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 Due Process Hearing Officer

Final Decision and Order
ODR No. 21090-18-19
CLOSED HEARING

Child's Name:
E.K.

Date of Birth:
[redacted]

Parents:
[redacted]

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Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
March 15, 2019

Introduction

This matter concerns the educational rights of a student (the Student).[1] The Student resides with the Student's parents (the Parents) within their local school district (the District). The Student is a child with disabilities as defined by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*. (IDEA).

The Student is diagnosed with a rare genetic condition that is associated with physical disabilities and hearing loss, developmental delay, and hypotonia. The Student is also diagnosed as having autism. The District has classified the Student as a child with multiple disabilities for IDEA purposes.

After receiving early intervention services from an Intermediate Unit (the IU), the Student enrolled in the District for kindergarten. The District evaluated the Student and offered an Individual Education Program (IEP). Through the IEP the District offered special education services to the Student and placed the Student outside of the Student's neighborhood school to receive some of those services in a specialized classroom.

The Parents take issue with the District's evaluation and placement. The Parents claim that the evaluation fell short of legal mandates. The Parents further claim that the IEP is inappropriate both in terms of the Student's placement and the services offered. Finally, the Parents claim that the District predetermined the Student's placement. The District denies these claims, taking the position that its evaluation and IEP are appropriate, and that it did not predetermine the Student's placement.

For reasons discussed below, I find that the District's evaluation of the Student complied with legal mandates, but that the resulting IEP was not appropriate in terms of both the services offered (or, more accurately, not offered) and the restrictiveness of the placement. I also find that the District predetermined the Student's placement, thereby denying the Parents an opportunity to meaningfully participate in IEP development.

Issues and Remedies

The parties phrased the issues somewhat differently thorough the hearing and in their briefs, but there is no substantive dispute about what issues are presented in this matter. The issues presented and remedies demanded in this hearing are:

1. Did the District's evaluation of the Student comply with legal mandates? If no, the Parents demand an independent educational evaluation (IEE) at the District's expense as a remedy.

2. Is the District's IEP appropriate? If no, the Parents demand compensatory education and changes to the IEP to enable greater inclusion as a remedy.

3. Did the District predetermine the Student's placement? If yes, the Parents demand declaratory relief to that effect and compensatory education to remedy a violation of their right to meaningful participation in the IEP development process.

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

Findings of Fact

I carefully considered the record of this hearing in its entirety. I make findings of fact, however, only as necessary to resolve the issues before me. Consequently, I do not reference substantial portions of the record in this case. The record in this case is large, particularly in light of the Student's age and grade. Unfortunately, the size of the overall record is also large in comparison to the portion of the record that is both outcome-determinative and concerns *disputed* facts. I note that the threshold for admissibility in a Pennsylvania special education due process hearing is low by any measure. Neither the state nor federal rules of civil or administrative procedure apply. I use those rules are for guidance, but they are not controlling.

I find as follows:

1. The Student received EI services from the local IU from a young age. S-2.

2. The Student received EI services pursuant to an EI IEP. The last EI IEP is dated September 29, 2017. S-7.

3. The Student received EI services, in part, delivered using the Verbal Behavior, Milestones Assessment and Placement Program (VB-MAPP). S-4.

4. The IU also formally evaluated the Student at least twice. The last EI evaluation is dated January 20, 2018. S-6.

5. The Student became eligible to participate in the District's kindergarten program based on age at the start of the 2018-19 school year. The Parents, working with the IU, notified the District that they intended to register the Student for the 2018-19 school year on January 31, 2018. S-10.

6. The District sought the Parents' consent to evaluate the Student on February 8, 2018. S-14. The consent form was sent with a Parent Information form for the Parents to complete and return. The Parents signed and dated the form on February 10, 2018, but they did not complete it. Instead, they wrote that the requested information had already been provided during a registration meeting. S-15. The Parents did, however, provide consent to evaluate.

7. The District received the Parents' consent to evaluate and the incomplete Parent Input form on February 22, 2018. S-15. The Parents did not provide requested audiology and vision reports from a hospital. S-19.

8. On April 5, 2018, the District sent two behavioral rating scale forms to the Parents for them to complete and return to the District by April 19, 2018. S-21.

