

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

OPEN HEARING

ODR File Numbers:

21647-18-19

21677-18-19

21691-18-19

Child's Name: M. C.

Date of Birth: [redacted]

Parent:

[redacted]

Counsel for Parent

Pro Se

Local Education Agency:

Catasauqua Area School District

201 N. 14th Street

Catasauqua, PA 18032

Counsel for the LEA

David Knerr, Esquire

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

Date of Decision: 04/13/2019

INTRODUCTION

The student (hereafter Student)¹ is a mid-elementary school-aged student in the School District (District). Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² on the basis of an identification under the classification Emotional Disturbance. This decision addresses several Due Process Complaints related to Student; and, for all of the following reasons, each party will prevail in part.

PROCEDURAL HISTORY

In January 2019, three Due Process Complaints were filed by the parties and consolidated into a single proceeding by agreement. The chronology of events relating to the procedural aspects of this matter may be summarized as follows.

- a. The District filed two Complaints, one seeking to defend its initial evaluation of Student following the Parent's request for an Independent Educational Evaluation (ODR File No. 21647-18-19/AS); and one seeking approval of the program and placement it proposed earlier that month (ODR File No. 21677-18-19/AS). The decision due dates were calculated to be February 28, 2019 and March 9, 2019, respectively. *See* 34 C.F.R. § 300.515.
- b. Shortly thereafter, Student's Parent filed a Due Process Complaint against the District raising essentially the same issues as well as a claim that the District denied Student a free, appropriate public education (FAPE) under the IDEA on both procedural and substantive grounds (ODR File No. 21691-18-19/AS). The decision due date was calculated to be April 9, 2019. *See id.*

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).

- c. This hearing officer provided procedural information and resources to the parties in connection with each Complaint. (Hearing Officer Exhibits (HO-) 1, 2, and 3.)
- d. An initial conference call was held on January 29, 2019 for hearing planning, and the parties mutually agreed to consolidate all three Complaints for purposes of hearing and decision. A formal order of consolidation followed on February 4, 2019, and the matter was scheduled for March 21, 2019. The District's unopposed request to extend the decision due dates in the two cases it filed was also granted to April 9, 2019, consistent with that for the Parent-filed Complaint. (HO-4.) *See id.*
- e. A second conference call was held on March 13, 2019 for further hearing planning. This hearing officer also confirmed the need for an efficient hearing on March 21, 2019, for submission of all of the evidence, as well as a timely decision.
- f. On March 14, 2019, the Parent requested a continuance of the March 21, 2019 hearing date because she had consulted with, but not yet retained, legal counsel who needed time to review the records. Over the District's objection, the hearing was continued to March 29, 2019.
- g. The hearing convened on March 29, 2019 with the Parent appearing *pro se* and confirming that she wished to proceed without counsel. (Notes of Testimony (N.T.) 4.)
- h. The hearing did not conclude on March 29, 2019, because the Parent had another obligation in the afternoon. Over the District's objection, her request to extend the decision due date was granted for a period of six days to April 15, 2019; and a second, half-day hearing session was scheduled for April 3, 2019. The parties were advised that the record would close on April 3, 2019, and the Parent identified two witnesses to be called at that session.
- i. At the start of the hearing session on April 3, 2019, the Parent sought to call a third witness who was not previously available to testify, and also to recall a District witness. The District's objection to calling the third witness was overruled although that testimony was limited; neither party was permitted to recall any witness. (N.T. 230-35.)
- j. The parties concluded their presentation of evidence and closing statements on the record on April 3, 2019.

ISSUES

1. Whether the District's evaluation of Student was appropriate and compliant with the requirements in the IDEA and Chapter 14;
2. If the District's reevaluation was not appropriate, should the District be ordered to provide an Independent Educational Evaluation at public expense;
3. Whether the District complied with all procedural obligations in the IDEA to permit meaningful participation by the Parent;
4. Whether the District failed to properly implement Student's IEP; and
5. Whether the District's proposed change to the program and placement for Student is appropriate?

