SCHOOL YEAR: KINDERGARTEN

79. Student was in a full day regular education kindergarten class for the 2018-19 school year, with the District implementing the fall 2017 IEP. (N.T. 240, 263-65, 320, 413-14.)
80. There are approximately twenty-two students in Student's kindergarten classroom. Modeling is provided throughout the school day for the entire class. (N.T. 242, 265.)
81. Student has a full-time one-on-one aide in the kindergarten classroom. The aide has had some training in ABA principles. (N.T. 241, 291, 326, 584-85.)
82. Student's related service providers do a combination of pull-out and push-in services, and a special education teacher does the same although that push-in support is to a lesser extent. That teacher also observes and provides suggestions for the classroom for Student. (N.T. 244-48, 301-04, 414-15, 458, 460-61, 658-59, 682, 966-68, 972-74, 999-1000; S-40.)
83. The special education teacher has worked with Student in the proposed autistic support classroom including to pair with Student, a process involving the development of rapport and a positive relationship. (N.T. 124-25, 970-71.)
84. The District administered the VB-MAPP to Student in early- to mid-September 2018 based on observations of Student by several professionals who work with Student. At that time, Student exhibited a number of play skills (a relative strength) and a few skills related to visual perceptual, social, and gross motor imitation skills. (N.T. 535-36, 539-40, 543-44, 551-52, 554-55, 987-88, 991; S-44.)
85. The VB-MAPP is updated frequently throughout the school year on an ongoing basis as students demonstrate acquisition of skills. (N.T. 549-50.)
86. Student participates in whole group activities, although sometimes Student is merely present without participating. Student requires prompts and redirection during large group activities. During small group activities, Student typically works individually because of difficulty engaging in turn taking with peers or because Student requires individualized attention to maintain focus to tasks. (N.T. 269-70, 289-95, 296-98, 300-01, 458, 484, 556, 587-88, 1000-01, 1070-71; S-50.)

87. Student's work such as with academic tasks has been modified in the kindergarten classroom to address the pendent IEP goals and to align with Student's skills and needs. Examples of such modifications were asking Student to trace letters of a word or identify objects in pictures while other students were writing sentences about those objects. (N.T. 247-50, 254, 290-94, 349, 446-49, 455.)
88. The District holds inclusion team meetings weekly for children in kindergarten, and Student's program is one of those discussed. These meetings are attended by the kindergarten teachers, special education teacher, BCBA, and related service providers. The various "accommodations" identified for Student included adapted writing instruments and scissors; targeting identified skill deficits in reading, writing, and mathematics; prompt hierarchies; positive reinforcement with pairing, a variable schedule, and preference checks; mand training; errorless teaching; modeling; multisensory instruction; repetition and practice; and visual supports. (N.T. 249-51, 266-67, 304-05, 420-23, 430, 475-76, 478, 635-36, 665, 705-06, 1024; S-34.)
89. The District BCBA observes Student across educational settings and provides ongoing consultation to the teachers, paraprofessional, and related service providers. (N.T. 557-58, 561.)
90. Student and other students in the classroom can be distracted by items available to Student for reinforcement and sensory purposes, especially during group activities. (N.T. 258, 286-89, 314-15, 1002-03.)
91. Student has access to preferred reinforcers in the autistic support classroom that are generally not available in the regular kindergarten classroom because they would be distracting to other students, and are therefore not appropriate in that environment. (N.T. 676-77, 690-92, 698-99, 971-73, 1009-10.)
92. Student's main concerning behaviors remain elopement (to another area or beyond the room or environment) and task refusal. Student at times will throw items on the floor, shake head no, or elope to avoid a task. Student's exhibition of those behaviors varies in frequency, intensity, and duration. (N.T. 271, 277, 558, 566, 568-69; S-50.)
93. Student at times has reached out to peers who are in close proximity, or sometimes pushed or hit them. When seating adjustments were made, those behaviors significantly decreased. (N.T. 271-73, 276-77, 280-81, 283-86, 304, 558.)
94. Student at times becomes distracted in the kindergarten classroom. (N.T. 242-43, 302-03.)
95. Student uses adaptive seating in the classroom that also helps Student not to elope. (N.T. 287, 298-300, 308-09, 332, 465-66, 645-46.)
96. By January 2019, Student was exhibiting additional skills assessed by the VB-MAPP, specifically emerging skills in the following areas: vocalization, manding (requesting), responding to directions, and echoic responses. Student continued to demonstrate significant deficits in the areas assessed by the VB-MAPP. (N.T. 553-55.)