9. The District's evaluator, a certified school psychologist (the CSP), reviewed the Student's IU educational records, took input from the Student's preschool teacher and personal care assistant, assessed the Student using standardized, normative tests of cognitive ability and academic achievement, and observed the Student in preschool. S-22.

10. The District also conducted speech therapy, physical therapy, and occupational therapy assessments. Those assessments were completed by well-qualified personnel and were compiled by the CSP. S-22.

11. The CSP urged caution in interpreting standardized, normative tests for the Student, believing that the Student's focus and ability to take the tests (as opposed to the Student's actual knowledge) may have depressed test scores. Nevertheless, the CSP concluded that the scores were reportable and, with caution, could be used as part of the evaluation as a whole to derive useful information about the Student. S-22.

12. According to the standardized, normative assessments, the Student's early reading skills were in the "average" range, while listening comprehension and math problem solving were both in the "low" range compared to same-age peers. The Student's full-scale IQ was assessed with a standard score of 43, which is below the first percentile for same-age peers. While extreme caution is needed to interpret that result, the full-scale IQ score was consistent with all verbal and non-verbal skills assessed by the test. S-22.

13. The CSP drafted an evaluation report for the Student and sent the report to the Parents on April 23, 2018. S-22.[2]

14. The evaluation report lists the following "instructional levels and academic needs" – these function as recommendations to the Student's IEP team: academic readiness skills, learning related behaviors, speech and language, occupational therapy, and physical therapy. S-22

15. On May 8, 2018, the hospital faxed the requested vision and audiological report to the District. S-23. This enabled the District to proceed with vision and hearing evaluations designed to assess school-based needs. The District contracted with the IU for those evaluations on May 9, 2018. S-25, S-26.

16. On May 15, 2018, the Parents provided a detailed, line-by-line response to the District's evaluation. S-27. Therein, the Parents reported that the input from preschool did not come from the preschool teacher that knew the Student the best. The document also includes a letter on letterhead from the Student's preschool, but it is not completely clear where the preschool's comments end and the Parents' comments begin. S-27.

17. On May 16, 2018, the Parent sent updated information about the Student progress through the VB-MAPP to the District. S-29.

18. The Student's IEP team convened on May 17, 2018. The District brought a draft IEP to the meeting, and clearly indicated that the draft was a "working copy." S-31.

19. The IEP includes goals and specially designed instruction (SDI) that are described in greater detail below. For context, and in general, the IEP called for the Student to continue to receive instruction using the VB-MAPP. Since the District only offers the VB-MAPP in autistic support classrooms outside of the Student's neighborhood school, the IEP placed the Student in a different District elementary school. Under the IEP, the Student would spend two hours of a 6.5-hour school day in regular education. S-32.

[2] The District refers to the report as a reevaluation report although it was the Student's first school-age evaluation. I refer to the evaluation as an evaluation for simplicity. The difference is purely semantic.

20. The IU completed a functional vision evaluation on June 7, 2018 and sent that evaluation to the District. S-33.

21. On June 7, 2018, the District sent a NOREP proposing the May 17, 2018 IEP as a final IEP without revisions. S-35. The Parents rejected the NOREP on June 15, 2018. From the IEP team meeting through the NOREP and beyond, the Parents consistently stated their position that the offered placement was too restrictive, and the offered program would not enable the Student to achieve appropriate educational goals. *See, e.g.* S-35.

22. On June 21, 2018, the Parents and District administrators spoke by phone about the Parents' concerns. In response, the District revised the IEP to place the Student in regular education for 3.25 hours of a 6.5-hour day (the Student would be in regular education for 50% of the school day). The District sent the revised IEP to the Parents on June 22, 2018, with a revised NOREP. S-36, S-37.

23. The SDI in the revised IEP was also revised to explicitly require the IEP team to reconvene once the VB-MAPP was complete to review goals, SDI, and placement. S-36.

24. The Parents rejected the revised IEP via the second NOREP on July 2, 2018. At that time, they noted that the revised IEP was substantively identical to the original IEP in terms of the services that the Student would receive and did not constitute placement in the LRE. S-37.

25. The Parents requested this hearing on August 24, 2018. *Complaint*.

26. On September 18, 2018, the District added an addendum to the evaluation report. The addendum includes the results of the functional hearing evaluation, the functional vision evaluation, and parent rating scales. None of those were available at the time the evaluation report was completed. The addendum also includes information from the Student's preschool teacher, based on the documents that the Parents sent to the District in response to the original evaluation report. S-45.

