

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: 21306-18-19

Child's Name: A. J. **Date of Birth:** [redacted]

Parent:
[redacted]

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Hearing Officer: Charles Jelley Esq. **Date of Decision:** **August 9, 2019**

Introduction

The Parents of an early elementary school-age Student filed the instant due process Complaint seeking compensatory education alleging the District's offer of a free appropriate public education (FAPE), as defined by the Individuals with Disabilities Education Act (IDEA), in a non-neighborhood school, in the District is not appropriate and violates the IDEA's least restrictive environment (LRE) requirements.¹ The District argues that at all times relevant, it complied with all substantive and procedural requirements of the IDEA. For all of the following reasons after carefully considering all relevant facts, including the non-testimonial extrinsic evidence, I find in favor of the District. Hence, under these particular facts, the Student's request for compensatory education is also denied. All other claims or affirmative defenses not otherwise addressed herein are dismissed with prejudice.²

Issue

1. Did the District offer the Student a free appropriate public education ("FAPE"), in the Least Restrictive Environment; if not, is the Student entitled to appropriate relief in the form of compensatory education? (N.T. 22-23).

Findings of Fact

The District Located and Evaluated the Student

1. The Student is a rising first-grader who just completed kindergarten. On or about March 26, 2018, the District issued Prior Written Notice and a Request for a Consent to evaluate the Student for school-age IDEA eligibility. Before attending the District, the Student attended an early intervention and preschool program operated by the local intermediate unit.

¹ The Parents' claims arise under 20 U.S.C. §§ 1400-1482 and Section 504. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). The Decision Due Date was extended for a good cause, upon written motion of the Parties. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number.

² After carefully considering the entire testimonial record, including the non-testimonial, extrinsic evidence in the record, in its entirety, I now find that I can draw inferences, make Findings of Fact and Conclusion of Law. Consequently, I do not reference portions of the record that are not relevant to the issue(s) in dispute.

While enrolled in the intermediate unit program, the Student received specially-designed instruction and related services (S-2).

2. On or about May 23, 2018, the District, after providing the Parents with prior written notice, provided the Parents with a draft reevaluation report (RR).³ The RR included Parental input and a detailed historical summary of the Student's speech and language therapy, occupational therapy (OT), adaptive behavior, social, emotional and behavioral test data collected and reviewed by the Parents during the Student's participation in the IU preschool program (S-2).
3. To gauge the Student's motor skills the May 23, 2018, RR included the results of a visual and perceptual-motor assessment. On the visual and perceptual-motor assessment, the Student earned a Below Average score (S-2).
4. Due to the Student's age and developmental profile, the speech therapist, through a series of structured play-like tasks, completed an informal assessment of the Student's needs. The therapist anecdotal data referenced in the RR states that the Student could not answer "yes or no" questions. For example, rather than provide verbal answers to the play tasks, the Student, at times, would echo back the question. Articulation and voice were judged to be within the normal limits; however, the Student would only answer one choice questions (S-2).
5. The Parents and the teacher completed the Adaptive Behavior Assessment System-Third Edition (ABAS-3) a nationally recognized measure of functional skills. ABAS-3, scores have a scaled score mean of 10 with a standard deviation of 2. Standard scores (SS) between 90 and 109 and scaled scores between 8 and 12 are considered Average. The Parents' SS ratings all fell in the Average range, while the teacher's rankings fell in the Below Average range (S-2).
6. On the Stanford Binet Intelligence Scales-Fifth Edition (SB-V) the Student's subtest scores ranged from the 1st percentile to the 13th percentile. On the SB-V, the Student earned a full-scale IQ score of 71, at the 2nd percentile. The Student's full-scale IQ score falls within the borderline impaired to the delayed range of cognitive ability. On the Kaufman Test of Educational Achievement, Third Edition (KTEA-3) the Student's SS ranged from a high

³ Following the IDEA nomenclature, although this was the first time the District evaluated the Student, since the Student was evaluated by the IU in preschool, I will reference the District's first evaluation of the Student as a reevaluation.

of 99, in Letter and Word Recognition to a low of 80 on Written Expression. Likewise, the Student's percentile rankings ranged from a low of 9 on Written Expression subtest to a high of 47 on Letter and Word Recognition subtest (S-2).

7. The RR notes the Student has multiple communication, language, attention behavioral, executive functioning planning and organizational needs. After reviewing the IU assessment data and the RR results, the team concluded that the Student was IDEA eligible as a person with a speech and language impairment. The IEP team also noted as "the IEP team moves forward with gathering additional testing [the team should] rule in or rule out additional qualifications for specially-designed instruction" (S-2).
8. After reviewing the existing data, the RR team then concluded the Student was a person with a Speech and Language Impairment (S-25, S-26).

The District's First Offer of a FAPE in the LRE

9. On or about June 14, 2018, the District and the Parents met to develop the Student's kindergarten IEP. The IEP included Parental input and the IU preschool data. The IEP present levels of educational and functional academics describe the Student's behavioral, speech and language, OT/fine motor, adaptive behavior, social and cultural background. The IEP included clear present levels of performance and a description of the Student's strength and needs (S-2).
10. The June 14, 2018, IEP included six measurable annual goals. To support the measurable annual goals, the IEP included 16 different forms of specially-designed instruction (SDI), along with the related services of OT (S-8).
11. The IEP also called for the Student to receive Itinerant Speech and Language supports, provided by special education personnel for 20% or less of the school day (S-2).
12. On or about June 14, 2019, the District issued a Notice of Educational Placement/Prior Written Notice (NOREP/PWN) proposing a full-time regular education kindergarten placement with 40 sessions of speech and language support, for 30 minutes each session, in a small group. All services, supports and SDIs were scheduled to be provided in the Student's neighborhood school (S-9).

