

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Hearing Officer
Final Decision and Order

CLOSED HEARING
ODR File Number: 21263-18-19

Child's Name: T. C. **Date of Birth:** [redacted]

Parent:
[redacted]

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

Date of Decision: 12/30/2018

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a primary elementary school-aged student in the School District (District). Student was identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) on the basis of Emotional Disturbance in the summer of 2018.² Student's Parent and the District disagreed on the program to be provided to Student for the 2018-19 school year, and the Parent filed a Due Process Complaint in October 2018.

The case proceeded to a due process hearing.³ The Parent's position was that the District's proposed program was not in compliance with the IDEA and specifically its least restrictive environment provisions, thereby depriving Student of a free, appropriate public education (FAPE). The District maintained that the special education program as offered was appropriate for Student and met all of its obligations under the IDEA.

For the reasons set forth below, the claims of the Parent must be granted, and specific directives will be given to the IEP team for Student's transition back to school.

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 References to the record throughout this decision will be to the Notes of Testimony (N.T.), School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibit 1 (HO-1). A brief (ten day) extension to the decision due date was granted on joint request after a mid-December hearing session became necessary; however, this decision is still issued prior to the end of the District's winter holiday closure.

ISSUE

Whether the District's proposal to implement Student's educational program in an out of District setting is appropriate for Student and in compliance with its least restrictive environment obligations?

FINDINGS OF FACT

1. Student is a primary elementary school-aged student who is a resident of the District. Student is eligible for special education under the IDEA based on Emotional Disturbance. (N.T. 37.38.)
2. Student attended a private kindergarten program during the 2016-17 school year. Student reportedly exhibited a number of concerning behaviors in that setting, including difficulty following directions, refusing to comply with directions, and using inappropriate language with peers. Student was nonetheless promoted to first grade. (S-20 at 4-8.)

ENROLLMENT IN DISTRICT

3. Student enrolled in the District in mid-January 2018, and had not attended public school prior to that time. Student was homeschooled for the first semester of the 2017-18 school year. (N.T. 67, 88, 120-21, 257, 385-86.)
4. On the enrollment form, the Parent did not indicate that Student had attended the private kindergarten program. (N.T. 104-05.)
5. There were approximately twenty five students in the first grade classroom when Student attended the neighborhood school. In addition to Student's regular teacher, a special education teacher co-taught some classes and provided other support to students as needed. There was also a paraprofessional who was present throughout the day when the special education teacher was not in the classroom. (N.T. 304-06, 403, 405, 422-23.)
6. The classrooms in the neighborhood elementary school are arranged in pods, such that all classrooms of the same grade level are in the same physical location but mostly separated by dividing walls or furniture such as bookshelves. Classes within a pod have access to the whole room including the other classes in the same pod. (N.T. 129, 186, 306-07, 384-85.)
7. The pod arrangement generally can provide distraction to students, especially those who have difficulties maintaining attention. (N.T. 385.)
8. Student engaged in problematic behavior at school in first grade, particularly during unstructured settings. Student made verbal and physical threats to others, sometimes used inappropriate language toward others or called out in class, and was at times defiant.

Student touched staff of the opposite gender inappropriately on several occasions, and sometimes engaged in physical aggression toward objects or self when frustrated. (N.T. 257-59, 261, 281-84, 292-94, 386, 388-89, 394-95, 446, 457-58; S-2; S-11; S-12; S-21 at 7; S-31; S-32.)

