

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

PENNSYLVANIA SPECIAL EDUCATION HEARING OFFICER
FINAL DECISION AND ORDER

Closed Hearing

ODR File Number:

22778-1920

Child's Name:

J.C.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent:

Nicole Reimann, Esquire
Batchis Nestle & Reimann LLC
7 Bala Avenue, Suite 202
Bala Cynwyd, PA 19004

Local Education Agency:

Upper Darby School District
601 N. Lansdowne Drive
Drexel Hill, PA 19026

Counsel for LEA:

Heather D. Matejik, Esquire
Fox Rothschild LLP
10 Sentry Parkway, Suite 200
Blue Bell, PA 19422

Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

July 14, 2020

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a primary elementary school-aged student in the Upper Darby School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student transitioned to District programming at the start of the 2019-20 school year. In September 2019, Student's Parent filed a Due Process Complaint against the District challenging the program offered and provided to Student. An Amended Complaint was thereafter filed asserting claims under the IDEA, Section 504 of the Rehabilitation Act of 1973,³ and the Americans with Disabilities Act (ADA).⁴

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable details are not used in the body of this decision. All personally identifiable information will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

⁴ 42 U.S.C. §§ 12101-12213.

The matter proceeded to a due process hearing⁵ with most sessions conducted virtually due to the COVID-19 pandemic. ⁶ The Parent sought to establish that the District’s program amounted to a denial of a free, appropriate public education (FAPE) in the least restrictive environment, and that it lacked adequate planning for Student’s transition to kindergarten as well as necessary transportation. As remedies, the Parent sought compensatory education and an order for a meeting of Student’s team. The District maintained that its special education program, as offered and implemented, was appropriate for Student and that no relief was due.

For the reasons set forth below, the claims of the Parent will be granted in part and denied in part.

ISSUES

1. Whether the District’s evaluation of Student was appropriate;
2. Whether the District’s program for Student for the 2019-20 school year was appropriate both substantively and procedurally;
3. If the program for Student was not appropriate for Student in any respect, whether Student should be awarded compensatory education;
4. If the program for Student was not appropriate for Student in any respect, whether Student’s Individualized Education Program team should be ordered to reconvene; and

⁵ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. Citations to duplicative exhibits may not be to all.

⁶ The parties jointly sought a continuance soon after the school closures in order to provide them with the opportunity to prepare for the remaining hearing sessions. (N.T. 117.)

5. Whether the District discriminated against Student in violation of Section 504 and the ADA?

FINDINGS OF FACT

1. Student is early elementary school-aged and is a resident of the District. Student is eligible for special education on the bases of a Hearing Impairment and an Other Health Impairment. (S-69.)
2. Student has bilateral hearing loss and has had bilateral cochlear implants since before age three. (P-2 at 8; S-6 at 6-7.)
3. Student exhibits difficulty with transition across environments. (N.T. 875.)
4. Student needs a consistent routine throughout the school day. (N.T. 201, 204, 276, 290.)
5. The Parent's goal for Student's communication is to use speech in addition to basic sign language, with Student using both at home. (N.T. 842-43.)

Relevant Previous Early Educational Services

6. Student was eligible for school-age services in the fall of 2018, but the Parent elected to have Student remain in preschool. At that time, Student was at a private school placement for what could have been Student's kindergarten year. (S-6 at 4; S-69 at 1.)
7. Student has historically needed a highly structured learning environment with an emphasis on language in addition to hearing support. (P-9 at 21; P-15 at 39.)
8. At least since early 2019, Student has at times removed the cochlear implant processors when engaging in problematic behavior such as when exhibiting frustration. (N.T. 242, 530, 687-88; S-6 at 7, 13.)

