

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

**Pennsylvania Special Education Due Process Hearing Officer
Final Decision and Order**

Closed Hearing

ODR No. 29000-23-24

Child's Name:

A.G.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

July 10, 2024

INTRODUCTION AND PROCEDURAL HISTORY

The student(Student)¹ is [redacted] years old and recently completed the [redacted] grade in the (District). The Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) as a child with Autism, Intellectual Disability, and Speech-Language Impairment ².

[redacted] The Student struggled behaviorally, and the parties discussed options. The District proposed the placement of the Student in an educational program outside of the district. The Parents filed a due process complaint, and the Student remained in the pendent placement at the District, pending the resolution of this matter. The Parents contend that FAPE is available for the Student in the District, and it is the least restrictive environment. The District maintains the Student's needs are significant, it cannot provide FAPE and the recommended proposed placement (Proposed Placement) is the least restrictive environment.

Following review of the record and for all of the reasons set forth below, the claims of the Parents are mostly denied.

ISSUES

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, and will be redacted from the cover page prior to posting on the website of the Office for Dispute Resolution.

² 20 U.S.C. §§ 1400 – 1482. The implementing federal regulations are found at 34 C.F.R. §§ 300.1 – 300.818, and the state regulations are found at 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

- 1) Is the District's current placement recommendation for Student an offer of a free appropriate public education ("FAPE"), in the Least Restrictive Environment?
- 2) Can the District provide the Student a free appropriate public education ("FAPE") in the Least Restrictive Environment within a District placement?
- 3) Did the District violate any procedure, thereby restricting full Parent participation in the IEP process?
- 4) Is the Student owed compensatory education for missed related services or missed school?

FINDINGS OF FACT

1. The Student is currently [redacted] years of age and recently completed the [redacted] grade in the District. (J-7)
2. The Student is eligible for special education as a child with autism, intellectual disability and a speech and language impairment. The Student has medical diagnoses that include [redacted]. (J-3, p. 10-11, J-4, J-7)

Previous Educational History

3. During the 2020-2021 and 2021-2022 school years, the Student was enrolled in a neighboring school district (former district) and received education in the home. (J-3; N.T. 377)

4. During the 2022-2023 school year, the Student received in-person instruction in the former district. (N.T. 376)
5. On June 17, 2022, the former school district reevaluated the Student.³ (J-2)
6. On October 7, 2022, the IEP team in the former school district developed educational programming for the Student. The IEP identified needs that included functional communication, self-help skills, self-control, math and language arts skills. The IEP contained goals to address communication skills, toileting accidents, aggressive behavior, symbol copying, and matching. (J-3)
7. SDI in the IEP included breaks, sensory pressure, small group/one-to-one instruction, and a picture exchange system (PECS). Offered related services included consultative OT (fifteen minutes/month), individual speech (fifteen sessions for fifteen minutes), group speech therapy (twenty-four, thirty-minute sessions), individual PT (sixty minutes a month), and specialized transportation. The team concluded that the Student was eligible for ESY. The IEP offered the Student full-time autistic support (J-3, p. 20-26)
8. While attending the former district, the Student demonstrated behaviors, including aggression to others, property destruction,

³ As a Student with an intellectual disability, the Student is due for a reevaluation, which will be ordered. 22 Pa. Code § 14.124.

inappropriate vocalizations, hands in the diaper, ripping things off walls, knocking things over, dumping things, and fecal smearing. Reportedly, the Student was strapped in a Rifton chair for the school day. (J-4, J-56; N.T. 378, 382-383)

9. On June 13, 2023, a private provider developed a treatment plan for the Student. The treatment rationale noted the Student demonstrated dangerous behavior when unsupervised; the current classroom was understaffed and lacked prerequisite skills needed for learning. The plan contained a safety plan that identified level I, II, and III crises with triggers, example behaviors, and actions recommended action steps.⁴ (J-4)

Education in the District

2023-2024 School Year

10. In mid-July 2023, the Parents moved to the District to access improved autistic support services for the Student. On August 21, 2023, the Parent started the new student registration process. (N.T. 181-182, 196, 414)
11. The first day of school in the District was August 28, 2023. On August 29, the District convened an IEP team meeting. At that meeting, the team agreed that the Student's first day of school would be August 31, 2023. (J-5, J-6, J-7; N.T. 188-191)

⁴ Throughout this decision, PA Mentor, the outside provider that worked on behalf of the family, will be referred to as the "private provider".