FINDINGS OF FACT

1. Student is mid-elementary school-aged and is a child with a disability for purposes of eligibility under the IDEA based on a classification of emotional disturbance. (N.T. 22-23, 237.)
2. Student first enrolled in the District at the very end of the 2016-17 school year (first grade) after nearly two years' enrollment in a charter school. Student's report cards from the charter school reflect no concerns with Student's behavior. (N.T. 274-75; Parent Exhibit (P-) 7.)
3. In approximately the middle of Student's second grade year (2017-18), Student began to exhibit problematic behaviors at school at times (calling out and failing to comply with directives). Student then had a daily behavior chart. (N.T. 37-38, 66; S-15.)
4. At the beginning of the third grade (2018-19) school year, Student engaged in some additional problematic behaviors such as crumbling or destroying papers, throwing objects, and kicking furniture. (N.T. 164, 172-73; S-26.)
5. The District conducted an initial evaluation of Student in the fall of 2018 following the Parent's request due to behavioral and emotional concerns. (N.T. 25-26, 56; S-1.)

6. The District school psychologist who conducted the evaluation of Student is a certified school psychologist with an undergraduate degree in education and a graduate degree in psychology. (N.T. 25-26; S-22.)
7. The Evaluation Report (ER) was issued on or about October 22, 2018. (S-2.)
8. The ER included input from the Parent obtained through a questionnaire. No academic concerns were noted other than whether the curriculum was sufficiently challenging for Student. Behavioral concerns were for an excessive need for reassurance and signs of anxiety. (S-2 at 2.)
9. Teacher input into the ER reflected concerns with Student's behavior: noncompliance with requests and directives, refusal to complete work or respond to questions, and aggression toward objects when upset. A number of academic strengths was noted, as were a need for more individualized attention and support, and difficulty maintaining attention to tasks and transitioning between activities. Some reading and mathematics skill weaknesses in addition to social/emotional skill deficits were identified. (S-2.)
10. The ER included information on Student's performance in the classroom and on benchmark assessments. (S-2.)
11. A second school psychologist also contributed to the ER through administering the cognitive and achievement assessments and conducting a classroom observation, and he collaborated with the District school psychologist responsible for that evaluation. The second psychologist, who is also a certified school psychologist and has experience working with children with behavioral difficulties, affirmed in the ER that the results of the cognitive and achievement testing were valid and reliable estimates for Student. (N.T. 26-27, 32-34, 41; S-2.)
12. Assessment of cognitive ability (Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V)) for the ER yielded average to high average range scores across Composites with a Full Scale IQ of 103 (average range). (S-2 at 12-16, 37.)
13. Assessment of academic achievement (Wechsler Individual Achievement Test – Third Edition (WIAT-III)) for the ER yielded average range scores across subtests and Composites with the exception of Sentence Composition (below average score on Sentence Building but an above average score on Sentence Combining). (S-2 at 16-20, 38-39.)
14. A comparison of the WISC-V and WIAT-III scores revealed no significant discrepancies; Student's achievement was commensurate with cognitive ability. (S-2 at 20.)
15. A Functional Behavioral Assessment (FBA) was conducted as part of the ER with input from Student and the third grade teacher. The District school psychologist concluded that Student's teacher identified two behaviors of concern for the FBA: defiance through breaking rules or challenging authority, and failing to respond to redirection. The hypothesized functions of those behaviors was determined to be attention seeking, social acceptance/status, and avoiding task demands (defiance); and social acceptance/status,

reducing anxiety, and avoiding or escaping feelings (responding to redirection). (N.T. 30-31; S-2 at 21-24, 28-30, 34-35.)