9. The local Intermediate Unit (IU) providing pre-school-age services conducted a reevaluation of Student in February 2019 and issued a Reevaluation Report (RR). (S-6.)
10. Cognitive assessment for the February 2019 RR reflected nonverbal ability in the low range (SS 77.) (S-6 at 11-12.)
11. The February 2019 RR noted Student's use of both American Sign Language (ASL) and spoken English for short phrases. (S-6 at 13.)
12. Student's problematic behaviors (off-task behavior (elopement, throwing objects, and physical aggression toward others)) and tantrums were noted in the February 2019 RR to impede Student's learning. A functional behavior assessment (FBA) conducted at that time determined that the function of the behaviors was to gain attention or access to an item or activity when presented with a direction or demand. (S-6.)
13. Recommendations in the February 2019 RR included a highly structured setting with a low student to teacher ratio; a consistent routine with limited transitions; a picture schedule; and frequent breaks. (S-6 at 25.)
14. In the summer of 2019, Student transitioned from the private school placement to a full-day IU program where Student had previously attended. The IU program was considered a diagnostic placement. (N.T. 63-65, 75, 182-83, 799; S-6 at 4; S-17 at 7.)
15. The IU program is located in an IU building that serves approximately 125 children who are early intervention age through age twentyone. Various programs operate within the building. There are no typically-developing students in that building. (N.T. 132, 201, 260, 341-42, 346-47, 358, 360, 385; S-17 at 44.)

16. The IU developed an IEP for Student in June 2019. That IEP contained goals addressing: transition between activities; following directives; fine motor skills; expressive language using ASL, spoken English, and pictures; pre-academic skills; and behavior. Related services included specialized instruction; speech/language therapy; occupational therapy; hearing support; behavior support hearing services; and a personal care assistant (PCA) fluent in ASL. The Parent approved the Notice of Recommended Educational Placement (NOREP). (S-15; S-16.)
17. The IU also developed a communication plan for Student in June 2019. At that time, Student was reportedly using ASL, spoken English, and visuals, but was not engaging in functional communication with peers. The plan specified a total communication approach for direct instruction (verbal language, ASL, and visuals such as pictures). (S-14.)
18. The Parent approved the NOREP accompanying the June 2019 IEP providing for a specialized classroom for instruction and related services that included transportation to the IU building. (S-16.)
19. Over the course of the summer of 2019, the IU determined that Student had a very limited ASL vocabulary and was using spoken English more frequently than signs. (S-69 at 12-13.)

District Policies Relevant to Student

20. When a child is preparing to transition from early intervention programming to school-age programming, the District reviews the current evaluation report, Individual Family Service Plan/Individualized Education program (IFSP/IEP), and progress data. A transition meeting is then held. (N.T. 59-60.)

21. As further preparation for transition, the team next convenes an IEP meeting in the spring prior to the start of the school year where school-age programming will begin. (N.T. 57.)
22. The District has and follows a policy that transportation to and from “care providers” other than parents or guardians will not be available. (N.T. 66; S-5.)
23. The District’s own kindergarten program is a half day, limited to 2½ hours per day. (N.T. 75.)

Preparation for 2019-20 School Year

24. The Parent registered Student with the District in March 2019, and the parties communicated and met over the summer. (S-7; S-86.)
25. The IU and the District developed a new IEP for the start of the 2019-20 school year in August. Parental concerns at that were noted to include transportation on the bus. (S-17 at 1, 13.)
26. The District did not evaluate Student prior to development of its initial IEP, but it accepted the IU evaluation. The District planned to conduct its own evaluation in the fall of 2019 after Student became acclimated to the school-age environment and staff, and the team discussed doing so at the August 2019 IEP meeting. (N.T. 38, 76, 381-82; S-23 at 2.)
27. Identified needs in the August 2019 IEP were for communication skills; transitioning; fine motor skills; following directions; pre-academic skills; and attention to tasks. (S-17 at 14-15.)