27. The Parents obtained a private neuropsychological consultation for the Student. A doctoral-level Developmental Neuropsychologist (the DN) who is also a Pennsylvania Licensed Psychologist and a Pennsylvania Certified School Psychologist observed the Student on October 16, 2018. The DN then wrote a consultation report, which is almost entirely a detailed accounting of the observation. Nevertheless, the DN found that the goals and services in the Student's IEP were appropriate but insufficient. The DN recommended adding social skills goals and academic goals to the IEP. The DN also recommended increased inclusion, but with the development of a specific plan to enable that inclusion. S-57.

Witness Credibly

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See,*

D.K. v. Abington School District, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

Different witnesses recalled events differently. Even so, I find that all witnesses testified credibly. To the extent that witnesses recalled events differently, I find that the testimony of each witness was the individual witness' honest recollection of events. I do not, however, assign equal weigh to each witnesses' testimony. Rather, I used documentary evidence and appropriately weighted testimony to reach the findings of fact above.

Applicable Laws

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'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). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id* at 3015.

Historically the Third Circuit has interpreted Rowley to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003).

LEAs are not required to maximize a child's opportunity; it must provide a basic floor of opportunity. *See Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "*de minimis*" benefit. *See Polk v. Central Susquehanna Intermediate Unit 16,* 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P*., 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free Sch. Dist.*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than *de minimis*" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F*., 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id*. Education, however, encompasses much more than academics — as is clearly evident in this case.

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Least Restrictive Environment (LRE)

The IDEA requires LEAs to "ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." 34 C.F.R. § 300.115(a). That continuum must include "instruction in regular classes, special schools, home instruction, and instruction in hospitals and institutions." 34 C.F.R. § 300.115(b)(1); see also 34 C.F.R. § 300.99(a)(1)(i). LEAs must place students with disabilities in the least restrictive environment in which each student can receive FAPE. See 34 C.F.R. § 300.114. Generally, restrictiveness is measured by the extent to which a student with a disability is educated with children who do not have disabilities. See id.

In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993), the Third Circuit held that LEAs must determine whether a student can receive a FAPE by adding supplementary aids and services to less restrictive placements. If a student cannot receive a FAPE in a less restrictive placement, the LEA may offer a more restrictive placement. Even then, the LEA must ensure that the student has as much access to non-disabled peers as possible. *Id* at 1215-1218.

More specifically, the court articulated three factors to consider when judging the appropriateness of a [restrictive] placement offer:

“First, the court should look at the steps that the school has taken to try to include the child in a regular classroom.” Here, the court or hearing officer should consider what supplementary aids and services were already tried. *Oberti v. Bd. of Educ*., 995 F.2d 1204, 1216 (3d Cir. 1993)

“A second factor courts should consider in determining whether a child with disabilities can be included in a regular classroom is the comparison between the educational benefits the child will receive in a regular classroom (with supplementary aids and services) and the benefits the child will receive in the segregated, special education classroom. The court will have to rely heavily in this regard on the testimony of educational experts.” The court cautioned, however, that the expectation of a child making greater progress in a segregated classroom is not determinative. *Oberti v. Bd. of Educ*., 995 F.2d 1204, 1216-1217 (3d Cir. 1993).

“A third factor the court should consider in determining whether a child with disabilities can be educated satisfactorily in a regular classroom is the possible negative effect the child's inclusion may have on the education of the other children in the regular classroom.” The court explained that a child’s disruptive behavior may have such a negative impact upon the learning of others that removal is warranted. Moreover, the court reasoned that disruptive behaviors also impact upon the child’s own learning. Even so, the court again cautioned that this factor is directly related to the provision of supplementary aids and services. In essence, the court instructs that hearing officers must consider what the LEA did or did not do (or could or could not do) to curb the child’s behavior in less restrictive environments. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1217 (3d Cir. 1993)

There is no tension between the FAPE and LRE mandates. There may be a multitude of potentially appropriate placements for any student. The IDEA requires LEAs to place students in the least restrictive of all potentially appropriate placements. There is no requirement for an LEA to place a student into an inappropriate placement simply because it is less restrictive. However, LEAs must consider whether a less restrictive but inappropriate placement can be rendered appropriate through the provision of supplementary aids and services.