12. On August 30, 2023, through a NOREP, the Parent agreed to the provision of comparable special education services pending the development of a District IEP. The NOREP indicated the Student would receive speech, occupational therapy (OT), and physical therapy (PT) (pending receipt of an up-to-date prescription). (J-5)
13. Before the Student joined the autistic support classroom, the assigned teacher reviewed the Student's treatment plan from the private provider, the IEP from the previous school district, and a previously prepared FBA. (J-3, J-4, J-12, N.T. 44-46)
14. Within the first week of school, the Student's teacher expressed concerns to District administration about observed classroom behaviors. In September 2023, the District contacted specialized educational placements and referred the Student for consideration. The placements had waitlists or declined citing the Student's behaviors. (J-20, J-21, J-22, J-24, J-26, N.T. 191)
15. During the school day, the Student demonstrated a high frequency of aggression, and the teacher found it difficult to find someone to "pair" with the Student.⁵ The Student was observed to engage in aggression (hair pulling, biting, scratching, hitting, kicking), property destruction, smearing (feces, food), and elopement. (J-7, p. 7; N.T. 49, 191, 268)

⁵ Pairing is a systematic approach to developing a relationship with the student that is positive and productive by introducing different reinforcers and collecting data on the student's behavior toward the reinforcers. (N.T. 49)

16. In early September, the District ordered an augmentative communication device. The Student was able to successfully use the device. After the trial, the Student's progress was discussed with the SLP and the Parents, and a second trial occurred. Between the first and second trials, the Student did not have access to the device from approximately December 20 to February 23. (J-53, p. 5; N.T. 550-555)
17. The Student received education in a District autistic support classroom with eight students with various abilities and behaviors. The autistic support classroom utilized principles of ABA, including intensive teaching (ITT), differential reinforcement, and errorless teaching. The teacher has thirteen years of experience and formerly worked at a private school for children with severe and complex behaviors. (J-56; N.T. 42, 54-57)
18. In addition to District support, the Student's classroom was staffed with a registered behavioral technician (RBT) and three instructional assistants (IA) from a contracted agency. The staff working directly with the Student were frequently rotated and asked for 2:1 support because of safety concerns and sustained injuries. (N.T. 81-85)
19. The District monitored the Student's behavior using five-minute "partial interval" data. The data was summarized and reported as a percentage where a specific behavior occurred. (N.T. 51-52)
20. On October 20, 2023, the IEP team met to discuss the Student's programming needs. At the meeting, the District advised the Parent of

its search for placement options for the Student if the supports and services offered through the October IEP proved insufficient. (J-6, J-7, J-31; N.T. 196-200)

21. The present levels in the October IEP indicated the Student could not join peers because of behaviors that required two adults to manage. Collected behavioral data indicated that from October 3 through October 6, the Student engaged in aggression for 90%, 85%, 85% and 90% of intervals. (J-7, p. 7, J-17)
22. The Student's functional performance levels indicated the Student demonstrated approach behaviors for two out of twenty-six classroom activities, used defective mands and scrolls to escape the classroom, and engaged in a high level of problem behaviors that included physical aggression (hair pulling, biting, scratching,) property destruction (throwing/dumping materials), smearing (food, feces), elopement (attempting to leave classroom or building), non-compliance, and dropping to the floor. (J-7, p. 7, J-17)
23. During hair-pulling incidents, the Student wrapped hair around each finger, sometimes requiring the involvement of multiple staff. Because of the Student's aggression, the teacher had to clear the classroom multiple times a day to ensure safety. (J-19; N.T. 72-77, 93)
24. The October 2023 IEP offered goals to address attending, participation, selecting pictures, new words, and requesting items/actions. SDI included modeling the use of communication

device, adult support, two adults for toileting at least every two hours, small food portions, differential reinforcement, an FBA, a onesie or fully body jumpsuit under clothing to prevent smearing, 1:1 behavioral and academic support from an adult familiar with the PBSP and principles of ABA. (J-7, p. 16-18)