16. The District school psychologist responsible for completing the ER for Student did not conduct a formal classroom observation of Student but relied on information gathered from teachers for the FBA. There was no data collected for or provided in the FBA. (N.T. 43-44, 48-50.)
17. Social/emotional/behavioral functioning was assessed through sets of rating scales for the ER.
 - a. Rating scales from the Behavior Assessment System for Children - Third Edition were completed by the second and third grade teachers, the Parent, and Student. Both teachers' scores endorsed clinically significant concerns with Hyperactivity, Aggression, Conduct Problems, and Depression, with one or the other teacher indicating clinically significant concerns with Withdrawal and Adaptability; several Composite scores were also in the clinically significant range. One or the other teacher endorsed at risk concerns with a majority of the other scales.³ By contrast, the Parent's ratings yielded no concerns. The teachers' and Parent's scales were judged to be acceptable in terms of validity. Student's Self Report (completed with the District school psychologist) reflected concerns with Atypicality, Locus of Control, Anxiety, Depression, Sense of Inadequacy, Attention Problems, Hyperactivity Self-Esteem, and Self-Reliance. (S-2 at 24-28, 40-43.)
 - b. Student's second and third grade teachers completed the Emotional Disturbance Decision Tree scales that were strongly suggestive of the IDEA classification of Emotional Disturbance. (S-2 at 30-33.)
18. The ER set forth a conclusion that Student was eligible for special education under the category of Emotional Disturbance. Identified areas of need were for on-task behavior, responding to redirection, following rules, use of coping skills, verbalizing feelings, and improving interpersonal relationships. Other recommendations included adult supervision, development of problem solving and social skills, and a Positive Behavior Support Plan (PBSP) to include having choices available for requests, opportunities to take breaks or access adult support as needed, movement breaks, and consistent implementation. (S-2.)
19. The District school psychologist responsible for completing the ER met with the Parent to review the results. The Parent indicated agreement with the ER at that time. (N.T. 40; P-1 at 2; S-2 at 46.)
20. Student's IEP team met in mid-November 2018. (N.T. 58-59; S-3.)
21. The IEP developed in November 2018 contained two goals, both part of the PBSP: complying with teacher requests 70% of the day (with no baseline) and maintaining

³ The Adaptive Scale results are omitted from the summary chart, S-2 at 25.

attention to task and completing assignments 70% of the day (with no baseline). Antecedent strategies included positive reinforcement, student choices, reduced frequency of demands, checks for understanding of directions, a highly structured setting with consistent routines, preferential seating, social skills instruction, and movement breaks. In addition to some replacement behaviors and consequences for exhibiting those, the consequences for exhibiting the behavior of concern were: modeling and positive practice; correction/redirection without emphasis on the behavior of concern; prompts and cues; planned ignoring; and use of choice. (S-4 at 32-39.)

22. Program modifications and items of specially designed instruction in the November 2018 IEP addressed preferential seating, brief instructions with multi-step directions chunked, verbal models and prompts, nonverbal cues, clear expectations, frequent positive reinforcement, frequent breaks as needed, a behavior chart, and testing accommodations. Student was also to be provided behavioral health services (counseling) twice each week. (S-4.)
23. Although both regular education without support and a higher level of learning support were considered, the District members of the IEP team recommended itinerant learning support with implementation of the PBSP and counseling services twice each week. It was during the counseling services that Student was to learn coping strategies but there was no plan for Student learning to generalize such skills into other environments. (N.T. 60-61, 106; S-5.)
24. The Parent approved the Notice of Recommended Educational Placement/Prior Written Notice (NOREP/PWN) on November 20, 2018 so that services could begin, but she conveyed a need to fully consider the program. (N.T. 113, 270; S-5.)
25. Student also began receiving outside behavioral health services in November 2018. (N.T. 291.)
26. Some District staff met with the Parent following implementation of the IEP to address continued concerns and her suggested revisions. Student's behaviors had increased in frequency following implementation of the IEP, and Student began to hit or bang parts of Student's body, cry or yell, sit on the floor, and verbally threaten other students at times. Student was also frequently noncompliant with adult directives. (N.T. 63-64, 117, 120, 165, 172-73, 175-78, 181, 276-77; S-14; S-26.)
27. After the IEP was implemented, when Student engaged in problematic behavior, Student was permitted to take a break. However, Student was often removed from the classroom to de-escalate, thereby missing instructional time. Often a guidance counselor or administrator, or even the school resource officer, would intervene to try to direct Student and avoid the removal from the classroom but that was not consistently successful. (N.T. 77, 87-88, 93-94, 106, 108, 168-71, 192-93.)
28. Student had the same type of behavior chart during third grade but, after the Parent asked that it be discontinued, it was used solely for data collection on whether Student followed directions or completed tasks. (N.T. 66-67, 76, 86, 185-86, 204-05, 213-14; S-16.)