9. Student incurred a number of bus and school suspension after beginning to attend the District first grade classroom. (S-4; S-6; S-7.)
10. During first grade in the District, the Parent was frequently contacted about Student's behaviors, including instances of defiance, moving a large item in the classroom, and hugging or touching staff inappropriately. (N.T. 61-62, 96-97, 102-03, 271-73, 282-83, 386-87, 400-02; S-30.)
11. Student did not respond well to redirection while in the District first grade, so the teacher made a referral to a behavior specialist. (N.T. 262-63.)
12. In late January 2018, a District Board Certified Behavior Analyst (BCBA) observed and met with Student. She made several recommendations including a behavior/safety plan and implementation of a variety of interventions and strategies, such as review of expected behaviors with social stories. The Parent did not agree with all of the suggestions. The BCBA also provided consultation to staff in the District for working with Student. (N.T. 445-47, 449-50, 453, 457, 460; S-3; S-7; S-24; S-29.)
13. A number of interventions were attempted in the first grade classroom to address Student's behavioral difficulties. Those included small group instruction; breaks throughout the school day; a behavior chart with rewards; a full time personal care assistant (PCA); meetings with an administrator for de-escalation and processing; review of expectations; preferential seating; visual reminders; an older peer buddy; meetings with the school counselor; and push-in support by an emotional support teacher on a few occasions. (N.T. 268-70, 277, 297-98, 321-22, 390-91; S-8.)
14. Student was also provided individual and group social skills training in first grade that included use of social stories. (N.T. 297-98, 302, 406, 414; S-8 at 1-2.)
15. In late February 2018, the District issued a Permission to Evaluate form because of Student's behaviors. The Parent did not consent at that time. (N.T. 122; S-5.)
16. Student attended a different District elementary school in late April 2018, as a trial that ultimately lasted only for a two-day period because Student experienced significant difficulties there and engaged in behavior similar to that exhibited in the neighborhood school. (N.T. 78, 146-47, 318-20; S-13; S-26.)
17. In May 2018, the District proposed a diagnostic placement for full time emotional support in an IU program after the trial elementary school setting was not successful. However, after visiting there, the Parent did not approve the Notice of Recommended Educational Placement (NOREP). The District did attempt to convene meetings before the school year ended and the Parent communicated with its representatives about

holding meetings. (N.T. 57-60, 124-25, 148-49, 318-19, 322-23; S-14; S-15; S-21 at 10-32.)

18. Attendance records reflect that Student's last day in the District was April 27, 2018, with a total of approximately forty-five days attending at least part of the school day, omitting days of suspension. (HO-1.)
19. The District funded tutoring services arranged by the Parent for Student over the summer of 2018. (N.T. 50-51, 98, 322-24; S-21 at 33.)

EVALUATION

20. In late April 2018, the District again sought permission by the Parent to conduct a special education evaluation. The Parent provided consent at that time. (S-10.)
21. The District conducted the special education evaluation of Student and issued an Evaluation Report (ER) in late August 2018. (N.T. 159.)
22. Parent input into the ER did not include information about the private kindergarten. A few concerns were noted: a short attention span, and difficulty getting along with friends and adjusting to the school environment. (S-16 at 1-2; S-33.)
23. Teacher input into the ER included a number of strengths and some gaps in academic skills. Student's behavioral challenges and interventions that were attempted to address them, and difficulties maintaining attention to task, were also noted. Other District information including discipline was also summarized in the ER. (S-16 at 2-4.)
24. Assessment of Student's cognitive functioning (Wechsler Intelligence Scale for Children – Fifth Edition and select subtests of the Woodcock-Johnson Tests of Cognitive Abilities) reflected overall average ability (Full Scale IQ in the average range (SS 96) but with some variability across domains). Areas of relative strength and weakness were also identified through those measures. (S-16 at 6-10.)
25. On assessment of academic achievement (Wechsler Individual Achievement Test – Third Edition), Student earned scores in the average range on all subtests with the exception of Oral Reading Fluency (low average range), Numerical Operations (high average range), and Sentence Composition (upper end of the well below average range). (S-16 at 10-12.)
26. Student's attention and executive functioning was assessed through rating scales (Conners Third Edition) completed by the Parent and the first grade teacher at the neighborhood school. Student's teacher's scales reflected very elevated scores with respect to hyperactivity/impulsivity, defiance/aggression, and peer relations; and elevated scores for inattention. The Parent's scales were in the very elevated range with respect to inattention and peer relations, and in the elevated range for hyperactivity/impulsivity. Additional rating scales for Attention Deficit Hyperactivity Disorder (ADHD) yielded scores near or in the clinically significant to range by both raters. (S-16 at 12-16.)