13. On June 17, 2018, unbeknownst to the District, the Student's physician diagnosed the Student with autism spectrum disorder (S-10).
14. In response to the NOREP, the Parents provided the District with a seven-page response, calling for a series of changes to the IEP. First, the Parents requested that the Student be placed in a "mainstream" first-grade class, rather than kindergarten. Second, the Parents requested the District provide the Student with a one-on-one aide, who understood and could implement more in-depth behavioral strategies and a positive behavioral intervention plan. Third, the Parents requested clear descriptive communication goals, environmental adaptations, along with additional supports to teach toilet training, along with an increased emphasis on ongoing progress monitoring strategies (S-11).
15. The seven-page letter did not request a due process hearing or reject the offer of a FAPE. When school started in August, the Student received all of the services in the June 2018 IEP (S-11).
16. On October 11, 2018, the Parties met to redesign the Student's IEP. After spending a few weeks in kindergarten, the IEP notes the Student needed a positive behavior support plan. The present levels note the Parents waited until August 2018 to provide the District with documentation dating back to 2015 and confirmed in 2018 that the Student was diagnosed as a person with autism. The IEP progress monitoring further notes that after spending several months in kindergarten the Student could identify 26, upper and lower case letters, yet at the same time, the Student with one-on-one support could not complete the Dynamic Indicators of Basic Early Literacy Skills (DIBELS) math assessment on a computer (S-15).
17. The present levels go on to note the Parents asked the team to use a seatbelt to keep the Student seated throughout the day. The Parents also requested the District punish the Student for ongoing classroom disruptions (S-15).
18. The present levels included behavioral data from multiple observations throughout the day. The behavioral data notes the Student was frequently noncompliant, failed to follow teacher directives and engaged in elopement behavior throughout the day. (S-15).
19. The present levels progress reporting notes that numerous behavioral interventions, like using a timer to deliver consistent reinforcers, a sensory box, stickers, and one-on-one escorts to and from the bus were not making a significant difference (S-15).

20. The October 2018, IEP included a clear statement of the Student's unique needs, including but not limited to increasing attention, increasing language skills, increasing writing, reducing elopement, improving fine motor skills, increasing ability to follow instructions, and improving adaptive skills (S-15).
21. The October 2018 IEP included ten (10) measurable goals, 32 SDIs including OT, speech and language and crisis intervention techniques to manage the Student's noncompliant and elopement behaviors. The SDIs included strategies like: toilet training reminders; frequent movement breaks; close teacher Student proximity; immediate reinforcement strategies like "high fives" and stickers; a timer to ensure the Student received positive reinforcement every one to six minutes; a weighted vest and/or a lap weight-20 minutes on 40 minutes off, errorless learning strategies; a personal care assistant throughout the day, in combination with the related services of OT and speech therapy (S-15). Although the Student was now identified as a person with autism, and a speech impairment, the IEP team did not have sufficient data to decide if the Student was eligible for extended school year (ESY) services (S-15).
22. The October 2018, IEP suggested that the Student should participate with non-disabled peers for science, social studies, specials like recess, lunch and assemblies. The IEP also stated that the Student would not participate with nondisabled peers for core academic instruction while in the autistic support program. The IEP team concluded that due to the Student's need for a highly structured verbal communication program and behavioral supports, along with the need to receive instruction in the kindergarten core standards the Student should also receive supplemental autistic support (S-15).
23. The IEP included a stand-alone PBSP, describing slow triggers, behaviors of concerns, consequences maintaining the behavior of concern, the perceived function of the behavior, repeated 18 SDIs in the IEP and suggested targeted replacement behaviors (S-15).
24. The team openly discussed that on at least one occasion how and why the staff physically restrained the Student (S-14, NT *passim*).
25. The October 2018 IEP calls for the Student to spend more than 20% of the day but less than 80% of the day with special education supports and service provided by special education personnel in an autistic support class with itinerant speech and language support at a location in the District (S-15).

26. On or about October 16, 2018, the District offered and the Parents rejected a NOREP offering a package of individualized services, supports and SDIs described in the October 2018 IEP. The Parents also rejected the proposed action of placing the Student in a Supplemental autistic support class, with speech and language services, OT and supplemental aids and services, in a different regular education elementary school in the District (S-15, S-16).
27. As part of the IEP preparation leading up to the development of the IEP, the District staff completed an informal internal assessment to determine if the Student required a one-on-one aide. The assessment noted the Student had the following difficulties/needs: (1) The Student has multiple communication difficulties. (2) The Student needs personal assistance to use the bathroom. (3) The Student requires adult support when eating. (4) The Student dresses with partial assistance. (5) The Student has fine motor difficulties. (6) The Student engages in multiple inappropriate behaviors like elopement and non-compliance seven or more times per week. (7) The Student requires inclusive support for up to four hours a day, meaning that the Student requires an associate teacher to accompany the Student in the general education setting. The informal assessment noted aggressive behaviors like biting, hitting, and kicking occurred across all school settings. The assessment further noted the need for the staff to implement crisis techniques like blocks, or restraint, to either manage or prevent self-injurious behaviors. The Student's cumulative score of 2.71 indicated that the Student can not be left unattended and may require a one-on-one aide. At the same time, the assessment also indicated that the Student could be safely and appropriately supported in regular education in a group of two or more peers (P-12, NT pp.284-286).
28. The Parents then rejected the October 2018 NOREP and requested a due process hearing. Along with the NOREP the Parents provided the District with a two page statement calling for the one-on-one behavioral trained aide, smaller class setting for part of the day, a positive behavior support plan incorporating errorless teaching, elimination of aversive techniques, requested a functional behavioral assessment (FBA) under the direction of a board-certified behavioral analyst (S-17).
29. On November 5, 2018, the Director of Special Education sent a letter to the Parents stating that RR dated September 28, 2019, provided to the Parents in "Draft" format contained eight substantive errors. First, the letter states that the RR on page 5, incorrectly listed the Student's full-scale IQ as "71" as opposed to "72." Second, the Student's Visual Spatial Nonverbal Domain Subtest score should be recorded as a "10" not "11." Third, the Student's