28. Goals in the August 2019 IEP addressed communication (functional communication with spoken English, ASL, and visuals); transitioning between activities with minimal prompts; fine motor skills; following directions; pre-academic skills (counting with 1:1 correspondence); and maintaining attention to group tasks. (S-17 at 23-36.)
29. Program modifications and items of specially designed instruction in the August 2019 IEP provided support for transitions, and also addressed duration of task demands, behavior strategies, sensory needs, availability of choices, multisensory presentation, errorless teaching, instruction using spoken English and ASL, chunking of instruction, simple language, hearing support, visual cues, and checks for comprehension. (S-17 at 37-40.)
30. Related services in the August 2019 IEP were for hearing support; speech/language therapy; occupational therapy; audiology services; a PCA who would be taught basic signs; behavior specialist services; and transportation curb to curb. Student's program was full time special education. (S-17 at 41-45.)
31. The IEP team also developed a communication plan for Student in August 2019 that specified use of spoken language supplemented with some sign language. The PCA would use ASL as needed. Communication with peers would be in the same modes, but the extent to which Student did so already was not indicated. (S-18.)
32. At the August 2019 IEP meeting, the team also discussed and decided to maintain the services and supports provided in early intervention when Student began school-age services. (N.T. 384, 775.)
33. At the August IEP meeting, the team discussed the need for a PCA on the bus and throughout the school day. The PCA was to be trained in ABA principles. (N.T. 67-68, 69-70, 422-23, 778-79, 782.)

34. The IEP team concluded, with minimal discussion at the August 2019 IEP meeting, that Student's needs could not be met in the regular half day program and the only other option was an out of District (IU) placement. (N.T. 104, 106-07.)
35. Because she begins her workday very early in the morning before the District transportation is available, she asked that the District pick Student up at a day care center for transportation to the IU program. That issue was not resolved and was discussed further in early September 2019 without success. (N.T. 33, 65-66, 81-83, 194, 412-13, 425-26, 777, 835, 837, 838, 865-66, 853-54; S-22; S-26; S-42 at 3; S-58 at 14-15, 22, 34-36, 65.)
36. The Parent did not approve the NOREP for full time autistic and deaf/hard of hearing support that accompanied the August 2019 IEP, stating that she had questions that included transportation. (S-25.)
37. A District professional spoke with a representative of the day care center to discuss possible arrangements for transporting Student to the IU program from the day care center. The day care center did not transport children to the IU building Student attended. (N.T. 79-80, 835.)

2019-20 School Year

38. In early October 2019, the IU sought consent to conduct an evaluation of Student, and the Parent agreed. (S-45.)
39. Student needed a small group educational environment with multisensory instruction as well as access to speech/language, occupational, and physical therapy services, during the 2019-20 school year. (N.T. 185-88, 204-05.)

40. Student was in an autistic support classroom at the same IU building for the 2019-20 school year with a special education teacher and two teaching assistants. The class size ranged from approximately six to eight students, with eight the maximum. Some students were verbal and some were not. (N.T. 128-29, 135-36, 158, 185, 201, 202-03, 416.)
41. Students in the IU classroom received individualized instruction based on need and intensive behavioral support. (N.T. 308-09.)
42. In the 2019-20 school year, the autistic support classroom used a standards-based curriculum that is supplemented by other programming and materials beyond that curriculum. Student's IEP was implemented in that building. (N.T. 139, 141-42, 154-55, 213.)
43. Student's teacher assessed Student's academic readiness skills in September 2019. Student exhibited a few emerging skills in literacy and mathematics with prompts and accommodations. (S-34; S-36; S-71 at 8-11.)
44. Student's program at the IU during the 2019-20 school year focused on Student's language needs using a variety of forms of communication, and provided structure and a consistent routine. (N.T. 154-55, 201, 204.)
45. In the classroom during the 2019-20 school year, the autistic support teacher used spoken language first, then if necessary pictures, and then sign language. The autistic support teacher also spoke with the Parent about Student's communication needs, and she expressed that she wanted to focus on verbal communication with Student's use of the cochlear implants. (N.T. 190-92.)