Evaluation Criteria

The IDEA establishes requirements for evaluations. Substantively, those are the same for initial evaluations and revaluations. 20 U.S.C. § 1414.

In substance, evaluations must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the child is a child with a disability and, if so, what must be provided through the child’s IEP in order for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation must “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child” and must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”. 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the District is obligated to ensure that:

> assessments and other evaluation materials... (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments.

20 U.S.C. § 1414(b)(3)(A).

Finally, evaluations must assess "all areas of suspected disability". 20 U.S.C. § 1414(b)(3)(B).

Independent Educational Evaluation (IEE) at Public Expense

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency…" 34 C.F.R. § 300.502(b)(1). "If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense." 34 C.F.R. § 300.502(b)(2)(i)-(ii).

"If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4).

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy*. Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach

was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* and explaining that compensatory education "should aim to place disabled children in the same position that the child would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the "same position" method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

> … the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies.

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist*., 2014 U.S. Dist. LEXIS 114414 at 39. *See also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist*., ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist*., ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education are

warranted. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Discussion

Some case law suggests a tension between the IDEA's FAPE and LRE obligations. I believe that tension is an artifact of a false dichotomy. The LRE obligation is part of the FAPE obligation; the concepts are completely compatible. For any student with disabilities, the IEP team must determine current needs, set goals, and decide what special education will enable the student to meet those goals. Once that is done, the IEP team must determine the least restrictive environment in which the identified special education can be delivered. In this way, the LRE obligation is relative to the individual student.

Two extreme examples illustrate the concept: A student may only require redirection from a teacher in order to receive a FAPE. Redirection, more likely than not, can be delivered in any educational environment. The least restrictive environment *for that student* is likely a regular education classroom. In contrast, a different student may require intensive educational services for nearly every waking hour. The least restrictive environment *for that student* could very well be a residential placement. A regular education classroom is always less restrictive than a residential placement in absolute terms. The relative restrictiveness of the placements to each other, however, is not part of the ultimate analysis. The analysis concerns the restrictiveness of the placement relative to the individual student. In this way, the IDEA prohibits placement of the first student in a restrictive setting but does not require the second student to fail in a less restrictive placement before obtaining a FAPE.

The same examples also illustrate the importance of determining what special education a student requires before making any decisions about placement. It is impossible to know what placement the least restrictive placement for any individual student is before knowing what special education he or she will receive. Even then, the IEP team cannot make assumptions about what forms of special education can be provided in any placement. Instead, when the IEP team turns to placement, the team must also consider whether supplementary aids and services can enable educators to provide special education in less restrictive settings.

With the foregoing in mind, analysis must begin with the District's evaluation. The District's evaluation served as the basis of the District's program recommendations. The appropriateness of the District's evaluation relates to the appropriateness of the District's program recommendations. I will, therefore, assess the appropriateness of the District's program recommendations second. Those program recommendations, in turn, should have driven the District's placement offer. I will examine the placement offer third. In doing so, I will consider the appropriateness of the placement and the claims of predetermination separately. It is possible for a placement to be inappropriate even if it was not predetermined. It is also possible for a predetermined placement to be appropriate.

The District's Evaluation

The Parents argue that the IDEA establishes more than procedural requirements for evaluations. They argue that the substantive standard for IEPs established by the Supreme Court in *Endrew F.*, *supra*, also set the mark for evaluations. The Parents' logic is sound. If an IEP must be reasonably calculated to provide a FAPE, and also must be based upon a current

evaluation[3], the evaluation itself must provide sufficient information to enable the IEP team to draft a substantively appropriate IEP. This concept is not new. The IDEA's procedural mandates for evaluations require schools to conduct the type of evaluations that are likely to yield actionable information for the IEP team. A procedurally appropriate evaluation, by its nature, should provide information about the Student's educational levels and the special education that is likely to result in a meaningful benefit.

The District evaluated the Student and drafted a Reevaluation Report dated April 23, 2018 (the 2018 RR). (S-22). The Student's IEP team convened on May 17, 2018. (S-31). The 2018 RR was supplemented on September 18, 2018 (the Addendum). (S-45). The Addendum includes the entire 2018 RR with additional information from a Functional Hearing Evaluation and Functional Vision evaluation that were completed after the 2018 RR. The Addendum also includes parent rating scales that the Parents did not initially return, and information provided by the Student's teachers.