full-scale IQ is a “71” to a “72” with a Confidence Interval at “68-76” not “69-77.” Fourth, the Student’s Nonverbal IQ SS is a “79”, not 81, with a Percentile rank of “8” not “10,” at the Confidence Interval of “74-86,” not “76-88.” Fifth, the letter corrected the Student’s Bracken Basic Concept Scale Receptive Third Education (BBCS-3R) scaled score should be a “6” not a “7” with a Percentile Rank of “9” not “16.” The letter also corrected the description of the Student’s level as “very delayed” “not delayed.” Sixth, the letter stated that proposed IEP present levels were changed to correct the above errors. Seventh, the letter stated that the Penndata reporting section, describing the time, the Student would participate inside the regular classroom would be corrected as the “case manager accidentally missed completing the Penndata Section (S-13).

The Parent’s IEE and the Expert’s Kindergarten Observation

30. On or about November 12, 2018 and November 27, 2019, the Parents’ expert administered a battery of assessments including the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) (selected subtests), the Wechsler Individual Achievement Test-Third Edition (WIAT-III) (selected subtests), the Clinical Evaluation of Language Functioning-Fifth Edition (CELF-5) (selected subtests), the Bracken School Readiness Assessment-Third Edition (BSRA-3), the Behavior Assessment System for Children-Second Edition (BASC-2) Parent and Teacher Report, the Childhood Autism Rating Scale-Second Edition (CARS2-ST) and the Developmental Neuropsychological Assessment, Second Edition (NEPSY-II) (selected subtests) (P-18).
31. The examiner also observed the Student in the kindergarten classroom. The examiner noted the Student presented as a very active and impulsive learner. During the observation, the Student, on a few occasions, attempted to take the examiner’s materials and spoke in short phrases or in single words (P-18).
32. On the WISC-V, which typically includes 21 subtests, 10 of which are primary and 11 of which are supplemental, the examiner administered selected subtest to assess the Student's Fluid Reasoning; the Student earned a Composite Score of 82 at the 12th percentile (P-18).
33. On the NEPSY Design Copying subtest, the Student earned a score at the 75th percentile in the Average range (P-18).
34. On the WIAT-III the Student earned the following SS: a 78 on Early Reading subtest; a SS of 70 on the Spelling subtest; a SS of 109 on the Alphabet Writing Fluency subtest; a SS of 100 for Numerical Operations

subtest; a SS of 80 in Math Problem Solving subtest; a SS of 59 on the Receptive Vocabulary subtest; a SS of 78 on the Expressive Vocabulary subtest, and a SS of 77 on the Sentence Repetition subtest (P-18).

35. On the BSRA-3, a measure of the Student's understanding of basic concepts like colors, letters, number/counting, shapes and sizes, the Student earned a score of 100% for colors, 87% for letters, 45% for shapes and 5% for size comparisons (P-18).
36. On the BASC-2 assessment, which is designed to identify a variety of emotional and behavioral difficulties, the mother did not endorse any "at-risk" or "clinically significant" concerns in the areas of emotion, behavioral and or adaptive functioning in the home. During the clinical interview, the mother did, however, express multiple behavioral concerns in the school setting. The mother also expressed concerns about the school-based reports describing the Student's behaviors. Although the teacher completed the BASC-2 rating scales, the examiner opined, relying on the BASC-2 F-Index rating, a built-in measure to establish the informant's reliability, the teacher's BASC-2 scores should be interpreted with "Extreme Caution." Therefore, the teacher's ratings were not used in calculating the Student's overall BASC-2 results. That aside, the remaining BASC-2 results suggested the Student's rankings were consistent with an autism spectrum disorder diagnosis (P-18).
37. On the VABS-III, a measure of mastery of personal and social demand expected of a person at a particular chronological age, the Student's score fell in Low Average to the Borderline range (P-18).
38. The Student's CARS2-ST scores, a rating scale by a trained clinician to gauge items indicative of autism spectrum disorder (ASD) as opposed to a developmental disorder the Student's earned a CARS2-ST score in the Moderate range on the autism spectrum disorder scale. The examiner's data confirmed the District's identification of the Student as a person with autism. To remediate the Student's academic needs the examiner suggested the Student would benefit from discrete-trial-training targeting academics, visual perception/match to sample tasks, listener responding, beginning math skills reading, time telling, social, emotional skill development (P-18).
39. To accomplish continuous skill development, the private examiner recommended OT services, a one-on-one aide, a behavioral support plan in school and the home, under the direction of a board-certified behavioral analyst (BCBA) (P-18, NT pp.444-518). The expert further opined that the Student's IEP should be implemented in a regular education classroom with

the supports from a trained aide, preferably a registered behavior technician (RBT), OT, and speech and language support (P-18). Otherwise, the expert did not comment negatively on the substantive content of the measurable goals, the SDIs, the OT, or speech supports (NT *passim*).