46. Student used total communication, which includes verbal language, visual and auditory modalities, and sign language during the 2019-20 school year. Student verbalized single words and occasionally a two-word phrase at school during the 2019-20 school year, and also used pictures and gestures to communicate. Student was using a very basic level of sign language and it was not used as a primary mode of communication. (N.T. 207, 471, 515, 519, 520, 523, 534, 536, 556, 685, 704-05.)
47. A hearing support teacher worked with Student on ASL individually each week, and consulted with the autistic support teacher and other staff so they had signs for vocabulary and concepts to be used in the curriculum on a weekly basis. (N.T. 151-52, 155, 180-81, 455-56, 465, 483.)
48. Student did not always have the processors (an external piece similar to a hearing aid) for the cochlear implants at school during the 2019-20 school year. The IU had substitute equipment that was provided as needed. (N.T. 188, 199-200, 209-10, 212, 623-24, 650-51; S-6.)
49. There is technology available that can enhance the ability of a student with cochlear implants to receive targeted audio signals (i.e., the sound that is intended for the student to hear, and not background noise). The specific technology depends on the individual and was not recommended for Student as of the end of the 2019-20 school year. (N.T. 633-34, 635, 637, 670.)
50. Student had behavioral needs that had to be addressed throughout the school day. Behaviors included noncompliance with directives, elopement, aggression, and resistance to transitions. (N.T. 188-89, 228-29, 238-40; S-65; S-66; S-67; S-68.)

51. A behavior specialist consulted regularly with the autistic support teacher and Student's assigned PCA. The IU also conducted informal preference assessments for Student's reinforcers throughout the school day. (N.T. 168, 169-70, 221, 239, 760.)
52. The IU building provided clubs for students on a weekly basis. (N.T. 245.)
53. Student was frequently absent during the 2019-20 school year prior to the school closure in March 2020. A majority of those were because Student was not provided transportation from the day care center to the school. (N.T. 144-45, 162, 193, 203, 401-02, 880-81; S-48; S-57; S-58 at 46-47; S-60; S-61; S-69 at 2; S-75 at 8.)
54. Student's frequent absences impeded Student's need for structure and a consistent routine, and exhibited some regression in skills after absences. (N.T. 200-01, 203-04, 517-18, 575.)
55. Student did not have a consistent PCA until approximately January of the 2019-20 school year in part because of Student's attendance. Individuals familiar to Student from early intervention typically served as PCAs prior to that time, but sometimes one was not available for the entire school day. (N.T. 145-47, 173, 218-20, 423-24.)
56. A PCA for the bus was in place as of January 2020. However, the Parent was not notified of this new staff person in advance and concerns resulted. (N.T. 386-87, 389, 846.)
57. Student's progress on IEP goals was very limited and inconsistent during the first quarter of the 2019-20 school year. (S-57.)
58. Student's progress on IEP goals during the second quarter of the 2019-20 school year reflected inconsistent performance; however, behavioral data showed significant improvement in attention to group tasks, successful transitions, and use of the cochlear implants; Student

was also removed from the classroom very infrequently over that quarter with overall less frequent problematic behaviors. (S-90; S-91; S-92.)

59. The autistic support teacher provided a daily communication sheet to the Parent each day that Student attended. (N.T. 224-25; S-48.)

December 2019 Evaluation

60. The IU completed a new ER in December 2019. The Parent did not return the input form provided to her for this evaluation. (S-69.)
61. The December 2019 ER included observations of Student by the school psychologist in two different therapy sessions and during transitions. Testing observations were also noted that reflected Student's cooperation, and results were deemed to be consistent with true ability. (N.T. 286-87; S-69 at 4.)
62. Teacher input in the December 2019 RR including a description of a classroom observation. (S-69.)
63. Cognitive assessment for the December 2019 ER (Primary Test of Nonverbal Intelligence – Second Edition) yielded an Index score of 92 (within the average range). That score does not factor in Student's weak adaptive functioning. (N.T. 291-92, 294-95, 306; S-69 at 29-30.)
64. Adaptive functioning assessment for the December 2019 ER (Vineland Adaptive Behavior Scales – Third Edition) reflected weaknesses across most domains, with the exceptions of interpersonal relationships and gross and fine motor skills (teacher) and fine motor skills (Parent). (S-69 at 30-33.)