Altogether, the District's evaluation included a review of the records of the Student's early intervention program (evaluations and early intervention IEPs), behavior rating scales completed by the Parents, an observation of the Student in preschool by the District's school psychologist, information provided by the Student's PCA and preschool teacher, and standardized, normative assessments of the Student's cognitive abilities and academic achievement.

I recognize that I must evaluate the pre-Addendum evaluation. That evaluation [contained] all information available to the District at the time. It was appropriate for the District to add information to the evaluation as it became available.

I conclude that the evaluation satisfied the IDEA's procedural requirements. The evaluation used multiple assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the Parents. There are no claims about the technical soundness of any of the assessments, or any of the factors listed at 20 U.S.C. § 1414(b)(3)(A). More importantly, by following the IDEA's procedural mandates, the District's evaluation did, in fact, gather information to enable the IEP team to develop the Student's IEP.[4] This is true of both the pre and post supplement evaluation reports.

The Parents argue that the District's evaluation did not truly assess the Student's need, but rather assessed the Student's ability to take tests. I disagree. The District's evaluator was candid that the Student's disability likely impaired the Student's performance on various assessments. For that reason, the Student's test results were interpreted with caution, and no single assessment formed the basis of the District's overall conclusions.

Given the standards for IEEs and public expense described above, I find that the Student is not entitled to an IEE at public expense.

[3] *See* 20 U.S.C. § 1414 *et seq.*

[4] The Parents list the conclusions about the Student's needs derived from the District's evaluation in their complaint at ¶ 35. With the exception of noting an incorrect statement about teacher recommendations in the pre-addendum evaluation, however, the Parents do not truly dispute the District's findings about the Student's needs. Rather, the Parents' "principal issue" concerns the District's conclusions that those needs cannot be met predominantly in a regular education classroom. *See* Parents' Closing Argument.

The District's Program Offer

The Parents argue that the IEP is inappropriate in part because it flows from an inappropriate evaluation. Above, I find that the District's evaluation was appropriate, and so I reject this aspect of the Parents' argument. The Parents also argue, however, that the IEP is inappropriate because it does not help the Student advance in the areas of need identified in the District's own evaluation. I agree with the second prong of the Parents' argument.

According to the Districts' own evaluation, the Student needs to improve academic readiness skills, social skills, expressive and receptive language, and functional communication skills (with speech as a particular means of communication). (S-32). The District's evaluation also revealed that reading was a relative strength for the Student but cautioned that the Student's ability to comprehend written communication lagged behind the Student's ability to read words.

The IEP includes four speech goals. Two of those goals concern the Student's ability to label objects and identify numbers and letters. Another goal concerns the Student's ability to independently request items using any form of communication. A fourth goal concerns the Student's ability to articulate certain sounds. These goals are appropriate in light of the District's evaluation. It is unfortunate that only one of the goals contains a baseline.

The IEP includes three other goals that target the Student's independence.[5] All three of those goals concern the Student's ability to follow the daily kindergarten routine. Only one of those goals is baselined. I find that these goals are appropriate based on the District's evaluation. I also find that it was appropriate to determine baselines for these goals after the start of school, and then adjust the IEP if necessary, because the Student was entering a completely new environment.

The District also identified needs in the areas of attention, focus, and age-appropriate social skills. Those needs are reflected in the IEP itself in the present education levels. Despite this, the IEP contains no goals targeting these domains. It is not clear that research-based programs exist for children with the Student's cognitive profile that address these deficits, but the IEP's silence after identifying the type of deficits that are routinely targeted through special education is unacceptable. Perhaps the programs do not exist, or perhaps the District thought it best to target other domains first, but the IEP does not say so. Either a goal or an explanation was needed. The District provided neither.

The District's inclusion of SDI accommodating the Student's short attention is insufficient to mitigate the lack of a goal in this domain. I do not doubt that breaking work into small chunks is important for the Student. That *accommodation*, however, does nothing to remediate the Student's deficits in this domain.

The IEP contains no academic goals. The IEP does not contain a plan to build off of the Student's relative academic strengths or boost the Student's academic weaknesses. Nothing in the IEP sets an expectation that the Student will achieve any of the reading, writing, or math skills that kindergarteners are expected to master. Every student with a disability, regardless of cognitive profile, must have an opportunity to derive an academic benefit from being in school. For individuals with cognitive profiles like the Student's, such academic benefit is unlikely to come incidentally from being in a regular classroom environment. Rather, goals and SDI are required to ensure academic progress.