The Diagnostic Evaluation and the VB-MAPP Assessment

40. After hearing testimony from a variety of witnesses, this hearing officer Ordered a diagnostic evaluation. The diagnostic evaluation required the District to administer the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) assessment. To accomplish the diagnostic assessment, the Student participated in an autistic support verbal behavior classroom, operated by the IU, in a different building within the district (HO#3). The student to staff ratio in the verbal, behavioral classroom varies between five to six adults to eight students. When the Student participated in the verbal behavior classroom, the Student received support from a one-on-one aide (NT pp.553-557).
41. The staff in the verbal behavior classroom utilize verbal behavioral analysis, discrete trial, applied behavioral analysis and errorless learning techniques (NT pp.553-560).
42. The VB-MAPP is a criterion-referenced assessment curriculum guide and skills tracking system designed specifically for children with autism and other individuals who demonstrate language delays. The main components of the VB-MAPP are as follows: The Milestones Assessment focuses on 170 milestones that serve as the foundation of language, learning and social development.⁴ On the Milestones Assessment, the Student's scores fell at Level 2, at the 18 to 30 months level (NT pp.584-610, HO#2, HO#3).
43. The Student's Visual Skills fell at the 48-month range (NT pp.584-610,

⁴ The Milestones Assessment is broken down into three levels: Level 1 (0-18 Months), Level 2 (18-30 Months) and Level 3 (30-48 Months). At Level 1, the child is tested for Manding, Tact, Listener Responding, Visual Perceptual Skills and Matching-to-Sample, Independent Play, Social Behavior, Social Play, Motor Imitation, Echoic, Spontaneous Vocal Behavior. Level 2 adds Listener Responding by Function Feature and Class, Intraverbal, Classroom Routines and Group Skills, Linguistic Structure. Level 3 adds Reading, Writing, and Math. Since the VB-MAPP is a criterion-referenced assessment, this means that it measures how well an individual performs against an objective rather than another student. The VB-MAPP provides a baseline assessment prior to intervention as well as opportunities for follow-up assessment periods, such as every 4 to 6 months. The VB-MAPP allows others to see the student's progress over time and identify areas of deficit and strength (NT *passim*, HO#2).

HO#2, HO#3).

44. The Student's Intraverbal behavior skillset fell at the 36-month range. The Student's VB-MAPP Intraverbal score indicates the Student could benefit from verbal behavioral therapy (NT pp.584-610, HO#2, HO#3).
44. The second component in the VB-MAPP is the Barriers Assessment, which provides an assessment of 24 common learning and language acquisition barriers faced by children with autism or other developmental disabilities. The barriers include behavior problems, instructional control, defective mands, defective tacts, defective echoic, defective imitation, defective visual perception and matching-to-sample, defective listener skills, defective intraverbal, defective social skills, prompt dependency, scrolling, defective scanning, defective conditional discriminations, failure to generalize, weak motivators, response requirement weakens the motivators, reinforcer dependency, self-stimulation, defective articulation, obsessive-compulsive behavior, hyperactive behavior, failure to make eye contact, and sensory defensiveness. By identifying these barriers, the examiner can develop specific intervention strategies to help overcome learning barriers, which once addressed can lead to more effective learning in school and the home (NT pp.584-610, HO#2, HO#3).
45. The higher the Barrier score, the more barriers there are to the child's learning path. The Student's barriers score of 25 suggests that Student has difficulty in the areas of generalization, socialization, behavior, instructional control, hyperactive behavior and impaired attention/response requirements. The Barriers score in autistic support classroom of 10 suggests that the barriers in the areas of problem behaviors, instructional control, generalization, response requirements and hyperactive behavior are not as a significant barrier/impediment to learning as in that setting (NT pp.584-610, HO#2, HO#3).
46. The third component is the VB-MAPP is the Transition Assessment. The Transition Assessment contains 18 assessment areas and can help to identify whether a student is making meaningful progress and has acquired the skills necessary for learning in a less restrictive educational environment. This VB-MAPP Transition Assessment tool can provide an objective way for a student's IEP team to make decisions and set priorities to meet the Student's educational needs (NT pp.584-610, HO#2, HO#3).

47. The Transition assessment is comprised of several summary measures from other parts of the VB-MAPP, as well as a variety of other skills that can affect transition. The assessment includes measures of the overall score on the VB-MAPP Milestones Assessment, the overall score on the VB-MAPP Barriers Assessment, noting negative behaviors, classroom routines and group skills, social skills, academic independence, generalization, variation of reinforcers, rate of skill acquisition, retention, natural environment learning, transfer skills, adaptability to change, spontaneity, independent play, general self-help, toileting skills, and eating skills (NT pp.584-610, HO#2, HO#3).
48. The Transition Assessment rating is important because it will tell if a student's skill level is high enough to keep up with the material that is presented in various settings. If the student's skills aren't strong enough for a proposed setting, then a different setting that would better meet the student at the student's level should be considered. The Student's score suggested a different placement, e.g., a smaller, structured environment would better meet the Student's needs should be considered. The 2nd section of the Transition assessment provides information on how successful a student might be at different levels of inclusion. If scores are higher across these categories, the student may be more successful in more inclusive settings. If the scores are lower, then a more supportive setting with individualized instruction will be necessary. The Student's overall scores suggest the Student may benefit from academics in an inclusive environment; however, the Student does need a more supportive setting with individualized instruction (NT pp.584-610, HO#2, HO#3).⁵
49. The Transition Assessment plays an important role in determining how restrictive a setting is recommended to ensure success. The Transition Assessment focuses more on behaviors that aren't directly taught in school but may cause a problem if they aren't in the student's skill set. The information here may not completely rule out a proposed setting but may indicate that accommodations need to be made to allow the child to

⁵ Neither the testimony nor the summary provided this hearing officer with the actual numerical VB-MAPP Transition score; that said, after reviewing the testimonial and non-testimonial record neither party challenged the accuracy of the Student's Transition scores. Therefore, I now find the summary is an otherwise accurate representation of the Student's VB-MAPP Transition score.

access the less restrictive setting. The Student's scores here suggest that in the areas assessed, *e.g.*, areas of self-help, the Student demonstrates emerging skills that will allow the Student greater access to a less restricted setting (NT pp.584-610, HO#2, HO#3).