25. The developed PBSP was based on data collected during the first trimester by the private provider. Behaviors of concern included aggression, destruction (throwing/dumping/damaging materials), smearing (food or feces), elopement, dropping to the floor, and hands in diaper. The PBSP identified antecedent strategies (limit free access to classroom, high-density adult attention), replacement behavior (manding, arm tap, functional communication training), consequences for replacement behavior (high-quality attention), and consequences for behaviors of concern (planned ignoring, gestural prompts). (J-9, p. 2, J-17; N.T. 47-48)

26. IEP offered related services included individual speech for two hours a month, group speech for ninety minutes a month, ninety minutes of group occupational (OT), sixty minutes of individual OT per month, sixty minutes of physical therapy (PT) a month, and specialized transportation. The IEP team determined that the Student was ineligible for ESY. (J-7, p. 17-18)

27. At the meeting, the team discussed that OT and PT would be delivered in a "co-treatment" model to ensure at least two adults were with the Student. During the co-treatment sessions, the OT and PT worked with the Student for fifteen minutes a week. The District did

not document the change in service time. (N.T. 513-514, 525, 528-529, 532, 578)

28. On October 25, 2023, through a NOREP, the District offered the Student a full-time, autistic support placement. The Parents did not return the NOREP. (J-7, J-10; N.T. 62)
29. Based on the collected data, the teacher observed it was rare to have a full interval with instruction before taking the Student on a walk, a preferred activity. (J-7, p. 7-8 ;N.T. 51)
30. Because of the Student's behaviors, the teacher restructured the classroom, removing loose items, visuals and manipulatives. (J-34; N.T. 89, 93)
31. On November 6, 2023, the Student's teacher communicated to the Parent that most days, the Student's aggression was between 80% and 90% of the school day, but the previous week worked for three consecutive hours without aggression. (J-36; N.T. 115)
32. On November 22, 2023, the Student's IEP was updated with progress reporting. Academically, the Student was able to attend to tasks for an average of three seconds. The Student learned one new action during the reporting period, learned one new item, and demonstrated the use of one core word. (J-11, p. 7)

33. Speech progress could not be measured because the Student refused to enter the room where services occurred. The District changed the service time to the morning, upon the Parent's suggestion. (J-11, p. 7; N.T. 542-543)
34. At the November 22 IEP meeting, the team discussed the Student's needs, lack of progress and behavioral data. The District advised the Parent of a space for the Student at the Proposed Placement contingent on a parental tour. (J-11; N.T. 63-65, 202)
35. After the meeting, the District's special education supervisor emailed the Parent information about the Proposed Placement and provided the website and the phone number of its clinical director. (J-13, p. 2, J-27; N.T. 202-203)
36. On November 27, the District again provided the Parent with information on the Proposed Placement and dates and times for a tour. (J-13, p. 2)
37. During October and November, a BHT from the District's contracted provider supported the Student in the classroom for two hours a day until she was injured. In December, after a break in service, an RBT from that agency was assigned to assist the Student. (N.T. 84-89)
38. The Student demonstrated improved behavior briefly when new staff was introduced. However, the private provider was unable to provide staff for the majority of October and November, and some

individuals, after injury, requested reassignment after working with the Student. An RBT from that agency was assigned to assist the Student in December. (J-11, p. 7; N.T. 84- 89, 117)

39. On November 15, 2023, the District received the prescription from the Parent for physical therapy (PT) services for the Student. Services began on November 29. The District made up the two missed PT sessions. (J-30; N.T. 214, 565-567)
40. Because of a clerical error, the Student's OT did not receive the referral to start services until November 29. The OT made up the time by providing the missed sixty minutes through four fifteen-minute sessions. (N.T. 510-511, 525-526)
41. The Student spent a great deal of time on [redacted] through the school halls and used repetitive manding to request "walks, wagon, or hallway". A refusal typically ended in aggression or property destruction (N.T. 95- 96, 561)
42. On December 1, 2023, a board-certified behavior analyst (BCBA) completed an FBA of the Student on behalf of the District. (J-12; N.T. 279-280).
43. During three days of observation, the BCBA observed the Student display physical aggression a total of 73 times at a rate of 24.33 times per hour; property destruction 9 times at a rate of 4 times per hour, elopement 23 times at a rate of 7.67 times per hour; and smearing, hair pulling, and dropping one time each (J-12, p. 23)