65. Behavioral assessment was conducted through rating scales completed by the teacher (Behavior Assessment System for Children – Third Edition) for the December 2019 ER. The teacher’s ratings endorsed clinically significant concerns with aggression and adaptability; and at-risk concerns with hyperactivity, study skills, and functional communication. The Parent did not complete and return this rating scale. (S-69 at 33-34.)
66. Assessment of executive functioning through teacher rating scales for the December 2019 ER indicated extreme weaknesses overall, and specifically in the areas of problem solving, behavioral control, and emotional control. (S-69 at 34.)
67. Rating scales for characteristics of autism for the December 2019 ER did not suggest Autism Spectrum Disorder. Student’s emotional response presentation was determined to be based on difficulties with self-regulation, emotional control, and executive functioning. (S-69 at 34-35.)
68. Speech/language formal assessment for the December 2019 ER was described but scores were not reported because it was not administered under standardized conditions. However, a receptive and expressive sign inventory could be determined from the standardized instruments that measure vocabulary (6 and 38 signs, respectively). Additional information was obtained through use of a matrix that identified communication skill weaknesses. (S-9 at 6-11, 13-18.)
69. Occupational therapy assessment through observational input was provided for the December 2019 ER. (S-69 at 19-20.)
70. Physical therapy functioning was assessed for the December 2019 due to concerns with body and spatial awareness. Weaknesses in a number of gross motor skills were reflected. (S-69 at 20-22.)

71. A new FBA was conducted for and included in the December 2019 ER. The FBA identified four behaviors: elopement, noncompliance, aggression, and tantrums. The hypothesized functions of those behaviors were: access to tangibles with a secondary function of attention from adults (elopement); attention from adults with secondary functions of access to tangibles and to escape demands (noncompliance); attention from adults with a secondary function of peer attention (aggression); and attention from adults and access to tangibles (tantrums). (S-69 at 22-27.)
72. The conclusion in the December 2019 ER was that Student was eligible for special education on the basis of a Hearing Impairment including Deafness and an Other Health Impairment. A number of recommendations of teachers and therapists were also summarized. (S-69 at 44-46.)

December 2019 IEP

73. A new IEP was drafted following the December 2019 ER. The team met in early January to discuss both documents. (S-70; S-71; S-75.)
74. Identified needs in the December 2019 IEP were for functional communication skills and increased words used in utterances; transitioning; gross motor skills; fine motor skills; hearing services; development of understanding of directional and positional concepts; early literacy and mathematics (pre-academic) skills; and maintaining attention to tasks. This IEP recommended a highly individualized program of full-time special education in a small class size with curricular adaptations as well as personal care and behavioral support. (S-71 at 41-43.)
75. Goals in the December 2019 IEP were revised to address communication (using multi-word utterances with spoken English,

signs, and/or pictures); functional literacy (development of directional and positional concepts); reading comprehension (identification of main ideas and supporting details); functional mathematics (developing 1:1 correspondence); gross motor skills (improving coordination and body awareness); fine motor skills (improving developing skills); hearing support (self-advocacy); and behavioral support (transitioning between activities with minimal prompting, attending to small group tasks, and responding to denial of access to items or activities). Nearly all goals contained baselines, with the minor exceptions basing outcomes on other observed performance. (S-71 at 54-73.)

76. A PBSP was part of the December 2019 IEP and provided for a number of antecedent strategies and consequences for performing replacement or problem behavior. Modeling and use of visual supports, in addition to prompts when needed, were part of the PBSP. (S-71 at 74-77.)
77. Program modifications and items of specially designed instruction in the December 2019 IEP provided for hearing support; consistent and meaningful communication; practice with early literacy and mathematics skills; chunking of information; errorless teaching; physical and occupational therapy supports; and behavioral supports that included a prompt hierarchy and various components of the PBSP. (S-71 at 78-83.)
78. Related services in the December 2019 IEP were for hearing support; speech/language therapy; physical therapy; occupational therapy; audiology services; a PCA; BCBA services; and transportation with the PCA curb to curb. Student's program was full time special education. (S-71 at 88-89.)