97. Some language skills may be learned through observation and modeling after a child is able to engage in joint attention and has an imitative repertoire. (N.T. 627-28.)
98. Student benefits from a routine and schedule, and is learning to imitate and model peers and others. Student continues to need a high rate of reinforcement that changes with Student's preferences. (N.T. 117-18, 127-28, 148, 151, 318-19, 335, 555, 1008-09; S-21 at 22.)
99. Student has difficulty generalizing skills across environments. (N.T. 441-42.)
100. Student would benefit significantly from a combination of natural environment teaching and intensive teaching. The former would promote generalization of skills. (N.T. 58-83, 133, 587-88, 629-30.)

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. In this type of proceeding, as in most cases, 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. Nonetheless, 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, such 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 all of the witnesses who testified to be credible, testifying to the best of his or her recollection and naturally based on his or her perspective.

Each party presented a witness who was qualified as an expert, observed Student at school for a portion of a single school day in mid-October 2018 (when Student was undoubtedly still becoming acclimated to a full time educational program), and gave an opinion on the program proposed by the District with recommendations. Neither actually evaluated or worked directly with Student, or had any in-depth understanding of Student's unique strengths and needs. 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-5). However, most of her recommendations were based on research on students with Student's specific disability rather than on Student. Moreover, her opinion that Student should be included with typical peers in the regular education setting for 80% of the school day, a position also ultimately taken by the Parents (*see* Parents' Closing Statement at 1), was determined from generalities rather than Student's individual strengths and needs. 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-33 at 10-11). However, her opinion that Student should be provided all language and pre-academic instruction outside of regular education was not well explained, and lacked consideration of supplementary aids and services that could be provided in the regular education setting.

For these reasons, while the opinions of the experts were both carefully considered, neither were more probative, or accorded more weight, than the other.⁹ In conducting a review

⁹ This hearing officer does, however, suggest that both witnesses provided informed recommendations, albeit from early in the school year, that the IEP team should consider when it next convenes.

of the entire record, the testimony of all other witnesses, and the content of each admitted exhibit, were also fully considered in issuing this decision, as were the parties' comprehensive and focused closing statements.

GENERAL IDEA PRINCIPLES: SUBSTANTIVE FAPE

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to its students 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 considered once again 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. See *Dunn v. Downingtown Area School District*, 904 F.3d 248, 254 (3d Cir. 2018).

As *Endrew*, *Rowley*, and the IDEA make extraordinarily 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 his or her “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). 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).

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

A critical premise in the IDEA is the obligation that eligible students 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. *Andrew, 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.

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 DISTRICT’S REEVALUATION

The first issue is whether the District’s reevaluations met the requisite standards. The Parents contend that the spring 2018 RR, on which the proposed IEP was based, did not identify

Student's academic abilities and deficits to be addressed by the special education program, which in turn resulted in an IEP without baselines.

The District's spring 2018 RR included a number of assessment tools, strategies, and instruments that yielded relevant functional and developmental information, and some anecdotal description of earlier academic skills. Specifically, the District obtained and reported on input provided from the Parents and previous information from the preschool; included an observation of Student at the preschool by the District school psychologist; and incorporated a summary of results of previous evaluations. Rating scales were sought in order to evaluate, in both the home and preschool settings, Student's social/emotional/behavioral and adaptive functioning as well as characteristics of Autism. An FBA was also conducted as part of the process. Occupational therapy, physical therapy, and speech/language therapy strengths and needs were fully examined as well. It is unfortunate that cognitive and achievement testing could not be conducted in the spring of 2018, but those were completed in the fall before the hearing began, and the two reports must be construed together.

Still, the absence of specific information on Student's current academic skills in the spring of 2018 is a very valid concern. One of the needs identified by the spring 2018 RR was for Student to improve pre-academic skills, and that need was carried over into the proposed IEP without an understanding of what pre-academic skills did and did not exhibit. Examination of those abilities outside of standardized testing would have better prepared the IEP team to identify pre-academic and academic skill deficits in order to develop related annual goals and specially designed instruction by the time of the May 2018 IEP meeting. As noted, one of the purposes of an evaluation is to gather sufficient data to determine the child's educational needs; thus, the

omission of such crucial information must be considered fatal to the evaluation process, and ultimately to the proposed IEP, in this case.