44. Although the District provided consistent one-on-one assistance to the Student from an ABA-trained individual or staff familiar with the behavior plan and accompanied by a person trained in ABA (2:1), multiple behavioral staff requested reassignment from the classroom citing behaviors and injuries. (J-29, J-50; N.T. 81, 84-85, 89, 207, 386)
45. In addition to the Proposed Placement, the District sent referrals to four other programs. Three of the programs placed the Student on a waitlist, one program declined, citing frequent aggression and the need for 2:1 staffing. (J-20, J-22, J-24, J-26; N.T. 192-194)
46. On December 5, 2023, through a NOREP, the District recommended placement of the Student to a school outside the District. On December 12, the Parents returned the signed NOREP to the District, rejecting the District's recommendation, citing the short time in the current school and a one-hour, one-way bus ride to the proposed placement. The Parent requested mediation.⁶ (J-13, J-39, J-40)
47. On December 14, 2023, the District advised its transportation carrier that as of Monday, December 18, 2023, the Student should no longer be transported. (J-44, p. 2; N.T. 437)
48. As of December 17, the Parents refused to participate in the intake process at the Proposed Program. Although a space was

⁶ Unfortunately, the Parent believed that pendency was triggered by their request for mediation but subsequently understood a mediation request had to occur through ODR. (N.T. 342-347)

available for the Student, no formal admission occurred. (N.T. 446-447)

49. On December 17, 2023 (Sunday), the District advised the Parent that the December 5 NOREP would be implemented since mediation was not requested. The District further advised that specialized transportation to the District would cease and contact with the recommended placement should occur for the next steps. That same day (Sunday), the Parent requested mediation through the Office for Dispute Resolution (ODR). (J-32, J-46; N.T. 428)

50. The Student missed school on Monday, December 18, 2024, because of canceled transportation. That day, the District reinstated transportation to begin the next day. The District declined to participate in mediation. (J-44, J-45, p. 2, J-46; N.T. 352-353, 430-432)

51. On December 30, 2023, the Parents filed a due process Complaint. (J-1, J-33; N.T. 434)

52. On January 16, 2024, the BCBA from the private provider completed its assessment/FBA/treatment plan for the Student. The sources of information included three school and two home observations conducted in November and December 2023. The Plan identified target behaviors, reduction objectives, and replacement goals. (J-55)

53. The Plan concluded that the Student demonstrated dangerous behaviors when unsupervised and needed support from highly skilled

personnel to maintain safety and create learning opportunities. The Plan indicated that the Student needed intensive therapy focused on problem behavior reduction and the teaching of functionally equivalent replacement behaviors. (J-55)

54. The treatment barriers identified in the Plan included staffing obstacles at the District and with the outside providers. The Plan cited staff injury and a lack of ABA-trained District staff. The Plan recommended that the Student receive 120 hours a month of ABA-trained BHT school-based services (J-55, p. 14)

55. On February 22, 2024, the BCBA from the private provider updated the Parents. The BCBA noted the Student made progress toward independently sitting in a typical chair with only vocal prompts, but problem behavior (hitting, kicking, dropping to the floor) often occurs when preferred activities are terminated, and academic demands are placed. Total time engaged in academic content remained limited due to high rates of problem behavior, and academic performance is inconsistent with endurance, which is limited to small chunks of instructional time. (J-56)

56. The BCBA noted that although the Student made progress toward attending, viewing instructional materials was inconsistent, and compliance remained difficult. The BCBA concluded that the Student demonstrated a high level of need; problem behavior was an obstacle to learning new skills but did prevent the acquisition of new skills. (J-56)

57. On February 29, 2024, a student teacher submitted an accident report that the Student pulled her hair, resulting in bilateral neck and shoulder discomfort and a possible concussion. (J-19; N.T. 77-78)

Proposed Placement

58. The proposed placement is a two-hour, round-trip bus ride from the Student's home. (N.T. 210)

59. The Proposed Placement provides intensive and individualized programming for students on the autism spectrum. All students have IEPs are referred because of behavioral needs their home school districts cannot manage. (N.T. 465-467)