The Third Offer of a FAPE

50. From February 25, 2019, through April 12, 2019, the Student participated in a diagnostic evaluation in a verbal behavior autistic support program and the general education classroom at a different non-neighborhood elementary school. During the diagnostic evaluation, the Student received speech and language support on a 6-day cycle and OT support on a weekly schedule. As part of the diagnostic evaluation, the Student also attended general regular education classes like music, art, library, and gym with kindergarten-aged peers. The Student also participated in regular education morning calendar activities, lunch, and recess with the general education classroom students (NT pp.584-610, HO#2, HO#3).
51. On or about May 2, 2019, the IEP team, including the Parents, met to review the results of the updated VB-MAPP, data collected during the diagnostic evaluation and the updated data collected upon the Student's return to the stay-put placement. The present levels included clear math, reading, writing, behavioral, OT, and speech/language data (NT pp.584-610, HO#2, HO#3).
52. The IEP present levels included behavioral data collected while the Student attended the stay-put placement and the diagnostic evaluation. The assessment team concentrated on assessing the Student's time-on-task behavior and developing strategies to decrease the Student's escape/elopement behaviors. Data about the Student's behavior was collected, reviewed and analyzed for the first ten days that Student attended the diagnostic evaluation and compared to the first ten days when the Student returned to the stay-put placement. From February 27, 2019, through March 12, 2019, at the diagnostic evaluation the Student was on task for 57.8% of the time in the morning session and 62.7% of the time at the afternoon session. During the same period, the Student escaped or eloped 33 times during the morning session and 44 times during the afternoon. Upon returning to the stay-put placement, the Student from April 15, 2019, through April 25, 2019, during the diagnostic evaluation the Student was on task for 35% of the time in the morning session and 54.7% of the time at the afternoon session. During the same time frame, the

Student escaped or eloped 45 times in the morning session and 77 times in the afternoon (NT pp.584-610, HO#2, HO#3).

53. The OT input to the present levels noted tangible improvements in the following areas; copying uppercase letters of the alphabet (A-Z) with an average of 89% accuracy for letter formation across consecutive bi-monthly probes and copying lowercase letters of the alphabet (a-z) with an average of 87% accuracy for letter formation. The Student was able to write the letters of first and last name with 100% accuracy for proper letter formation. The Student progressed to copying five simple words on 3/4 inch midline paper, with 85% accuracy for legibility and 55% accuracy for letter to line orientation, staying within 1/8 of an inch from the top, middle, and bottom lines. The Student continued to rush through handwriting assignments and the Student's letters appear illegible. For example, when writing the lowercase letter "a," it will look like a "q" or and "r" will look like an "n." When prompted, the Student would self-correct letter formation errors to make them more legible independently (NT pp.584-610, HO#2, HO#3).
54. The IEP included objective statements describing the Student's present levels in the following areas, behavioral, social, speech and adaptive behavior (HO#3).
55. The IEP described how the Student's diagnosis of autism significantly affected the Student's verbal and nonverbal communication and social interactions. The IEP included a description of how the Student's autism diagnosis adversely affected the Student's participation in the general education curriculum. After reviewing all of the data, the IEP team concluded that the Student needed additional special education instruction beyond the regular education curriculum in reading, math, speech, OT, behavior, and communication (NT pp.584-610, HO#2, HO#3).
56. The IEP included 17 goals targeting reading, math, writing, behavior, attention, along with 31 SDIs including supports for personnel, OT, speech and language, a PBSP including a consultation with a BCBA each week and a PCA (NT pp.584-610, HO#2, HO#3).
57. The IEP also included a four-week ESY program targeting 17 different need areas (NT pp.584-610, HO#2, HO#3).
58. The IEP included a statement describing how the Student would not participate with non-disabled peers for core academic instruction. The IEP

also included a statement that the District would provide the Student with intensive 1:1 instruction. Observations indicated that the Student struggled in large group instructional environments, like music, and art at this time (NT pp.584-610, HO#2, HO#3).

59. The IEP called for the Student to receive supplemental special education supports and services provided by special education personnel for more than 20% of the day but less than 80% of the school day and itinerant speech and language services at an elementary school in the District (HO#3).
60. The IEP included a stand-alone PBSP with antecedent, consequence multiple behavioral goals and 30 plus SDIs (HO#3). The PBSP present levels note upwards of 81 times per the Student's engaged escape motivated behavioral disruptions. The interfering behaviors include but are not limited to, crawling under desks, running around the room, crying, climbing on the table, heaters, tops of desks, falling out of chair then crawling away, running out of the classroom or recess area, spitting, kicking, hitting, spinning, rolling on floor, touching peers, head butting the staff (HO#3).
61. At the completion of the IEP meeting, the District provided the Parents with a NOREP describing the proposed location of the IU class. The NOREP called for the Student to be placed in a supplemental autistic support class with services provided by special education personnel for more than 20% of the day but less than 80% of the school day along with Itinerant Speech and Language, in an IU class, at an elementary school in the District (HO#3).

Applicable Legal Principles Burden of Proof

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize 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 rests with the Parent, who requested this hearing. In IDEA disputes, the hearing officer applies a preponderance of proof standard.