29. Student's IEP was revised at a meeting in mid-December 2018 and finalized in January 2019. This IEP added some updated information including a summary of the emotional support classroom that the District ultimately proposed. Needs were identified in the areas of reading fluency, functional communication, emotional self-regulation, and following directions/expectations including use of program modifications such as breaks. (S-10.)
30. The January 2019 IEP presented the PBSP with the Assessment Summary presented in a somewhat different format than had the November 2018 IEP but did not make material changes. However, the PBSP itself did contain a number of revisions. The Antecedent strategies were much more detailed: classroom rules posted, reviewed frequently, and visible; consistent expectations; accessible learning materials; minimal distractions; positive reinforcement; increased feedback and progress monitoring; peer support and positive peer mentors; preferential seating; cues and prompts for attention; social skills instruction; a timer for transitions; and instruction in coping skills/strategies. Consequences for performing behavior of concern referenced a level system and a classroom handbook as well as physical intervention as a last resort. (S-10.)
31. The January 2019 IEP contained two annual goals. One addressed behavioral expectations based upon those in the proposed emotional support classroom, and the other provided for reading fluency (from a baseline of 55 words correct per minute at grade level to 100 words correct per minute at the end of the 2018-19 school year). (S-10.)
32. The program modifications/items of specially designed instruction in the January 2019 IEP did not change significantly, but were couched in terms of the proposed emotional support classroom and the services offered in that environment. (S-10.)
33. The District members of the IEP team recommended that Student's program be changed to full time emotional support, with Student participating with typical peers only for certain special subjects, lunch, and recess with support of a paraprofessional to be faded with Student's acclimation. A NOREP/PWN was issued to the Parent on December 21, 2018, consistent with this recommendation. (N.T. 67-70; S-8; S-10 at 31.)
34. The Parent also attended a meeting in mid-December that was for referral to the IU emotional support program. (N.T.81, 138; P-2.)
35. The proposed emotional support classroom is in Student's neighborhood elementary school and is provided through the local Intermediate Unit (IU) for grades two through four. It has a low student to staff ratio, with a special education teacher, an emotional support interventionist, and two paraprofessional always present; a social worker and school psychologist also provide counseling and similar services for those students. All staff are trained in crisis management. Social/emotional skills are addressed throughout the school day and there are calming areas of the classroom where students can go as needed. (N.T. 71-72, 121-22, 131-33, 139, 141, 144.)

36. The proposed emotional support program can provide instruction in coping skills and regulation of emotions. (N.T. 159-60.)
37. On December 27, 2018, the Parent returned the December 21, 2018 NOREP/PWN disapproving the proposal and including a detailed letter conveying her concerns. (S-9.)
38. The District added a second teacher to the third grade classroom after a few incidents where Student's behavior was considered to be threatening to other students' safety. The two teachers co-teach the class and are available to assist any student, including Student. (N.T. 109-110, 166-67, 194-95.)
39. Although the IEP as revised in January 2019 indicates that the team discussed consideration of providing services to Student within the general education classroom with supplementary aids and services, the District members of the IEP team did not actually consider any options other than full-time emotional support for Student. (N.T. 88, 124; S-10 at 30.)
40. Following the Parent's disapproval of the NOREP for full-time emotional support, she requested an Independent Educational Evaluation (IEE) at public expense. The District issued a NOREP/PWN refusing to provide the IEE. (N.T. 91-92; P-6; S-13.)
41. The District denied the Parent's request for a one-on-one aide for Student because he or she would likely still need to remove Student from the classroom for de-escalation of behaviors. (N.T. 92-94; S-11; S-12.)
42. In late January 2019, the District developed a safety protocol for addressing Student's failure to comply with requests or redirection. (P-10.)