27. Other social/emotional/behavioral functioning was assessed through the Behavior Assessment System for Children – Third Edition (BASC-3) rating scales completed by the Parent and teacher. The Parent’s scales reflected some concern with adaptability, social skills, leadership, and functional communication. The teacher’s scales endorsed clinically significant concerns with hyperactivity, aggression, conduct problems, depression, atypicality, withdrawal, and adaptability; and at-risk concerns in the areas of anxiety, attention problems, learning problems, social skills, leadership, study skills, and functional communication. (S-16 at 15-19.)
28. The District reached a conclusion that Student was eligible for special education on the basis of Emotional Disturbance. The Parent agreed with that determination. (N.T. 66, 162-64; S-16 at 28-29.)
29. Recommendations in the ER were for structure and practice; chunking of tasks, assignments, and directions/instructions; review of expectations; instruction in using checklists and other strategies for completing work; positive reinforcement; sensory breaks; social skills including instruction with perspective-taking; prompts and redirection; and school-based counseling. (S-16 at 28-29.)
30. In late August 2018, the Parent participated by telephone in a meeting to review the ER and discuss the proposed Individualized Education Program (IEP). (N.T. 126-27, 214-15; S-17.)

PROPOSED INDIVIDUALIZED EDUCATION PROGRAM

31. The IEP developed following the August 2018 ER noted that Student exhibited behaviors that impeded Student’s learning or that of others. Other needs specified in the IEP were for structure and practice; redirection, proximity, and praise in the classroom to support academic skills; improved attention to task and compliance with directives; increased task completion with more independence; development of coping skills and strategies; improved self-confidence; external support, including direct instruction, for problem solving and socialization skills; sensory/movement breaks; and positive support and reinforcement. (S-17.)
32. The August 2018 IEP contained two goals: one for demonstrating socially appropriate behavior at school (such as remaining in assigned area, engaging in tasks, following directions, interacting with peers, and not calling out in class) with practice with emotional regulation strategies and functional communication training; and one for decreasing non-compliant behavior after review of social stories and functional communication training. (S-17 at 16-17.)
33. Program modifications/items of specially designed instruction in the August 2018 IEP mirrored the recommendations in the ER, with express provisions for structure and practice; social skills intervention (perception and coping skills); redirection and prompting; praise and positive reinforcement; opportunities for discussing upcoming events or past events that led to emotional outbursts; sensory/movement breaks; chunking of tasks; review of expectations; simple directions; and cues and checking for

understanding. Occupational therapy and physical therapy evaluations in addition to a Functional Behavioral Assessment (FBA) were also specified. (S-17 at 18-21.)

34. The August 2018 IEP proposed emotional support at a supplemental level, with all academic instruction in the special education classroom and participation in general education for specials, lunch, and recess. (S-17 at 22-23.)

DISTRICT PROPOSED IU PROGRAM AND PLACEMENT

35. The District proposed that Student's educational program be delivered at an Intermediate Unit (IU)-run program of emotional support in a neighboring school district, and issued a NOREP. The reason for that recommendation was to provide Student with a sufficiently intensive level of emotional support. (N.T. 66, 216-17; S-18.)
36. There are nine classrooms in the building that was proposed that Student attend. Four are emotional support classrooms: one for grades kindergarten through third grade that Student would attend, and three for older children through sixth grade. (N.T. 356, 358-59.)
37. The proposed IU program has a professional staff in the building that includes a full-time school psychologist, a board certified behavior analyst (BCBA), an educational consultant, a program coordinator, a social worker, and a school counselor. Related service providers are available for students who need those. Each classroom has a teacher and more than one instructional assistant. (N.T. 217, 219, 360-62.)
38. The classroom that Student would attend had seven students in the fall of 2018. The classroom is highly structured, and there are one teacher and two part-time paraprofessionals in the classroom.⁴ (N.T. 359, 364-65.)
39. The BCBA at the proposed IU program is trained in Crisis Prevention Intervention and provides training to staff. (N.T. 360-61.)
40. There is an opportunity for participating in some large-group inclusion activities at the proposed program. (N.T. 374-75.)
41. The Parent visited the proposed IU emotional support program location in the fall of 2018. (N.T. 57-60, 149, 357, 374-75.)
42. The Parent believes that the IU program would provide more intensive support than Student needed. (N.T. 58-59, 66-67.)