60. The Proposed Placement has instructional classrooms equipped with SMART boards, a natural environment teaching room where social skills are taught as an alternative to the classroom, a gym where daily instruction occurs in appropriate skills, a de-escalation area, workspaces for related service providers, and a school store. (N.T. 470-475)

61. The Proposed Placement has 72 students, with no more than eight per class. Each classroom is staffed with a special education teacher and academic and behavior support staff. Some students with higher needs have one-on-one staffing. The proposed placement provides speech and OT. PT is provided in conjunction with a student's resident school district. (N.T. 467-468, 484-485)

62. The clinical director at the Proposed Placement is a BCBA. Staff at the Proposed Placement receive training in special education, ABA, positive behavior support, trauma-informed care, and non-violent physical crisis intervention. After the transition to the proposed placement, data collection occurs, an IEP is developed, and an FBA occurs to complete a PBSP. (N.T. 464, 468, 484, 496-498)
63. The Proposed Placement follows an applied behavior analysis (ABA) methodology and provides verbal behavior programming for students with language delays who need social skills instruction. The verbal behavior classrooms are typically staffed with one teacher to four staff. (N.T. 466)
64. Intake at the proposed placement occurs after a Student is accepted. A tour of the program precedes admission. A Parent visited the Proposed Placement. At the time of the due process hearing, the Student was on a waitlist as the Proposed Placement was at capacity with anticipated openings at the beginning of the 2024-2025 school year. (N.T. 493-494, 499-500, 504)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In order to evaluate the claims in a dispute such as this, it is necessary to consider the burden of proof, a principle that is viewed as consisting of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384,

392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who filed the Complaint seeking this administrative hearing. Nevertheless, the 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.

Hearing officers, as factfinders, are charged with the responsibility of determining the credibility 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). Witnesses that testified included a Parent, the current autistic support teacher, the supervisor of special education, a representative from the contracted support services agency, the District's Director of Special Education, the Clinical Director from the Proposed Placement, and the Student's OT, SLP, PT.

Some of testimony was confusing regarding conducted FBAs and PBSPs when reviewed with the documentary evidence. However, I find that the witnesses were credible and reliable. The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

General IDEA Principles

The IDEA requires each of the states to provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and

related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with the procedural obligations in the Act. The various states, through local educational agencies (LEAs), meet the obligation of providing FAPE to an eligible student through the 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.'" *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court has confirmed, 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)

Individualization is, accordingly, the fundamental consideration for purposes of the IDEA. Nevertheless, an 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). Additionally, a proper assessment of whether a proposed IEP meets the above standard must be based on information "as of the time it was made." *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); see also *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same). "The IEP must aim to enable the child to make progress." *Dunn v. Downingtown Area School District*, 904 F.3d 248, 255 (3d Cir. 2018)(emphasis in original). IEP development, of course, must

follow and be based on an evaluation as monitored and updated by changes in the interim. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320-300.324.

General IDEA Principles: Least Restrictive Environment

The IDEA contains a crucial mandate that eligible students are to be educated in the "least restrictive environment" (LRE) that also satisfies meaningful educational benefit standards. The IDEA requires states to ensure that children with disabilities will be educated with children who are not disabled, "to the maximum extent appropriate" 20 U.S.C. § 1412(a)(5)(A). The Third Circuit has construed this language to prohibit local educational agencies from placing a child with disabilities outside of a regular classroom, if educating the child in the regular education classroom, with supplementary aids and support services, can be achieved "satisfactorily." *Oberti v. Board of Ed. of Bor. of Clementon Sch. Dist.*, 995 F.2d 1204, 1207 (3d Cir. 1993). Each public agency must ensure that a continuum of alternative placements is available, including special classes, resource rooms, supplementary services and special schools. 34 C.F.R. § 300.115. The Court noted a "tension" within the IDEA between the strong congressional policy in favor of inclusion, and the law's mandate that educational services be tailored to meet the unique educational needs of the child. *Oberti*, 995 F.2d above at 1214

Children with disabilities may not be removed from the regular educational environment unless "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 U.S.C. § 1412(a)(5)(A). In determining placement, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs" 34 C.F.R. § 300.116(d). Removal is not permitted if the

sole reason is "needed modifications in the general education curriculum."
34 C.F.R. § 300.116(e).