79. The IEP team also updated the communication plan for Student in December 2019 IEP that continued to specify use of spoken language supplemented by sign and visual supports. (S-72.)
80. Student's IEP was revised in January 2020 following the meetings of the team to add Student's attendance, and a new item of specially designed instruction for the collection of data on Student's use of the cochlear implants. The Parent approved the January 2020 NOREP specifying full time autistic support at the IU location. (N.T. 93, 177, 433-35, 506, 565, 719, 839-40; S-75; S-76.)
81. The Parent again raised the need for transportation at the January 2020 IEP meeting. (N.T. 216.)
82. Student's participation in the District's distance learning including related services following the COVID-19 school closures was limited. Both the autistic support teacher and the speech/language pathologist provided materials to the Parent to support Student's needs. (N.T. 233-34, 236-37, 721, 912; S-93; S-94; S-95.)⁷

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof in a legal proceeding is viewed as consisting of two elements: the burden of production and the burden of persuasion. In an administrative proceeding such as this, 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, that burden rests with the Parent who filed for this

⁷ The Parent did not in this hearing raise claims related to education following the school closures in March 2020.

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

Special education hearing officers, who are in the role of fact-finders, also have the responsibility of making credibility determinations of the witnesses who testify before them. *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). The witnesses generally were determined to be credible as to the facts as they recalled them. Nevertheless, there was some inconsistency in the testimony of various witnesses, particularly with respect to whether certain statements were made by certain individuals; the discrepancies, however, are attributed to memory, recall, and the parties’ own perspectives, rather than to intent to provide deceptive accounts. In any event, the issues in this case did not depend on reaching any conclusions on contradictory testimony.⁸ Moreover, the weight accorded testimony was not equally assigned; some testimony was more probative than that of other witnesses, particular that which was corroborated by the exhibits of record. The documentary evidence further supplied important details about programming development, decisions, and implementation and, as a whole, was accorded significant weight. In summary, in reviewing the record, the testimony of all witnesses and the content of each admitted

⁸ Specifically, testimony about informal, uncorroborated statements that may have been made in passing in unknown context was not reliable substantive evidence.

exhibit were thoroughly considered, as were the parties' closing statements, for purposes of this decision.

General IDEA Principles: Substantive FAPE

The IDEA requires 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. Many years ago, 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), must 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." *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). The U.S. Supreme Court has recently observed 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). "A focus on the particular child is at the core of the IDEA." *Id.*, ___ U.S. at ___, 137 S. Ct. at 999, 197 L.Ed.2d at 349-50 (2017)(citing *Rowley* at 206-09)(other citations omitted).

Individualization is, thus, a central consideration for purposes of the IDEA. In other words, a child's IEP must, primarily and critically, respond appropriately to his or her identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Still, 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). Rather, the law demands services are reasonable and appropriate in light of a child's unique circumstances, and not necessarily those that his or her "loving parents" might desire. *Andrew F., supra; Ridley, supra; see also Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard must be based on information "as of the time it was made" and not in hindsight. *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).

Substantive FAPE: Least Restrictive Environment

One critical premise in the IDEA is the mandate that eligible students be educated in the "least restrictive environment" (LRE) that also satisfies meaningful educational benefit standards.

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 U.S.C.S. § 1412(a)(5)(A); see *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993). 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*, the Third Circuit set forth a two-pronged test for determining whether a student’s placement is in conformity with the IDEA’s LRE mandate. The first prong involves a determination of whether the child can, with supplementary aids and services, be educated successfully within the regular classroom. 995 F.2d at 1215. The second prong is that, if placement outside of the regular classroom is determined to be necessary, there must be an examination of whether the child has been included with non-disabled children to the maximum extent possible. *Id.*

In assessing the first prong, the mere fact that a child might progress better academically in a segregated setting than in an inclusive setting is not determinative, since one must evaluate the unique benefits of the typical environment for the individual child, such as social skills and peer interactions. *Girty v. School District of Valley Grove*, 163 F.Supp.2d 527, 536 (W.D. Pa. 2001), *aff’d mem.*, 60 Fed. Appx. 889 (3d Cir. 2002) (quoting *Oberti* at 1217). 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. 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 first toward special classes and then toward special schools and beyond. 34 C.F.R. § 300.115.