DISTRICT NEIGHBORHOOD SCHOOL EMOTIONAL SUPPORT PROGRAM

43. The District has emotional support available in the neighborhood elementary school. There is an emotional support classroom for children in first and second grades with a

⁴ The term used for the word "para-educator" in the transcript (N.T. 359-60) appears to be inaccurate.

teacher and an instructional assistant for seven students. (N.T. 165-66, 218-19, 222, 384, 407-08, 425.)

44. The District's neighborhood school has available a school psychologist (four days per week) and a school counselor (five days per week). A BCBA is in the building at least weekly and meets with the emotional support classroom students; she is the primary contact for the neighborhood school at other times. (N.T. 220-21, 239, 407-08, 444-45, 448.)
45. The District emotional support classroom in the neighborhood school and the IU program use the same curricula. (N.T. 219.)
46. Student has friends who attend the neighborhood elementary school. (N.T. 74, 78.)

2018-19 SCHOOL YEAR

47. The Parent obtained records from the kindergarten program and forwarded them to the District in the fall of 2018, but did not give consent to its representatives to communicate with that private facility. (N.T. 106-07.)
48. As of the December due process hearing, Student had not attended school during the 2018-19 school year. With the exception of private tutoring sessions two hours per week, Student had not received any formal education during any portion of the 2018-19 school year. (N.T. 37-38, 46, 49, 51-53, 98.)
49. Student needs to develop coping and self-regulation skills. (N.T. 164-65.)
50. Student needs a structured, supportive setting with emotional support so that Student's behavior can be monitored. (N.T. 164-65, 160, 185, 241-42.)
51. At the time of due process hearing, Student was not receiving private behavioral health or similar services. (N.T. 143, 151-52.)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parent who requested this administrative

hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

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 and offering their views to the best of their recollection and experience.

In reviewing the record, the testimony of each witness and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties’ closing statements.

GENERAL IDEA PRINCIPLES: SUBSTANTIVE FAPE

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

Local educational agencies (LEAs) meet the obligation of providing FAPE to eligible students through development and implementation of an IEP which is “‘reasonably calculated’ to

enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Recently, the U.S. Supreme Court considered anew the application of the *Rowley* standard, observing that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Andrew 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.”

Andrew F., ___ U.S. ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017)(italics in original)(citing *Rowley* at 206-09)(other citations omitted). The Court explained that, “an educational program must be appropriately ambitious in light of [the child’s] circumstances... [and] every child should have the chance to meet challenging objectives.” *Id.*, 137 S. Ct. at 1000, 197 L.Ed.2d at 351. This is especially critical where the child is not “fully integrated into the regular classroom.” *Id.* The Court thus concluded that “the IDEA demands ... an

educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.*, 137 S. Ct. at 1001, 197 L.Ed.2d 352. This standard is not inconsistent with the above interpretations of *Rowley* by the Third Circuit.

As *Andrew*, *Rowley*, and the IDEA make abundantly clear, the IEP must be responsive to the child's identified educational needs. *See* 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, the LEA is not obligated to "provide 'the optimal level of services,' or incorporate every program requested by the child's parents." *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). In other words, the law does not demand that LEAs provide services beyond those that are reasonable and appropriate in light of a child's unique circumstances, such as those that "loving parents" might desire. *Andrew F.*, *supra*; *Ridley*, *supra*; *see also Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Critically, "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993); *see also D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010) (same). Finally, a child's educational placement must be determined by the IEP team based upon the child's IEP, as well as other relevant factors. 34 C.F.R. § 300.116.

GENERAL IDEA PRINCIPLES: PROCEDURAL FAPE

From a procedural standpoint, the family plays "a significant role in the IEP process." *Schaffer*, *supra*, at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b); *see also Letter to Veazey*, 37 IDELR 10 OSEP 2001) (confirming the position of OSEP that LEAs cannot unilaterally make placement decisions about eligible children to the exclusion of their parents). Indeed, a denial of FAPE may be found

to exist if there has been a significant impediment to meaningful decision-making by parents. 20
U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program. Among other things, IDEA requires the IEP Team, which includes the parents as members, to take into account any "concerns" parents have "for enhancing the education of their child" when it formulates the IEP.