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. The burden of persuasion generally 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). Here, with both parties presenting Complaints raising the same issues, they in essence shared the burden of persuasion on all issues but one, as noted below. 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, as is the case here; thus, the burden of persuasion was not determinative.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be generally credible; and, for purposes of deciding the issues presented, the testimony was essentially quite consistent where it overlapped. The parties were, however, precluded from recalling witnesses and revisiting evidence on which there was minor disagreement and that was, at best, only tangentially related to the claims.

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

IDEA PRINCIPLES: CHILD FIND AND EVALUATION

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to all children who qualify for special education services. 20 U.S.C. §1412. The IDEA and state and federal regulations obligate local educational agencies (LEAs) to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. The statute itself sets forth two purposes of the required evaluation: to determine whether or not a child is a child

with a disability as defined in the law, and to “determine the educational needs of such child[.]”
20 U.S.C. §1414(a)(1)(C)(i).

The IDEA further defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). “Special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a).

In conducting an evaluation or reevaluation, the law imposes certain requirements on LEAs to ensure that sufficient and accurate information about the child is obtained:

(b) Conduct of evaluation. In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

- (i) Whether the child is a child with a disability under § 300.8; and
- (ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. §§ 300.304(b); *see also* 34 C.F.R. § 303(a). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally,

the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3). Any evaluation or reevaluation must also include a review of existing data including that provided by the parents in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a).

In Pennsylvania, LEAs are required to provide a report of an evaluation within sixty calendar days of receipt of consent excluding summers. 22 Pa Code §§ 14.123(b), 14.124(b). Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1).

When parents disagree with an LEA’s educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). When such a request is made, the LEA must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2). Here, the Parent disagreed with the ER and sought an IEE at public expense, and the District refused; thus, the District had the burden of establishing that its evaluation was appropriate.

IDEA PRINCIPLES: SUBSTANTIVE FAPE

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.

LEAs meet the obligation of providing FAPE to eligible students through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Fairly recently, the U.S. Supreme Court considered once again the application of the *Rowley* standard, observing that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

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

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

That the progress contemplated by the IEP must be appropriate in light of the child’s circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. * * * As we observed in *Rowley*, the IDEA “requires participating States to educate a wide spectrum of handicapped children,” and “the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.”

Endrew F., ___ U.S. ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017)(italics in original)(citing *Rowley* at 206-09)(other citations omitted). The Court explained that, “an educational program must be appropriately ambitious in light of [the child’s] circumstances...

[and] every child should have the chance to meet challenging objectives.” *Id.*, 137 S. Ct. at 1000, 197 L.Ed.2d at 351. This is especially critical where the child is not “fully integrated into the regular classroom.” *Id.* The Court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.*, 137 S. Ct. at 1001, 197 L.Ed.2d 352. This standard is not inconsistent with the above interpretations of *Rowley* by the Third Circuit. *See Dunn v. Downingtown Area School District*, 904 F.3d 248, 254 (3d Cir. 2018).

As *Andrew*, *Rowley*, and the IDEA make extraordinarily clear, the IEP must be responsive to the child’s identified educational needs. *See* 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, the LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child’s parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). 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). The IEP must be reviewed at least annually and revised as needed. 20 U.S.C. § 1414(d)(4)(A). 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.

IDEA PRINCIPLES: PROCEDURAL FAPE

From a procedural standpoint, the family plays “a significant role in the IEP process.” *Schaffer, supra*, at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b); *see also Letter to Veazey*, 37 IDELR 10 OSEP 2001) (confirming the position of OSEP that LEAs cannot unilaterally make placement decisions

about eligible children to the exclusion of their parents). Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

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

Winkelman v. Parma City School District, 550 U.S. 516, 530 (2007). 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

A critical and rather paramount premise in the IDEA is the obligation that eligible

students be educated in the “least restrictive environment” (LRE) which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000).

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

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

In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993), the Third Circuit adopted a two-part test for determining whether a student has been placed into the least restrictive environment as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, be educated successfully within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the child has been included with non-exceptional children to the maximum extent possible. *Id.* In evaluating the first prong, the efforts the LEA has made to include the child (which must be more than “token gestures” and include modification of the regular education program); a comparison of the benefits to the child of placement in a regular classroom versus a separate special education setting; and “possible negative effects” of inclusion on the other students, must all be considered. *Id.* at 1215-18. Regarding this third consideration, the reflection on potential negative consequences of inclusion such as disruptions must also contemplate that an appropriate

IEP with supplementary aids and services and other necessary supports can diminish or prevent their impact on the classroom. *Oberti* at 1217.