Credibility Determinations

Hearing officers, as fact-finders, are 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); *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 now finds the District's and the Parents' witnesses were, for the most part, credible, and their testimony was essentially consistent concerning the actions taken or not taken by the District in evaluating and/or providing the Student with a FAPE. The testimony overall was essentially consistent, with minor variations, on factual matters in dispute. For all the reasons that follow, at times, I found the testimony of some witnesses to be more cogent and persuasive than others. Based upon a variety of factors, I will now give the coordinator of autistic support for the elementary program testimony more persuasive weight than the Parents' expert⁶. On the intertwined LRE topic, I gave the coordinator of autistic support for the elementary program greater weight than the Parents' expert on the selection of and the extent of time the Student should participate, with supplemental aids and services, in the regular education classroom. See, *A. H. v. Colonial Sch. Dist.*, No. 18-2698, 2019 U.S. App. LEXIS 20489 (3d Cir. July 10, 2019) citing with approval *Holmes v. Millcreek Twp. Sch. Dist.*, 205 F.3d 583, 592 (3d Cir. 2000) (at times and in some ways local staff who are more familiar with the student and the local curriculum, at times, can be better-qualified than third parties to gauge needs, individual circumstance and progress).

IDEA FAPE Standards

The IDEA and state and federal regulations obligate local education agencies (LEAs/districts) to provide a "free appropriate public education" (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services that are reasonably calculated to permit the child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). 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.*

⁶ In this particular instance, I gave persuasive weight to the witnesses' understanding of the following Student specific facts: (1) the time, frequency/duration of contact with the Student; (2) the witness's understanding of the Student's educational/academic needs; (3) the Student's behavioral, attention, self-regulation and social skills needs; (4) the witness's understanding of the Student's reinforcement needs; (5) the Student's behavior in the home/community; (6) the Student's testing data, and (7) any individual Student specific circumstances discussed herein.

School District of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Recently, the Supreme Court considered the application of the *Rowley* standard anew, observing that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, 580 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. The *Endrew* 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 determination of meaningful benefit 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. The *Endrew* standard is not inconsistent with the long-held interpretations of *Rowley* by the Third Circuit. See, *Dunn v. Downingtown Area Sch. Dist.* 904 F.3d 248 (3d Cir. 2018).

The IDEA LRE Requirements as Applied in the Third Circuit

The IDEA’s FAPE mandate requires disabled children to receive their “education in the least restrictive environment that will provide [the child] with a meaningful educational benefit.” *S.H. v. State-Operated Sch. Dist. of City of Newark*, 336 F.3d 260, 265 (3d Cir. 2003) (internal quotation marks omitted); See 20 U.S.C. § 1412(a)(5)(A). To determine whether a school district complies with the LRE requirement, the Third Circuit has adopted a three-part test. See *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 579 (3d Cir. 2000) (citing *Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F. 2d 1204, 1215 (3d Cir. 1993)). First, a hearing officer must “determine whether the school can educate the child in a regular classroom with the use of supplementary aids and services.” *S.H.*, 336 F.3d at 272. In making this determination, hearing officers consider: “(1) the steps the school district has taken to accommodate the child in a regular classroom; (2) the child’s ability to receive an educational benefit from regular education; and (3) the effect the disabled child’s presence has on the regular classroom.” *T.R.*, 205 F.3d at 579. If the child cannot be educated in an integrated classroom, the hearing officer must then “decide whether the school is mainstreaming [including] the child to the

maximum extent possible." *S.H.*, 336 F.3d at 272. As the FAPE and LRE requirements are legally distinguishable, this hearing officer will analyze each requirement separately. See *A.G. ex rel S.G. v. Wissahickon Sch. Dist.*, 374 F. App'x 330, 334 (3d Cir. 2010) ("FAPE and LRE are distinguishable."); *D.E.R. v. Bd. of Educ. of Borough of Ramsey*, 2005 U.S. Dist. LEXIS 48817, 2005 WL 1177944, at *6 (D.N.J. May 18, 2005) ("Inquiry into the LRE cannot be dismissed as immaterial because the LRE requirement is critical under the IDEA."). In short, the *Oberti* test requires the IEP team to review the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special class. Educational benefits may include both academic and socialization opportunities. Socialization can include the development of social and communication skills, increased sense of self-esteem, language, and role modeling. *Oberti*, 995 F.2d at 1221.

Compensatory Education as Appropriate Relief

Compensatory education is appropriate relief designed to compensate a disabled student, who has been denied a FAPE.⁷ Compensatory education should place the child in the position they would have been in but for the IDEA violation.⁸ Compensatory education accrues from the point that the school district either knows or should have known of the injury to the child.⁹ A child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem. *Id.*

With these fixed principles in mind, I will now turn to the analysis of the instant dispute over the Student's FAPE and placement in the LRE.

Overview, Discussion and Analysis of All Claims

The Parents' Claims for Appropriate Relief and the District's Responses

In its simplest form, the Parents contend the District's offer of a FAPE lacks appropriate supplemental aids, services and supports to educate this Student in a

⁷ *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 276 (D.D.C.2011) (citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir. 2005)).

⁸ *Boose v. District of Columbia*, 786 F.3d 1054, 2015 U.S. App. LEXIS 8599 (D.C. Cir. 2015) IEPs are forward looking and intended to "conform[] to . . . [a] standard that looks to the child's present abilities", whereas compensatory education is meant to "make up for prior deficiencies". *Reid*, 401 F.3d at 522-23. Unlike compensatory education, therefore, an IEP "carries no guarantee of undoing damage done by prior violations, IEPs do not do compensatory education's job."

⁹ *G.L.* at 618-619 quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396-97 (3d Cir. 1996) (citations omitted).

regular education class, in the Student's neighborhood school. If true, the District's conduct violates the IDEA's legally distinguishable FAPE and LRE mandates. That said, on multiple occasions, the Parents have advocated for the opposite point. In particular, the Parents have demanded that the District provide a smaller class setting for part of the day, an FBA, a one-on-one behavioral trained aide, including targeted language therapy, challenging academics, a PBSP and SDIs incorporating either applied behavior analysis, discrete trial training or errorless learning strategies for part of the day.