The Court in *Oberti* set forth a two part analysis for determining whether or not a local educational agency has complied with the least restrictive environment requirement. First, the court (or in this case the hearing officer) must determine whether or not the child can be educated satisfactorily in the regular education setting with supplementary aids and services. Second, the court must determine whether or not the agency has provided education in the general education setting to the extent feasible, such as inclusion in part of the general education classes and extracurricular and other school activities. *Oberti*, 995 F.2d above at 1215.

The U.S. Supreme Court's *Endrew* decision further recognized that educational benefit for a child with a disability is wholly dependent on the individual child, who should be challenged by his or her educational program. *Endrew, supra*, 137 S. Ct. at 999. Also crucial to the LRE analysis is a recognition that its 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)). Rather, LEAs are required to have available a "continuum of alternative placements" in order to meet the educational and related service needs of IDEA-eligible children. 34 C.F.R. § 300.115(a); 22 Pa. Code § 14.145. Furthermore, the "continuum" of placements in the law enumerates settings that grow progressively more restrictive, beginning with regular education classes before moving first toward special classes and then toward special schools and beyond. 34 C.F.R. § 300.115.

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family plays “a significant role in the IEP process.” Schaffer, *supra*, at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b); see also *Letter to Veazey*, 37 IDELR 10 OSEP 2001 (confirming the position of OSEP that LEAs cannot unilaterally make placement decisions about eligible children to the exclusion of their parents). Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program. Among other things, IDEA requires the IEP Team, which includes the parents as members, to consider 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). 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 an 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).

The Parents' Claims

This [redacted] school Student has an array of disabilities and, during the school day, sometimes presents with behaviors that are challenging to manage. Early in the school year, the District recognized these difficulties and made inquiries to more specialized educational programs regarding the Student's suitability. The central issue is whether the Student's program and placement should remain the same or change as the District proposes. The Parents also contend the Student's LRE is the current District placement where FAPE is available, their procedural rights were violated, and the Student is owed a remedy for missed services. Based on this hearing record, the Parents have failed to sustain their burden of proof with respect to most of the claims at issue.

Addressing the first part of the *Oberti* analysis, the court must consider three things. First, it must determine whether or not the agency has given "serious consideration" to utilizing the full continuum of placements and supplementary aids and services, such as resource rooms, itinerant special education services, and related services such as speech and

language services, training, and behavior modification programs. *Id.* at 1216. Next, the court must compare and contrast the educational benefits that the child can receive in regular education and segregated settings, particularly considering the benefits of learning social skills in the general education context. *Ibid.* Finally, the court must consider the degree to which the child's behavior in the regular education setting is so disruptive that the child is not benefitting and that the behavior is interfering with the education of the other children in the general education setting. *Id.* at 1217. The Court emphasized that if supplementary aids and services would prevent these negative consequences, the determination of a negative effect on peers would not warrant removal from the regular education environment. *Ibid.*

Applying the *Oberti* analysis to the present matter, I conclude that the District offered the least restrictive environment appropriate to provide meaningful educational benefit to the Student while addressing the Student's serious academic and behavioral needs. I conclude that the Student cannot be educated satisfactorily in the current district setting at this time.

The Parents concede, and I agree that the first consideration under the *Oberti* test is satisfied. Although the Parents contend more staff training should have occurred, the record is preponderant that the District not only considered but actively attempted to implement an array of aids and services, all of which have not led to meaningful behavioral or academic growth. Those services included the assignment of an ABA-experienced teacher, 1:1 and frequently 2:1 staffing, an assistive technology trial, classroom reconfiguration, pairing, consultation and input from the PA mentor (BCBA), and related services. All of these interventions were attempted over several months without satisfactory improvement in the Student's disruptive and frequently violent behavior. Admittedly, behavioral

staffing challenges were present; however, the Parents have failed to introduce preponderant evidence that this resulted in a denial of mandated programming for the Student.

As to the second consideration, which is the most applicable to this situation, I conclude that the benefits of the segregated setting of the Proposed Placement outweigh the benefits of the current District setting. The Student is receiving negligible educational benefit in the District setting, even with the provided supplementary supports and services. The Student is unable to attend to instruction for more than a few minutes at a time and spends a significant amount of time either on [redacted] or demanding they occur, with refusal ending in aggression or property destruction. Behavioral data established that most days, the Student's aggression was between 80% and 90% of the school day, which detrimentally affected the ability to access instruction or positive social peer interaction.