The appropriate remedy for an evaluation that does not meet the requisite IDEA criteria is an Independent Educational Evaluation (IEE). *See generally* 34 C.F.R. § 300.502. This hearing officer also concludes that a publicly funded independent educational evaluation will further 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 will provide the parties with objective assessments and recommendations to consider in making a determination of how to meet all of Student’s needs appropriately,¹⁰ as well as to help foster the new relationship between them that is especially crucial given Student’s very young age. The IEE shall be limited to a psychoeducational evaluation conducted by a qualified independent psychologist who has experience evaluating children identified with Autism Spectrum Disorder and Intellectual Disability, to include assessments of Student’s cognitive ability, academic achievement, and social/emotional and adaptive functioning in the elementary school environment, as well as any other assessments determined by the independent evaluator to be necessary.

THE PROPOSED IEP

Because the proposed IEP was based upon an incomplete psychoeducational evaluation, there are necessarily resulting substantive flaws in the program that was proposed, particularly

¹⁰ Neither of the parties’ expert witnesses actually assessed Student in any respect.

the absence of identified pre-academic readiness and academic strengths and needs. The absence of baseline data that would have needed to be updated in the fall of 2018, while perhaps understandable, further reflects a lack of sufficient information about the academic skills that Student did and did not have at the time that the IEP was developed.

The proposed IEP also does not address Student's needs to improve attention and focus which are clearly impeding Student's education. Other than a provision for prompting and a passing reference in the PBSP to a social skills group addressing a variety of skills including attention to instruction, the proposed IEP lacks the specially designed instruction that Student requires in order to learn how to improve attention and focus. Moreover, removal of Student to an environment that does not have as many distractions as the kindergarten classroom will not alone help Student acquire the ability to improve focus and attention. The ordered independent psychoeducational evaluation and other updated assessments should provide the team with the information it will need to consider in addressing those deficits in the IEP to be developed upon their completion.

A major focus of the Parents' claim regarding the proposed IEP is that the team did not fully engage in consideration of the crucial IDEA premise for the least restrictive environment. Although the District members of Student's IEP team clearly believe very strongly that Student requires the level and type of support that the proposed autistic support program offers, the evidence is preponderant that the principles of the least restrictive environment were discounted.

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 Student, including modification of the regular education

program; (2) a comparison of the benefits to Student in a regular kindergarten 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.

The efforts made by the District to consider including Student in the regular education setting are difficult to discern at least from the Parents' perspective. It may well be that the District members of the IEP team understood the discussion of supplementary aids and services to begin with the regular kindergarten classroom, but the Parents, who are vital members of the IEP team, clearly did not. Rather, they understood that the dialogue was framed in the negative, describing the reasons that such aids and services could not be provided in the regular education classroom. Moreover, there is a section of the form IEP in Pennsylvania that guides the team through a discussion of the *Oberti* factors, and the specific questions are not answered in that section of Student's IEP. In addition, and while not binding, the annotated IEP available through PaTTAN¹¹ 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 and will not participate with students without disabilities in the regular education setting and in the regular education curriculum. Student's proposed IEP lacks such language that would have helped the Parents understand the discussion that forms the basis of this and other *Oberti* factors. Moreover, without an understanding of Student's pre-academic skills in the spring of 2018, it is difficult to conceive how the IEP team could have had a meaningful and informed discussion of what modifications to the regular education curriculum would be necessary to enable Student to participate with typically developing peers in the general education curriculum.

¹¹ Available at www.pattan.net/forms (last visited February 26, 2019).

With respect to the second factor, the benefits of the typical kindergarten environment for Student cannot be underestimated. Student is exhibiting an emerging ability to imitate and model others, including peers, and continues to develop communication and social skills. Those are facets of the everyday kindergarten setting for all students in the classroom. Student also has difficulty generalizing skills across environments, and providing more opportunities for Student to do so outside of the segregated setting will undoubtedly benefit Student. The regular education classroom will also give Student access to the rigors of the general kindergarten curriculum with ambitious expectations for Student in that environment. Nevertheless, and as discussed more fully below, there are also some very real advantages to Student also participating in the type of the autistic support proposed by the District. The District's contention that Student is likely to derive more benefit from a setting that is not the regular classroom is not determinative, as the *Girty* Court has made clear. For all of these reasons, comparing the relative positive aspects of the two settings leads to a conclusion that Student should participate in the regular education environment for a greater part of the school day than outside of the kindergarten classroom.