However, the failure to adhere to LRE principles does not automatically mean that an LEA has denied the student FAPE. *A.G. v. Wissahickon School District*, 374 Fed. App’x 330 (3d Cir. 2010)(citations omitted). The issues of FAPE and LRE are related but different.

Substantive FAPE: IDEA Evaluation Requirements

Substantively, an IEP must follow and be based on an evaluation. The IDEA sets forth two purposes of a special education 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).

Certain procedural requirements are set forth in the IDEA and its implementing regulations that are designed to ensure that all of a child’s individual needs are examined in this type of evaluation:

Conduct of evaluation. In conducting the evaluation, the local educational agency shall—

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

(i) whether the child is a child with a disability; and

(ii) the content of the child’s individualized education program, including information related to enabling the

child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

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

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

20 U.S.C. § 1414(b)(2); *see also* 34 C.F.R. §§ 300.303(a), 304(b).

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).

General IDEA Principles: Procedural FAPE

Another core principle of the IDEA is that of procedural FAPE, which includes parental participation in educational decisions. *Schaffer, supra*, 546 U.S. at 53. Procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

The IEP is developed by a team, and a child’s educational placement must be determined by the IEP team based upon the child’s IEP, as well as other relevant factors. 20 U.S.C. §§ 1414(d)(1)(B), 1414(e); 34 C.F.R. § 300.116; *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994); *see also Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258-59 (4th Cir. 1988). Many years ago, in *Letter to Veazey*, 37 IDELR 10 OSEP 2001), OSEP explained that local educational agencies cannot unilaterally make placement decisions about eligible children to the exclusion of their parents. *See also Spielberg, supra*, 853 F.2d at 259. The law does not permit the LEA to have predetermined a program and placement, without evidencing an open mind to consideration of alternatives. *See, e.g., Deal v. Hamilton County Board of Education*, 392 F.3d 840, 858 (6th Cir. 2004).

If the parties are not able to reach a consensus on special education programming, however, it is the LEA that must make such a determination; and, parents are afforded procedural safeguards if they do not agree. *Letter to Richards*, 55 IDELR 107 (OSEP 2010); *see also* 64 Fed. Reg. 12406, 12597 (1999)(same). Thus, an LEA’s refusal to acquiesce to a parent’s preferences does not necessarily mean that there is a procedural denial of FAPE.

General Section 504 And ADA Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). Further, the substantive standards for evaluating claims under Section 504 and the ADA are essentially identical. *See, e.g., Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those two statutes, particularly when considered together with claims under the IDEA. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

The Parent’s Claims

The issues presented all related to whether Student’s educational program for the 2019-20 school year was appropriate both substantively and procedurally. The various FAPE claims shall be addressed separately.

It is logical to begin with the challenges to the District’s December 2019 ER. The Parent contends that it was delayed, amounting to a procedural violation, and further that it was substantively inappropriate.

Here, the evidence establishes that the team, including the Parent, determined that Student would remain in the IU diagnostic placement into the fall of 2019 and conduct an evaluation at that time. While it is true that the District did not seek the Parent's consent for that evaluation at the very start of the school year when the District became the LEA, the record does not establish that the brief delay was anything more than *de minimis*. This is particularly so given Student's inconsistent attendance, discussed more fully below. This hearing officer cannot conclude that the timing of the December 2019 was a prejudicial procedural violation of the IDEA.

Substantively, the District's December 2019 ER included observations of Student in therapy sessions and in the testing environment as well as in the classroom, with relevant input from teachers, related service providers, and the school psychologist. The ER utilized a variety of assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student in all areas of suspected disability. Those included an assessment of Student's current cognitive ability; multiple rating scales to evaluate Student's adaptive and social/emotional/behavioral functioning, including one completed by the Parent (the only input she provided); and evaluation of physical, occupational, and speech/language therapy strengths and weaknesses. Although the speech/language therapist did not report standard scores because of the way it was administered, important information was gleaned about Student's strengths and needs in that area. Additionally, assessments of autism-related characteristics and executive functioning were also obtained from the teacher to provide a picture of Student's performance in the school environment. An FBA examined Student's problematic behaviors and provided hypothesized functions therefor. Other available input was also included and summarized.