Importantly, LRE principles “do not contemplate an all-or-nothing educational system” of regular education versus special education. *Oberti, supra*, 995 F.2d at 1218 (quoting *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1050 (5th Cir. 1989)). All LEAs are required to make available a “continuum of alternative placements” to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa. Code § 14.145. And, the “continuum” of placements in the law enumerates settings that grow progressively more restrictive, beginning with regular education classes, moving then toward special classes and then toward special schools and beyond. 34 C.F.R. § 300.115; *see also* 22 Pa. Code § 171.16(c)(specifying an order of priority for educational placements from the regular classroom in a public school through an approved private school).

However, as set forth above, the least restrictive environment mandate does not contemplate a mere comparison of lesser and more restrictive settings; on the contrary, it begins with the premise that a child can be educated in the regular education classroom with appropriate supplementary aids and services. Furthermore, FAPE and LRE are related, but separate, concepts; indeed, an LEA can be in noncompliance with the LRE mandate but still provide FAPE. *A.G. v. Wissahickon School District*, 374 Fed. App’x 330 (3d Cir. 2010) (citing *T.R., supra*, at 575, 578); *see also H.L. v. Downingtown Area School District*, 624 Fed. App’x 64 (3d Cir. 2015).

THE DISTRICT’S EVALUATION

The sole issue when an LEA has denied a parental request for an IEE at public expense is whether its evaluation met the standards for appropriateness set forth in the IDEA.

The District's October 2018 evaluation was conducted through a variety of assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student in all areas of suspected disability. Specifically, the District conducted assessment of Student's current cognitive ability and academic achievement; summarized available curriculum-based and benchmark assessment data; obtained and reported input from teachers; gathered and summarized parental input; and provided rating scales to evaluate Student's social/emotional/behavioral functioning. Both of the school psychologists involved are certified school psychologists; and, the second school psychologist who conducted several of the assessments has experience with children with emotional and behavioral needs. The results of all of the assessments were determined to be valid and reliable; and, the cognitive and achievement testing was analyzed to determine whether the latter was discrepant from predicted scores. The second school psychologist also conducted a classroom observation of Student. All of the evidence preponderantly establishes that the District's evaluation was appropriate under the requisite criteria, with one important exception: the FBA contained within the ER was fatally flawed.

The FBA itself merits some discussion. Though not binding, the Pennsylvania Training and Technical Assistance Network (PaTTAN) describes the FBA process as including (1) an interview of persons who observe the student in a variety of settings to identify behaviors, antecedents, and consequences; (2) observations and data collection of objectively defined behavior; and (3) summarization and hypothesis development based on the first two stages.⁴ Furthermore, PaTTAN also explains,

“[i]t is critical that a hypothesis statement be provided. A complete FBA clearly defines (a) the problem behavior, (b) the antecedent conditions that exist both when the behavior occurs and does not occur, (c) the consequences that maintain

⁴ <https://www.pattan.net/publications/functional-behavioral-assessment-process/> (last visited April 10, 2019).

the behavior, (d) a clear definition of the behavior we want the student to exhibit in place of the problem behavior, and (e) a statement of the behavioral function.”⁵

Here, there was a single classroom observation, and input from teachers that did not include any data collection or even lead to identification of objectively defined behaviors to target. This information is critical to development of an effective PBSP; and, as discussed more fully below, the FBA did not lead to a PBSP that appropriately addressed Student’s needs. As such, the FBA did not serve one of the crucial functions of an evaluation: to determine the educational needs of the child with respect to the behavioral domain of a child with an Emotional Disturbance.