Lastly on this prong, there is a lack of evidence that the team had a meaningful discussion of the possible negative impact on other students in May 2018 based on an appropriately supportive IEP with a PBSP and related services. The District members of the IEP team identified Student's behavior as a key consideration in its placement recommendations. The team was clearly aware that Student would be initially challenged by the transition to a full day educational program five days a week. Student's pendent IEP from 2017 did not include a carefully constructed behavior plan, and the District has had to resort to a variety of accommodations that its experienced professionals have considered worth trying to effectively

address what were described as low intensity behaviors. And, many of the behaviors that Student engaged in at the beginning of the school year have diminished significantly with the supports that were provided. This hearing officer cannot conclude that Student's behaviors, when appropriately addressed through the PBSP in the proposed IEP, warrant removal of Student from the regular classroom to a substantial degree.

Having considered all of the above factors, the record establishes that the District did not adequately consider whether Student can be appropriately educated in the regular education environment to satisfy the first prong of *Oberti*. However, the evidence does not also lead to a conclusion that the District predetermined Student's placement. The District uses the VB-MAPP for students with language deficits including those who are not provided with autistic support, so any reference to that assessment in the IEP or at a meeting does not mean that the placement would be based on it. And, even if some District members of Student's IEP team "contemplated" placement that included some level of autistic support (Parent's Closing Statement at 6-7), that LEA professionals may have given consideration to how Student's needs could be met in advance of the meeting falls far short of evidencing predetermination in this case.

The second prong of *Oberti* requires that, if placement outside of regular education is necessary, a determination must be made on whether the student has been included with non-exceptional children to the maximum extent possible. Here, the record does convincingly establish that Student requires some level of special education instruction and related services in a specialized setting outside of the regular classroom; and, nearly all of the witnesses agree that Student would benefit from the proposed autistic support. Indeed, the record is also clear that Student has benefitted from and made progress in that type of program in other settings. That

environment will permit Student to be provided with the high levels of varied reinforcements that even the private BCBA believes Student needs. The portions of the VB-MAPP that have been completed by the District further support the conclusion that Student continues to need to acquire skills such as making requests and labeling items. There is also no reason to suspect that, if Student is not making progress with the program of autistic support, the District will fail to respond appropriately in order to consider any necessary adjustments. This hearing officer concludes that with Student presenting such needs at this time, the District should begin implementing the autistic support aspects of the proposed IEP immediately within certain parameters.

The parties' major dispute in this regard, and the challenging question, is how much of the day Student should spend outside of the regular education environment. It is unclear how the District arrived at the proposed amount of time in regular education as of the May and June 2018 meetings. There is also insufficient persuasive evidence that 80% of the day is more appropriate based on Student's unique circumstances. The independent psychoeducational evaluation and other updates will undoubtedly inform the IEP team of the data needed to determine an appropriate specific level of services outside of the regular education environment later in the school year. In the interim, without sufficient evidence from which to identify such a level and also without the benefit of the ordered evaluations, this hearing officer will order that Student's program going forward include the proposed autistic support and related services outside of the regular education classroom for not more than 90 minutes of the 6.5 hour school day (S-21 at 38), approximately 23% of the day, which does not vary widely from the amount of time suggested by the Parents' expert. That limitation should minimize the degree of transition

Student will need to undergo with the ordered changes to Student's program while also expanding the amount of time Student can focus on language-based skills and behavioral needs.