Winkelman v. Parma City School District, 550 U.S. 516, 530 (2007). Full participation in the IEP process does not mean, however, that LEAs must defer to parents' wishes. *See, e.g., Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) (noting that IDEA "does not require school districts simply to accede to parents' demands without considering any suitable alternatives," and that failure to agree on placement does not constitute a procedural violation of the IDEA); *see also Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D.Md.2002) (explaining that "parents who seek public funding for their child's special education possess no automatic veto over" an LEA's decision).

As has previously been explained by the U.S. Department of Education,

The IEP team should work towards a general agreement, but the public agency is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE)... If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint.

Letter to Richards, 55 IDELR 107 (OSEP 2010); *see also* 64 Fed. Reg. 12406, 12597 (1999) (same).

LEAST RESTRICTIVE ENVIRONMENT

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

U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). 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 second prong, it is helpful to keep in mind that the “ ‘regular educational environment’ encompasses regular classrooms and other settings in schools such as lunchrooms and playgrounds in which children without disabilities participate.” 71 Fed. Reg. 156 at 46,585 (2006). In addition, placement decisions must be determined at least annually based on the child’s IEP, and should be “as close as possible to the child’s home.” 34 C.F.R. § 300.116.

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.

THE DISTRICT’S PROPOSED PROGRAM

The District proposed an IU-run program and placement that is not located within the District’s boundaries. The evidence certainly supports a conclusion that the proposed program would provide Student with a highly structured, supportive setting with the benefit of a number of professionals who can offer the emotional support and other services that Student clearly

needs. There is also no reason to question whether that program would be able to implement the goals and provide the program modifications and specially designed instruction in the proposed IEP. However, the least restrictive environment mandate does not contemplate a mere comparison of lesser and more restrictive settings; it begins with the premise that a child can be educated in the regular education classroom with appropriate supplementary aids and services. Indeed, the “continuum” of placements in the law enumerates settings that progressively grow more restrictive, beginning with regular education classes, moving then toward special classes and then toward special schools and beyond.

Here, there can be no question that Student’s experience in public school during first grade was wholly unsuccessful. The District acted quickly in providing a number of general education interventions, consulting with a BCBA, and seeking permission from the Parent to evaluate Student. When consent was not immediately provided to conduct an evaluation, the District proposed two other options for placement, one of which provided to not be appropriate and the other of which the Parent did not approve. In the meantime, consent to evaluate was provided and that process took place in a very timely manner.

However, it is also essential to keep in mind that Student’s first grade experiences were prior to identification as eligible for special education under the IDEA and, additionally, were during Student’s very first experience in a public school. While there was evidence that the number and type of interventions attempted at school were significant, they did not amount to a cohesive, carefully crafted special education program designed to meet Student’s unique needs and circumstances, including development of self-regulation and coping skills. *Compare, e.g., Greenwood v. Wissahickon School District*, 571 F. Supp. 2d 654, 667 (E.D. Pa. 2008)(concluding that the school district had “expended substantial time and resources to

integrate [the Student] to the maximum extent appropriate.”), *aff’d*, 374 Fed. App’x 330 (3d Cir. 2010). The sole issue here is whether the IEP that was ultimately developed in August of 2018 can be implemented in a less restrictive setting as required by the IDEA; in other words, has the IDEA preference for less restrictiveness along the continuum been satisfied by the proposed move from the neighborhood school to an out of District location?

There is substantial evidence that the District professionals who have been involved are not certain that the neighborhood school can meet Student’s needs (N.T. 326), and believe that it is in Student’s “best interest” to attend the IU program and placement (N.T. 228, 229, 232, 247). There is also suggestion that Student “could” be distracted by the pod arrangement in the elementary school (N.T. 187-88).⁵ Their concerns are certainly valid and understandable. However, the standard to be applied is whether an LEA program is “reasonably calculated” to yield meaningful educational benefit based on information known at the time, not a certainty that it can do so; and, the LRE is a critical consideration.