To address these concerns, the District offered a series of measurable individualized goals, SDIs and several related services. The proposed program also included regularly scheduled contact with age-appropriate nonhandicapped peers, in the regular education classroom along with supported participation in nonacademic settings like lunch or recess, for part of the school day. All of the above measurable goals, SDIs and related services would be provided in a small class of up to eight students with six or more adult staff members, for part of the day. The District offers to provide all of the SDIs and related services in a supplemental autistic support class, operated by the IU, up to 80% of the day, in a non-neighborhood school, in the District. The travel time to the supplemental class would be modest, the autistic support staff are trained in errorless learning and verbal behavior analysis techniques and the staff, as a consequence of the hearing officer Ordered diagnostic evaluation, have hands-on experience with the Student.¹⁰

Accordingly, ever mindful of the *Rowley* FAPE standard in conjunction with *Oberti* LRE standard and their progeny, after studying the exhibits, the VB-MAPP data, along with the testimonial and non-testimonial extrinsic evidence for all the reasons set forth herein I now find in favor of the District and against the Parents.

The Regular Education Class

Granted while the October 2018 and the May 2019 IEPs call for the Student to spend more time outside of the regular education class, I now find each IEP balanced the benefits of placement in a regular classroom for the entire day as opposed to the benefits of placement in a separate special education setting, for

¹⁰ In 1957, B.F. Skinner, already a noted behavioral scientist, wrote his book detailing several theories about how language is learned. Since then Mark Sundberg, the author of the VB-MAPP, Vincent Carbone and James Partington have advanced Skinner's theories into a method of teaching persons with autism. Based upon Skinner's proposals, Sundberg's work has resulted in the development of the verbal behavior method. The verbal behavior model, alone or in conjunction with other approaches are regularly used nationally to help autistic children, acquire language, develop academic skills and learn techniques to self-regulate and manage behavior. <https://www.appliedbehavioranalysisprograms.com/faq/what-is-verbal-behavior/>

part of the day. Each IEP included sufficient supplemental aids and supports, to support the Student's education, for the remainder of the day in regular education. The data comparing the Student's behavior in the kindergarten and the verbal behavior class is compelling. In the regular education kindergarten with multiple SDIs, and supplemental aids like a PBSP, and a one-on-one aide, the Student was on task 35% of the time in the morning, as compared to 57% in the IU class. In the afternoon, while the time on task rate went up to 54% in the regular education classroom, the Student was on task up to 67% of the time in the autistic support class. In regular education classroom, during the same time, the Student eloped 122 times in 10 days; while in the IU class the Student eloped 77 times. When reduced to a daily frequency, the data suggests that 12 times a day, the Student tried to elope. Practically speaking the Student will attempt to elope from the regular education class roughly every 30 minutes. This behavior pattern cuts against significant learning in the regular education setting and impedes the learning of others.

The PBSP present levels note upwards of 81 times per day the Student engages in escape motivated behavioral disruptions.¹¹ These interfering behaviors in the regular and special education include, but are not limited to, crawling under desks, running around the room, crying, spitting, kicking, hitting, spinning, rolling on floor, touching peers, climbing on the tables, heaters or desks, falling out of a chair and then crawling away and one at least one occasion, head butting the staff. Based on a typical six-hour school day, the Parents and the teachers can expect the Student to disrupt the class every four and a half minutes.¹²

The elopement issue, coupled with the Student's high rates of off-task behavior and below grade level present academic levels provide preponderant proof that the regular education classroom, at this time, is not an appropriate setting, for this Student. The data is equally compelling that the Student's profile, at this time, impedes the learning of others.

The Student's high VB-MAPP Barrier score of 25 is the second form of preponderant proof that the Student's behavior, time on task, executive functioning, lack of self-regulation and language skills profile negatively impacts the Student's meaningful success in the regular and special education curriculum. The Student's barriers score of 25, with the SDIs, in general education, suggests that Student has difficulty in the areas of generalization, socialization, behavior, instructional control, hyperactive behavior and meeting expected time on tasks and

¹¹ At the rate of 81 behavioral outburst a day the Student would have 324 outbursts a month.

¹² Assuming a typical 6 hour school day x 60 minutes equals 360 minutes in a school day divided by 81 behavioral incidents day equals every 4.5 minutes the Student will disrupt class.

response requirements. Absent meaningful improvement in all of the above barrier content areas the Student will lag behind typical peers.

Although the Parents were aware of the VB-MAPP Barrier data, neither the Parents nor their expert offered any testimony on what additional supplemental aids, services, or supports would enable the Student to reduce, minimize or eliminate the barriers to learning. On the other hand, the Student's Barrier score, in autistic support classroom of 10 suggests that verbal behavioral strategies, the small class size and high staff to student ratio are making an impact on reducing many of the Student's barriers to learning. Conspicuously absent is any testimony from the Parents' expert about the structure of the autistic support class, the staffs' ability to meet the Student's needs or the expected benefits from participation in the verbal behavioral classroom.

Unlike the Parents' expert, the coordinator of the autistic support provided a cogent explanation describing how the teacher and the associate teachers have provided the Student with high rates of reinforcement, sometimes as often as every three minutes, utilizes errorless learning strategies, in conjunction with verbal behavior analysis strategies.¹³ When the record is viewed as a whole, the evidence is preponderant that the District made ongoing efforts to serve the Student in a regular classroom, with SDIs and supplemental aids and services. When those aids, efforts and supports did not produce the anticipated benefits, the team promptly redesigned the IEP with additional SDIs, goals, offered new supplemental aids and services and suggested a different level of services at a different location. At all times relevant, the District took significant steps to educate the Student in the regular education setting. The evidence is also preponderant that the Student's presence in the regular education impedes the Student's and peers' learning. Therefore, absent contrary preponderant proofs, the contention that the District failed to consider additional supplemental aids and supports to support the Student in the LRE is rejected.