In addition to challenging the FBA at the hearing, the Parent raised another concern with the District’s evaluation that merits mention, namely that she did not believe that sufficient time was spent gathering and interpreting the relevant information. She points to the fact that only twelve days elapsed between an email communication to her from the District school psychologist about the rating scales and the finalization of the ER (N.T. 269-70; P-1). However, merely because there was communication over that relatively brief time span does not mean that the District school psychologist was only beginning the evaluation twelve days before its completion; indeed, even a cursory review of the ER reflects that a significant amount of time was spent gathering, summarizing, and interpreting all of the information contained therein. This contention is, thus, unavailing.

For all of these reasons, this hearing officer concludes that the District’s evaluation of Student in the fall of 2018 met all applicable criteria in every respect except the FBA. Student is accordingly entitled to an independent FBA at public expense, which shall be conducted by a

⁵ See Annotated IEP Form available at <https://www.pattan.net/forms/individualized-education-program-iep-annotated/?NodeId=567594> at 16 (last visited April 10, 2019).

Board Certified Behavior Analyst (BCBA), but no other independent evaluations will be ordered.⁶

THE PROVISION OF FAPE

The next two issues involve the related claims that the District did not provide FAPE on both procedural and substantive grounds. Procedurally, the Parent asserts that she was not permitted to meaningfully participate in program decision-making especially following her requests for revisions after the initial implementation of the IEP. Substantively, the Parent claims that the District did not implement a program that met Student's behavioral needs. The District, for its part, denies that FAPE was not provided in any respect.

Procedurally, the District did engage with the Parent to address her and its professional staff's concerns with the initial IEP. That the District did not agree with and adopt her suggested revisions is not, in and of itself, a procedural violation. As explained above, an LEA is not required to merely accede to any and all 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. Nevertheless, the same cannot be said about the December 2018 IEP meeting and resulting January 2019 IEP. As set forth above, a child's program must be individualized based on his or her needs, and the placement decision must be based on that IEP. Here, the revised IEP was drafted with full time emotional support the already-determined placement, and such does amount to a clear procedural violation. The proposal itself is discussed more fully below.

⁶ The Parent is, of course, free to obtain any independent evaluations that the IEP team will be required to consider. See 34 C.F.R. § 300.502.

Substantively, the record does preponderantly establish that the IEP of November 2018 was not based upon a sufficiently comprehensive FBA that would have provided the IEP team with adequate information on which to base the PBSP and other related aspects of the IEP. Instead, what became immediately apparent is that the IEP including the PBSP was not effective in addressing Student's behavioral manifestations; and, the result was that Student was removed from the classroom on a regular basis and thereby missed instructional time for an unknown number of unquantified periods. However, the District did respond promptly to the ongoing realization that Student's IEP required significant revision and, ultimately, led to the filing of multiple Complaints. The attached Order including an independent FBA is intended to remedy the deficits in the program as it currently exists.

The Parent also expressed concerns with the implementation of a safety protocol and the District's failure to adhere to the principles of pendency while this matter proceeded (N.T. 283-84). In this hearing officer's estimation, as discussed above, the critical flaws here are more fundamental in that they are rooted in the absence of a sufficiently developed FBA to inform an appropriate program including a PBSP. The ordered relief, again, is designed to remedy the deficiencies in the program for a path going forward.

THE PROPOSED PROGRAM AND PLACEMENT

The final issue is whether the District's proposal for a full time emotional support program and placement is appropriate for Student. Although the District members of Student's IEP team clearly believe very strongly that Student requires the level and type of support that the proposed full time emotional support program offers, and it is possible that Student would benefit therefrom, the evidence is preponderant that the principles of the least restrictive environment were discounted. As discussed above, FAPE and LRE are separate but related

concepts. Here, the leap from itinerant learning support to full time emotional support over a span of only four weeks (November 20, 2018 through December 18, 2018), a period that included the Thanksgiving holiday, can hardly be deemed an adequate amount of time to implement Student's initial program, gauge its effectiveness, and respond with needed changes.

The first prong of the *Oberti* test requires a determination of whether the child can, with supplementary aids and services, be educated successfully within the regular education setting. The record establishes that the District did not adequately consider whether Student can be appropriately educated in the regular education environment to satisfy the first prong of *Oberti*. The attached Order will provide the IEP team with additional information to guide this process following completion of the FBA for full consideration of the continuum of placements and the IDEA mandate for the least restrictive environment, including use of the Supplementary Aids and Services Toolkit⁷, an available PaTTAN resource.