The record as a whole simply does not support a conclusion that, at this time, the District lacks the ability and resources to implement Student’s IEP as it was developed in August 2018 in the neighborhood school where there is an emotional support classroom for Student’s grade level. This is not a circumstance where the District will be required to create a program specifically for Student in a location where none is currently available. There is no dispute between the parties that Student requires a level of emotional support that cannot be provided in the regular education setting, but Student’s IEP also provides for participation with typical peers for specials, lunch, and recess. Student already has friends at the neighborhood school, and a return to that familiar environment will more easily accomplish Student’s transition from a

⁵ It is, however, not clear that the first and second grade emotional support class in the neighborhood school is in a pod.

lengthy period of no formal schooling to the demands of a second grade public school student. Structure and other necessary supports that are directly responsive to Student's needs are already in the IEP. Professionals at the neighborhood school building four days a week include a school psychologist and a school counselor, and a BCBA is present at least one day each week and is the primary contact for the neighborhood school at other times. In addition, the emotional support curricula at the District program is the same as that in the IU.

Also significantly, an FBA is specifically provided in the IEP. That type of assessment will involve a systematic process of identifying and defining behaviors of concern, collecting data, identifying environmental factors and skill deficits impacting the behaviors, and developing hypotheses for their perceived functions, all of which will assist the team in developing a Positive Behavior Support Plan in the new classroom. Moreover, there is also no reason to suspect that the District and Parent will fail to carefully monitor Student's behavioral performance and other education related-needs and respond accordingly so that, if a more intensive level of support is needed beyond that which is available at the neighborhood school, the IEP team can promptly meet and discuss necessary changes. Student must, however, first be given the opportunity to become acclimated again to the educational environment and the rigor of attending full days of school.

It is prudent here to address the Parent's contention that the preference of a parent as one of the, if not the, most important members of the IEP team should prevail if there is not full agreement by all members. As explained above, however, parents do not have any sort of "veto power" in placement decisions, and an LEA is not required to acquiesce to parental preferences. Rather, the process is designed to work just as it did here: the LEA made the recommendation that it concluded offered FAPE, and the Parent had the ability to and did challenge that

determination. But that conclusion must be based on the law as applied to the specific facts of the case, and not as deference to parental wishes.

It will, of course, be critical for the District professionals and the Parent to communicate openly on a regular and ongoing basis. That type of communication should, ideally, include the sharing of information and records from other private or public educational agencies as well as any private medical or similar professional providers that may relate to Student's educational programming needs. The attached Order will set forth specific requirements to ensure that the parties continue to engage in the collaborative special education processes envisioned by the applicable law, while also setting forth specific directives for Student's transition back to the educational setting and continuing on into the 2018-19 school year.⁶

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District's proposed program and placement for Student does not comply with the IDEA least restrictive environment mandate at this time.

ORDER

AND NOW, this 30th day of December, 2018, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

⁶ Everyone recognizes the possibility that the neighborhood school emotional support classroom will not be sufficiently supportive and, thus, inappropriate for Student, particularly in light of Student's limited public school experience to date. If that is the case, there was substantial evidence at the hearing about the IU program that would logically be the alternative should the ordered return to the neighborhood school be unsuccessful.

1. The IEP developed for Student in August 2018 shall be implemented in the neighborhood elementary school in the age-appropriate emotional support classroom with the level of participation with typical peers as specified in that document.
2. Within three school days of the date of this Order, the IEP team shall meet (remotely, in person, or in some combination) to discuss and make revisions to the IEP including the addition of a provision for a PCA for Student at all times that Student is participating in the regular education environment with typical peers, and the addition of regular consultation by a District-selected BCBA.
3. At that same meeting, the IEP team shall also discuss whether a Crisis Intervention or other safety plan should be added to the IEP. If there is no agreement, the recommendation of the District-selected BCBA shall prevail.
4. At that same meeting, the IEP team shall also discuss whether Student's transition back to school beginning no later than January 7, 2019 should for some brief period of time begin at less than a full school day and gradually increase to full school days. If there is no agreement, the recommendation of the Parent shall prevail.
5. At that same meeting, the IEP team shall also determine the approximate date on which the FBA shall begin. If the Parent does not consent to an FBA, the District may proceed with one without such consent. The FBA shall be overseen by a District-selected BCBA who shall also be consulted in the development of a PBSP upon its completion.
6. At that same meeting, the IEP team shall also determine a regular schedule of meetings to discuss Student's performance at school, both in and out of the classroom, for the remainder of the 2018-19 school year, and to make revisions to the IEP as needed.
7. 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.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
ODR File No. 21263-1819KE