The Offer of a FAPE in the Supplemental Autistic Verbal Behavior Support Classroom

In June 2018, when the IEP team first met, then in October 2018 through the present, the Student's IEP teams have reviewed the educational benefits available

¹³ See, *A.H. v. Colonial Sch. Dist.*, No. 18-2698, 2019 U.S. App. LEXIS 20489 (3d Cir. July 10, 2019) citing with approval *Holmes v. Millcreek Twp. Sch. Dist.*, 205 F.3d 583, 592 (3d Cir. 2000) (at times and in some ways local staff who are more familiar with student and the local curriculum can be better-qualified than third parties to gauge needs, individual circumstance and progress)

to the Student in a full time regular class, with appropriate supplementary aids and services versus participation in the supplemental autistic support class, for part of the day. The October 2018 IEP and the May 2019 IEP, supported by the VB-MAPP data, provide a clear statement of the Student's unique needs, including but not limited to, increasing attention, increasing language skills, reducing elopement, improving fine motor skills, increasing time on task, increasing the ability to follow instructions and improving adaptive skills.

To address the Student's behavioral, language and functional academic skill needs the May 2019 IEP included 17 measurable goals, 32 SDIs, including OT, speech therapy and targeted crisis intervention techniques to manage the Student's disruptive and elopement behaviors.

The SDIs include individualized strategies like toilet training reminders, frequent movement breaks, immediate reinforcement strategies like "high fives," stickers, and a timer to ensure the Student receives positive reinforcement every three minutes.

To support the Student's sensory needs, the OT suggested a weighted vest and a lap weight-20 minutes on 40 minutes off, as needed. To ensure the Student is advancing, the May IEP included errorless learning strategies, along with Itinerant Speech and Language therapy.

The VB-MAPP Transition data in combination with the VB-MAPP Barriers and Milestones data supports the District's proposal to include the Student with non-disabled peers in science, social studies, including nonacademic classes like recess, lunch and assemblies. The proposed schedule of socialization with non-handicapped peers, will foster the development of peer-to-peer social/communication skills and provide the Student with a daily opportunity for positive role modeling.

To ensure the Student will have equal access to the regular education curriculum, the IEPs call for the Student to also receive instruction in the kindergarten/first-grade core standards in and outside of the regular/special education classrooms.

The IEP includes a stand-alone PBSP, describing slow triggers, behaviors of concerns, consequences maintaining the behavior of concern, the perceived function of the disruptive behaviors along with suggested replacement behaviors. These above strategies support the ambitious IEP goals in and outside of the regular education setting.

Neither the Parents nor their expert challenged the content of either IEP or the sufficiency or the quality of the research-affiliated instruction offered in either IEP. All IEPs, since enrollment, delicately balanced the possible positive and negative

effects of being fully included, in the regular education setting, as opposed to the possible positive and negative effects of participation in the special education class, for part of the day, along with structured time in regular education, on the Student and the Student's peers.

As part of the preparation leading to the development of the October 2018 IEP, the District staff completed an informal internal assessment to determine if the Student required a one-on-one aide. Based upon the District's rubric, the Student requires a one-on-one aide throughout the day. Therefore, based on the current VB-MAPP data and the District's informal assessment, I now find the Student needs a specific one-on-one aide, throughout the day. The one-on-one aide will ensure that for the time being, the Student's needs for continuous reinforcement, redirection and the TACT-2 strategies are provided to ensure successful participation in and outside of the regular education classroom.

Accordingly, the Student's denial of FAPE claims since enrollment and associated LRE claims are denied as stated; likewise, the Student's claim for appropriate relief in the form of compensatory education is also denied.

Conclusion

In this instance, after reviewing the existing data and after giving careful consideration to the testimonial and non-extrinsic evidence based upon the existing record, I now find the June 2018 IEP, the proposed October 2018 and the May 2019 IEPs each offered the Student a FAPE in the LRE. At all times relevant, each IEP included supplemental aids and services necessary and needed to enable the Student to participate, to the maximum extent appropriate, in the general education curriculum in the regular or special education settings.

When the record is viewed as a whole, the evidence is equally preponderant that despite the proposed and provided measurable goals, the SDIs, and related services, the Student's behavioral, language and academic needs, at this time, cannot be met in the regular education setting. Finally, the record evidence is equally preponderant that the Student's presence in the regular education setting impeded the Student's learning and the learning of others in the class.

Therefore, I now find the Parents failed to produce or provide the quantum, quantity, or weighty evidence necessary to prove the fact that the Student was denied a FAPE in the LRE. An appropriate Order denying all claims follows.

Order

And now, this 9th of August 2019, it is hereby **ORDERED** as follows:

1. I now find in favor of the District and against the Parents on all IDEA denial of FAPE claims and any and all LRE claims. Therefore, the claim for compensatory education is denied.
2. To ensure the Student is educated in the LRE the District is now Ordered to implement the May 2019 IEP. Furthermore going forward for the 2019-2020 school year the District is hereby Ordered to provide the Student with a one-on-one aide in all classes and settings throughout the day.
3. At the conclusion of the 2019-2020 school year, the District is Ordered to reevaluate the Student's need for a one-on-one aide and determine what if any supplemental aids and services could promote additional time in the regular education setting.
4. Consistent with the structure, design and organization in the IU supplemental autistic support classroom, the one-on-one aide should receive any and all supports for personnel, including but not limited to ongoing training needed to collect all needed data to implement the IEP, the PBSP throughout the day, in all academic, non-academic and extracurricular settings.
5. All other claims for violations of the IDEA and requests for appropriate relief including any other affirmative defenses are dismissed with prejudice.

Date: August 9, 2019

s/ Charles W. Jelley, Esq. LL.M.
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