[5] The IEP also contains occupational therapy goals, which are not the subject of this hearing.

To be clear, the IDEA does not require the same results for all children. The Supreme Court recognized this in *Endrew* by distinguishing between students who have the ability to advance from grade to grade (like the student in *Rowley*) and those who may never achieve grade-level standards.[6] But it is difficult to conceptualize a student who is completely incapable of any form of academic progress. More importantly, the District's evaluation does not suggest that the Student cannot make academic progress. I do not suggest that it is appropriate for the Student to master the regular kindergarten curriculum in one school year. The Student's cognitive profile suggests otherwise. It is inappropriate, however, to expect nothing.

For many students, it is appropriate to emphasize independent living skills over academics. It is also possible for an IEP to be appropriate without academic goals if the purpose of the IEP is to prepare a student to live on his or her own. The Student in this case is in kindergarten, and there is no reason to believe that the Student cannot derive an academic benefit from schooling with potentially 13 years of education to come. The Student's current IEP must be the start of that process, but it is not. The IEP is inappropriate for that reason.

A substantial portion of this due process hearing concerned the District's use of the VB-MAPP. The VB-MAPP program has been adopted by the Pennsylvania Training and Technical Assistance Network (PaTTAN), which provides training and technical support to schools. The Parents argue, in essence, that the District offered VB-MAPP because that is the system that the District has in house – that the District's choice in program has nothing to do with the Student's needs. The District argues that VB-MAPP happens to be the right program for the Student.

I find that VB-MAPP is the methodology selected by the District to effectuate the IEP. The District is owed considerable deference in this regard. *Ridley School Dist. v. M.R.*, 680 F.3d 260, 275 (3d Cir. 2012); *K.C. v. Nazareth Area Sch. Dist.*, 806 F.Supp. 806, 813-814 (E.D. Pa. 2011); *Leighty v. Laurel Sch. Dis.*, 457 F.Supp. 2d 546 (W.D.Pa. 2006). Under the methodology standards established by case law, I do not find preponderant evidence that VB-MAPP is inappropriate for the Student. Like the DN, I find that the IEP is inappropriate for what it lacks, not for what it contains.

The District's Placement Offer

The District's placement offer is inappropriately restrictive. For the past 26 years, schools have operated under an unequivocal mandate to consider how placement in less restrictive environments can be effectuated before removing students into segregated settings. I have no doubt that District personnel truly believed that they were offering an excellent program for the Student. Unfortunately, their enthusiasm for their placement blinded them to other options. The record of this matter is devoid of anything evidencing serious consideration supplementary aids and services before concluding that the Student could spend only two hours of a 6.5-hour school day inside a regular education classroom. Of equal concern, the District's acquiescence to the Parents' demands to increase inclusion was just that – a reluctant offer for no other purpose than appeasement. As a result, the District's decision that the Student should spend half of the school day outside of regular education was arbitrary. Further, the IEP was not revised to include any plan to facilitate the Student's inclusion (the supplementary aids and services *Oberti* requires) or enable the Student to derive a benefit from exposure to the regular education curriculum.

[6] I recognize the infinite permutations in between.

I will not completely discount the possibility that serious consideration of supplementary aids and services would have brought the IEP team to the same conclusions about time spent outside of regular education. The fact that the District ignored this critical step in the analysis, however, leads me to not return the same question back to the IEP team for further consideration. As discussed above, the IDEA does not create a 'forced to fail' scenario for students who require restrictive placements. Yet under the facts of this case, the Student must be given a chance for success not only with more *time* in a regular education, but with some plan for the Student to derive a benefit from that time. I will leave it to the IEP team to determine what supplementary aids and services will enable a greater amount of more productive time in regular education. I leave no discretion about whether the Student's time in regular education should be increased.