Moreover, the credible testimony of the Clinical Director at the Proposed Placement indicated that their program offers more specialized, intensive and individualized programming for students on the autism spectrum. Their students are referred because of behavioral needs their home school districts cannot manage. Each classroom has a special education teacher and academic and behavior support; many students receive one-on-one staffing. Furthermore, the Student's IEP would be implemented, and all related services (OT, PT, Speech) provided. All staff at the Proposed Placement receive training in ABA, positive behavior support, and non-violent physical crisis intervention. Data collection occurs after the transition to the proposed placement, and an FBA is developed within forty-five to sixty days.

The Student's family chose to make their home in the District upon learning of its reputation for excellent autistic support programming. Unfortunately, the Proposed Placement would require the Student to ride a bus for two hours on a round trip to the school. This is of great concern given the age of this child, the demonstrated behavioral instability, and the burden it places on the Parents in the event they need immediate access to their Student. The *Oberti* and *IDEA's* "presumption" in favor of placing the child in the neighborhood school or the school closest to the child's home cannot be ignored.⁷ The Parents attempted to introduce a post-complaint filing note from a physician that indicated prolonged sitting concerns.⁸ This suggestion was given limited weight without corroborative medical or PT testimony or an expert report. The District provided credible testimony that it referred to similar programs in the District or closer to the Parents' home, but the Student was waitlisted or denied. Since considerable time has passed since those initial inquiries, the District will be ordered to compile a list of comparable placements within the District and those less than thirty minutes away from the Parents' home. After a team discussion, the District must submit a referral of the Student to the agreed-upon placements. If a comparable placement is unavailable, the Student will transition to the Proposed Placement, assuming space is still available.

As to the third consideration, the evidence determined that maintaining the current District placement would more likely than not continue exposing Student's peers to highly disruptive behavior that would significantly diminish their opportunity to benefit from the academic experience. The hearing record is replete with examples of the Student's unpredictable, aggressive behavioral episodes. These behaviors have disrupted instruction,

⁷ *Oberti*, 995 F.2d above at 1224 n. 31; 34 C.F.R. §300.116(b)(3)

⁸ The District's objection was sustained. (J-49; N.T. 241)

are undoubtedly frightening for the Student and classmates and have resulted in physical harm to staff and almost daily clearing of the classroom. Adverse effects on the education of other children in the Student's current classroom are likely to continue if the placement is not changed. As noted, the District attempted numerous interventions to enable Student to remain in the current education setting. None of these was sufficient to ameliorate the deleterious effect of Student's behavior.

The second part of the *Oberti* analysis is whether the District made reasonable efforts to provide for contact with non-disabled peers to the greatest extent appropriate. In these circumstances, placement in the Proposed Program, a special school exclusively for children with autism, precludes such partial inclusion measures. Depending upon the final selection of programming, the Student, more likely than not, would be at a considerable distance from the District's schools and therefore unable, as a practical matter, to participate in any classes during the school day or in recess or lunch activities.

The District provided persuasive evidence that the primary benefit of the Proposed Placement would be an integrated, school-wide and systematic approach to behavioral intervention and autism support. I conclude from this evidence that any partial inclusion would disrupt the continuity of such a program and deprive the Student of the benefit of the proposed programming. Therefore, I conclude that the Parents have failed to prove that any partial inclusion would be practicable and would not deprive the Student of the primary benefit of the segregated setting. However, I also conclude that private placement must be limited to whatever reasonable period is necessary to enable the Student to benefit from it. Moreover, it is consistent with the purpose of the least restrictive environment requirement

that the IEP team begin immediately to discuss the appropriateness of the Student's transition back to the regular education environment. Therefore, I will order that prospective transition planning occurs after the Student spends a reasonable time in the Proposed Placement, to assess progress and suitability for return to the District.