There is one additional aspect of the autistic support program that must be addressed since the Parents also challenge that program as not aligned with the Pennsylvania standards for all children. This argument, however, misconstrues the standards as setting a uniform scope of curricular expectations regardless of current skills and abilities. "Pennsylvania Learning Standards for Early Childhood build on information learned previously, creating a continuum of learning that assures consistent and linked learning that begins in infancy, increasing in complexity as it extends through graduation." *Pennsylvania Learning Standards for Early Childhood: Kindergarten at 5.*¹² Thus, if a child lacks the necessary background information to continue building the skills set forth in the Standards, it can and logically must follow that a student's program address those identified deficits. As Student continues to make gains in acquiring basic skills needed to access the general education curriculum, including exposure to that curriculum and as modified to meet Student's unique profile, the IEP team will be able to effectively determine how Student's literacy and other academic skill deficits can be appropriately addressed. Moreover, even though there may well be an array of other interventions that could be used to address Student's needs, such does not render the established approach proposed by the District inappropriate.

There are other areas of the proposed IEP that are also wholly appropriate. First, there can be no question that Student requires implementation of a PBSP that is based on the behaviors currently exhibited. This hearing officer concludes that the District's proposed PBSP is

¹² The full text is available for download at <https://www.education.pa.gov/Early%20Learning/Early%20Learning%20Standards/Pages/Infant-Toddler-Pre-K-Learning-Standards.aspx> (last visited February 26, 2019).

reasonably calculated to appropriately address Student's behavioral needs and should be implemented until the ordered evaluation may be completed and the parties are able to meet to develop a new IEP.¹³

Second, there were few if any concerns raised with the related services identified in the proposed IEP. The evidence supports a conclusion that those aspects of Student's proposed IEP are appropriate and may be immediately implemented.

DISTRICT IMPLEMENTATION OF STUDENT'S PENDENT IEP

The next issue is whether the District's implementation of the pendent IEP has operated to deny Student FAPE in any respect. There is evidence that Student was provided specialized instruction and related services in preschool through a combination of push-in and pull-out services. The evidence is also 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. Although the Parents specifically challenge the occasions when Student was taken to the autistic support classroom for specialized instruction, this hearing officer cannot conclude that doing so amounted to a denial FAPE based solely on the environment to which Student was removed pursuant to the IEP, especially considering the overall limited time involved. In addition, his hearing officer has concluded that some level of the proposed autistic support is appropriate for Student. As such, there is no basis on which to award compensatory education.

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

¹³ The Parents do not appear to seriously challenge the content of this PBSP. (Parents' Closing Statement at 18.)

FINAL OBSERVATIONS

The process of obtaining an IEE and updating other assessments followed by the development of a new IEP will necessarily entail some period of time. The attached Order makes revisions to Student's pendent IEP from 2017 so that some of Student's most significant needs can be promptly addressed. In addition, the parties are strongly encouraged to share information among the private and District professionals, particularly with respect to coordinating Student's development and practice of language skills in the home and school environments. The parties may, of course, further agree to other assessments and changes to the pendent program while the processes set forth in the attached Order are completed.¹⁴

ORDER

AND NOW, this 28th 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 proposed IEP and NOREP for Student for the 2018-19 school year was appropriate with respect to including some level of autistic support. The District may immediately begin to implement the provisions for autistic support and some related services in the proposed IEP outside of the regular education environment for not more than 90 minutes per school day.

¹⁴ See 20 U.S.C. § 1415(j).

4. The PBSP in the proposed IEP is appropriate for Student and the District may immediately begin to implement that PBSP.
5. The 2017 IEP otherwise remains the pendent program with the exception of any revisions that the parties agree to until a new IEP consistent with the foregoing discussion is developed and finalized as approved by a NOREP.
6. Student is awarded an independent psychoeducational evaluation at public expense to assess cognitive ability, academic achievement, and social/emotional functioning as determined by the independent evaluator.
 - 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. The qualified professionals shall have experience in evaluating students who have both Autism Spectrum Disorder and an Intellectual Disability.
 - b) Within five business days of receipt of the list of qualified individuals to perform the independent psychoeducational 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 evaluation within a reasonable time not to exceed sixty calendar days from the date of engagement.
7. At the discretion of the District administrators, Student's teachers and related service professionals, and/or the BCBA currently providing consultative services, updated assessments of Student in those areas that were conducted for the fall 2018 RR as well as the VB-MAPP 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 assessments, their previous agreement to those assessments conducted for the fall 2018 RR are deemed to include the VB-MAPP and shall remain in effect for purposes of this Order.
8. 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.
9. 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.

10. There is no award of compensatory education.
11. 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. 21033-1819KE