The placement dispute also concerns the District's determination to place the Student outside of the Student's neighborhood school. The District's building selection was based on the unavailability of the VB-MAPP program in the Student's neighborhood school. Above, I conclude that the dispute about VB-MAPP is a methodology dispute and that the District is due deference in its methodology selection. I affirm the District's building selection for the same reason. School districts are not obligated to reproduce all services in all buildings and may take a centers-based approach to building selection. *Lebron v. North Penn Sch. Dist.*, 769 F.Supp.2d 788, 801 (E.D. Pa. 2011). Parents must have some voice in the building selection process, but nothing in the District's building selection in this case violates the IDEA. *See P.V. v. Sch. Dist.*, No. 2:11-cv-04027, 2013 U.S. Dist. LEXIS 21913 (E.D. Pa. Feb. 19, 2013) (LEAs may not exclude parents completely from building selection).

In addition to violating the IDEA's LRE mandate, the District also predetermined the Student's placement. The lack of consideration of any alternatives brings me to this conclusion. The District came to the table with its placement in mind, and then refused to consider any alternatives. It is perfectly permissible for LEAs and parents to simply disagree about what placement any student needs. Similarly, a LEAs refusal to consider inappropriate programs is not evidence of predetermination. However, the District's failure to consider supplementary aids and services, even with a plea from Parents to do so, establishes predetermination in this case.

Summary and Conclusions

In sum, the District's evaluation is appropriate, and so the Parents' demand for an IEE at public expense is denied. The District's proposed IEP is inappropriate for its failure to address the Student's attention and focus, social skills, and academic needs. The IEP must be revised, and the Student is owed compensatory education to remedy this deficiency.

The District's selection of VB-MAPP as a methodology is appropriate, considering the deference that the District is owed in methodology disputes. The District's building selection is also appropriate for the same reason.

The District's proposed IEP also violates the Student's right to be educated in the LRE. The totality of the record in this case compels me to order the District to place the Student in a regular education classroom for no less than 65% of the school day for at least four months that school is in session (roughly ½ of a school year). The Student's IEP team must determine what supplementary aids and services will enable that placement, and what data must be collected to determine the Student's success in that placement. Nothing herein prohibits the parties from agreeing to decrease the amount of time that the Student spends in regular education before

the four-month period ends if doing so is necessary to ensure the provision of FAPE. Any such agreement, however, must be written and signed by the Parents and a District representative.

The District also predetermined the Student's placement, thereby denying the Parents a meaningful opportunity to participate in the IEP development process. I do not imply that the Parents had any difficulty making their opinions known – they are zealous advocates. Rather, the infraction lies in the District's unwillingness to consider parental input concerning the restrictiveness of the Student's placement and academic goals. Additional compensatory education is owed to remedy the District's predetermination.

Neither party presents evidence to enable a *Reid* analysis. With no better evidence, I consider the amount of time that the Student was outside of the regular education classroom compared to what I order herein, and the absent goals from the Student's IEP to conclude that the Student is owed 3.5 hours of compensatory education per day that the Student attended school from the first day of the 2018-19 school year through the date of this order to remedy a denial of FAPE. An additional half hour (0.5) of compensatory education per day that the Student attended school from the first day of the 2018-19 school year through the date of this order is owed to remedy the District's predetermination.

The Parents may decide how the hours of compensatory education are spent within the following limitations: Compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device, purchased at or below prevailing market rates in the District's geographical area. Compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP. Compensatory education shall not be used to purchase transportation, products or services that are primarily recreational in nature, or products and services that are used by persons other than the Student except for group or family therapies.

ORDER

Now, March 15, 2019, it is hereby **ORDERED** as follows:

1. The District violated the Student's right to a FAPE by failing to address the Student's identified attentional, social, and academic needs in its offered IEP. The Student's IEP team shall reconvene in no less than 15 school days to add goals and specially designed instruction to address those domains.

2. The District violated the Student's right to a FAPE by placing the Student in a restrictive environment without considering what supplementary aids and services could be added to the Student's IEP to enable a less-restrictive placement. The Student's IEP team shall reconvene in no less than 15 school days to determine what supplementary aids and services must be added to the Student's IEP in order to enable the Student's participation in a regular education classroom for no less than 65% of the school day.

3. The District violated the Parents' rights to meaningful participation in the IEP development process by predetermining the Student's placement.

4. For all of the violations above, the Student is owed four (4) hours of compensatory education total for each day that the Student attended school from the start of the 2018-19 school year through the date of this order.

5. All of the Parents' other claims and demands are **DENIED** and **DISMISSED.**

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

/s/ Brian Jason Ford
HEARING OFFICER