Nevertheless, the second prong of *Oberti* requires that, if placement outside of regular education is necessary, a determination must be made on whether the student has been included with non-exceptional children to the maximum extent possible. Here, the record does convincingly establish that the January 2019 IEP is vastly improved over that in November 2018 in many respects; and, given the lack of success in implementation of the original IEP, Student would benefit significantly from some level of emotional support outside of the regular classroom for some period of time in order to develop skills for success in the regular education environment. However, the central issue here is whether the IEP that was ultimately proposed in January 2019 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

⁷ The Supplementary Aids and Services (SAS) Toolkit is available through the Pennsylvania Training and Technical Assistance Network (PaTTAN).

proposed move from the regular education classroom to full time emotional support in a segregated setting? That question must be answered in the negative, and the attached Order will provide for programming while the ordered independent FBA is conducted until a new IEP can be developed by the team.

FINAL OBSERVATIONS

The relationship between the parties clearly is strained to some degree, but providing for an independent FBA will not only provide an objective viewpoint but also should assist in “guarantee[ing] meaningful participation [of the Parent] throughout the development of the IEP” and the placement decision. *Phillip C. v. Jefferson County Board of Education*, 701 F.3d 691, 698 (11th Cir. 2012); *see also Schaffer, supra*, at 61 (noting that an IEE can afford parents “a realistic opportunity to access the necessary evidence” and information relating to an appropriate program and placement for their child). Nonetheless, the process of obtaining an independent FBA followed by the development of a new IEP will necessarily entail some period of time. The attached Order makes revisions to Student’s current IEP so that some of Student’s most significant needs can be promptly addressed in the interim.

ORDER

AND NOW, this 13th day of April, 2019, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Student is awarded an independent FBA at public expense to be conducted by a BCBA.
 - a) Within three school days of the date of this Order, the District shall provide to the Parent in writing a list of not less than three qualified BCBA professionals within the geographic area of the District to conduct an FBA. The BCBA's must be independent of the District but may be employees of the local IU or another agency.
 - b) Within five school days of receipt of the list of qualified individuals to perform the independent FBA, the Parent shall notify the District in writing of her selection.
 - c) If the Parent does not make a selection within five school days, the District may choose any BCBA from the provided list within seven school days of the date that the list is provided to the Parent and give written notice of the selection to her.
 - d) The selected BCBA shall determine the scope of the FBA including what observations and other procedures or assessments are necessary.
 - e) The arrangements with the selected BCBA shall include a requirement that he/she provide a written report of the FBA within a reasonable time not to exceed forty-five calendar days from the date of engagement.
2. Following completion of the FBA, and within seven school days of receipt by the District and Parent, Student's IEP team shall meet to review its results and to develop a new IEP including a new PBSP. The arrangements with the independent BCBA shall include up to two hours of attendance at that IEP meeting.
3. The IEP team shall consider all relevant information at the meeting to proceed to development of an IEP and PBSP and a discussion of placement based on that IEP. The team shall consider the LRE factors described above and utilize the SAS Toolkit available through PaTTAN to determine appropriate supplementary aids and services for Student's inclusion in the regular education environment to the maximum extent possible.
4. The District's proposed program and placement in the January 2019 IEP does not comply with the LRE mandate.
5. Until the IEP team reaches agreement on a new program including placement after completion of the independent FBA, the January 2019 IEP shall be implemented to the extent that Student can be provided with emotional support including counseling services at an itinerant level (20% or less of the school day), to include provision of a part-time or

full-time paraprofessional if necessary. Any portions of the January 2019 IEP that depend on full time emotional support in the IU classroom beyond the itinerant level shall not be implemented. The District shall also coordinate among staff to enable Student to practice learned emotional regulation and coping skills across educational environments.

6. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED. Jurisdiction is RELINQUISHED.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

ODR File Nos. 21647-1819AS
 21677-1819AS
 21691-1819AS