Next, the Parents contend they were deprived of their procedural rights when the District initiated referrals to outside placements without their knowledge or consent, failed to provide documents when requested, and canceled the Student's transportation.⁹ When a district searches for an appropriate placement for a student with a disability, administrators may have to discuss the student's needs with officials from other schools where enrollment is sought. For this reason, FERPA permits disclosure without prior written consent "to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer." 34 CFR § 99.31 (a)(2). However, the district must make a reasonable attempt to notify the parent unless the disclosure was initiated by the parent or eligible student. This is true unless a district's annual FERPA notification includes a provision that education records will be forwarded upon request to other institutions where the student seeks admission intends to enroll or is already enrolled. 34 CFR § 99.34 (a)(1)(ii). The Parents raised this issue in the context of a purported violation of their procedural rights and not a claim that FERPA rights were violated. My authority to decide the former is clear, but the latter is much less so.

⁹ The Parents did not indicate during prehearing proceedings or request Hearing Officer involvement for the production of any outstanding educational records.

Although certainly not conducive to a transparent home-school collaboration, the District's immediate search for a new placement without the Parents knowledge did not deny them meaningful participation in their child's programming. The Student's behavioral challenges and District's concerns were discussed at meetings in which the Parent fully participated and through follow-up correspondence. Although the initial referrals should have been made optimally with the Parents, both parties undoubtedly recognized the concerns that precipitated the District's outreach.

Finally, the Parents claim the District failed to provide all IEP services to the Student, and that compensatory education is due. The Student missed one day of school after the District canceled the Student's transportation because of the Parents' unresponsiveness to the issued NOREP and their failure to properly request dispute resolution through ODR. Once pendency attached, the next day, the Student's busing transportation resumed.

I do determine that the District failed to fully supply IEP mandated related and technology services to the Student. Although the team discussed a co-treatment model for PT and OT with both services occurring simultaneously, this resulted in a fifty-percent reduction in service time to the Student. No post-meeting documentation resulted to reflect this change. As a result, Student did not receive OT and PT as proscribed by the IEP. Furthermore, the Parents have established that the Student did not have consistent access to the needed communication device for roughly two months. As such, the Student is entitled to compensatory education for the deprivation of those services.

Compensatory Education

It is well settled that compensatory education is an appropriate remedy when a LEA knows, or should know, that a child's educational

program is not appropriate, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of deprivation of special education services, excluding the time reasonably required for the LEA to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed an approach that awards the "amount of compensatory education reasonably calculated to bring [a student] to the position that [he or she] would have occupied but for the [LEA's] failure to provide a FAPE." *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650- 51 (Pa. Commw. 2006); see also *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)(explaining that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA.")) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Based on the evidence of this hearing record, I conclude the following:

1. The District's current placement recommendation for Student is an offer of a free appropriate public education in the least restrictive environment.
2. The District is unable to provide the Student with free appropriate public education ("FAPE") within the current placement.
3. The District did not violate procedures restricting full Parent participation in the IEP process.

4. The District denied Student a FAPE through its failure to provide IEP related and technology services consistent with the IEP. The Student is owed compensatory education for this violation.

ORDER

AND NOW, this 10th day of July 2024, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows.

1. The District is ordered to issue a PWN to the Parents to conduct a reevaluation of the Student.
2. Within ten (10) days of this Order, the District and Parents must compile a list of placements comparable to the Proposed Placement within the District or less than thirty minutes from the Parents.
 - a. After the list is compiled, the IEP team will convene to discuss referral of the Student for consideration by the placements.

- b. The District must submit a referral of the Student to placements agreed by the team. In the event a closer comparable placement is unavailable, the Student will begin the 2024-2025 school year at the Proposed Placement, assuming space is available.

3. Within one-hundred and twenty (120) days of the Student's transition to a new placement, the School shall schedule an IEP meeting, to occur by the following thirty-days, inviting a representative of the program attended.
 - a. At the IEP meeting, the team will discuss the Student's progress and whether planning for the transition of the Student from the new placement back to the District is appropriate.

 - b. The team will also discuss the Student's waitlist status on placements closer to the family.

4. The Student is owed 6.25 hours of compensatory education for every day the Student attended school between December 20, 2023, and February 23, 2024, for the lack of access to the communication device.

5. The Student is owed six hours of compensatory education for missed related services.

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

/s/ Joy Waters Fleming, Esquire

Joy Waters Fleming

HEARING OFFICER
ODR File No. 29000-23-24

July 10, 2024