In sum, the District's December 2019 compiled and reviewed relevant data and determined Student's eligibility for special education, and made various programming recommendations. That it may not have been a perfect evaluation from a parental perspective is not the question. The December 2019 ER and the record as a whole preponderantly establishes that the evaluation was sufficiently comprehensive to identify Student's special education and related service needs in all areas related to suspected disability for purposes of informing the IEP team as required by the IDEA, and that it met that criteria.

One specific aspect of the FBA that the Parent challenges merits mention. There is evidence that Student at times would remove the processor when exhibiting problematic behavior at school. The District clearly considered Student's behavior and its impact on Student's education, and it was explored for the December 2019 ER. Then, in January 2020, the team determined that was appropriate to take specific data on Student's use of the device which, by the end of the second quarter, had improved. The fact that this specific data was not sought or obtained for the December 2019 ER does not render that evaluation incomplete or inappropriate.

A major issue in this case, and that which formed the basis for the initial Complaint, is whether the District denied FAPE because of its refusal to transport Student between the day care center and the IU building, and further whether doing so amounted to disability-based discrimination. It is true that the IDEA provides that, where necessary for a child to receive FAPE, transportation may be required as a related service. 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34. The Parent also raised concerns with transportation with the District as early as possible. However, courts that have addressed similar issues have held that the failure to provide transportation that is sought not based on educational needs, but rather for the convenience of the parent, does not violate the IDEA. *See, e.g., Fick v.*

Sioux Falls 49-5, 337 F.3d 968 (8th Cir. 2003); *S. v. Scarborough School Committee*, 366 F. Supp. 2d 98 (D. Me. 2005). These cases are persuasive and instructive and do not legally support a more sympathetic conclusion. Here, Student's IEPs provided for curb to curb transportation as a related service, something that Student did need as part of FAPE. However, the requested transportation between the day care center and the IU building was based on the Parent's work schedule, and not on a specific need of *Student*. As such, there is no IDEA violation. Furthermore, the District's refusal to transport Student from the day care center did not relate at all to Student's disability, but was based on its denial of a certain form of transportation for any of its students, whether disabled or nondisabled.⁹ Thus, the claim of disability-based discrimination under Section 504 and the ADA must also fail.

The Parent next contends that the District predetermined Student's placement at the IU building without considering a District building.¹⁰ Predetermination without permitting meaningful participation by a parent can constitute a procedural violation of the IDEA.

The record establishes that the District undertook preparation for Student's transition to school-age programming by holding meetings with the Parent to plan for necessary changes. The team agreed that the IU

⁹ The Parent's argument that the policy did not apply because Student was not "eligible" to attend the District's schools must be rejected. Simply because an LEA determines an out of district placement is necessary does not mean that the student is not "eligible" for its services. If it did have such meaning, the District would not have any obligation to provide FAPE for Student.

¹⁰ The Parent also relates this claim to the transportation issue, arguing that had the District placed Student in one of its buildings, the day care center would have made arrangements for Student to attend school.

placement would be diagnostic, and it was one with which Student and the Parent had previous experience.

It is, unfortunately, accurate that the District did not begin with consideration of the regular education setting for Student with supplementary aids and services for purposes of an LRE analysis. The two prongs of the *Oberti* test were, therefore, never meaningfully considered by the IEP team. Certainly Student would benefit from exposure to and interaction with typical peers, particularly with respect to communication deficits. However, with the only option a segregated placement that did not include any typically developing peers, Student has not been included with non-exceptional peers to any extent in the educational environment. The failure to comply with these critical LRE principles is a fatal procedural flaw.

The evidence is also preponderant, however, that the Parent participated in meetings and engaged in regular communication with educational providers including the District in developing a program in the summer of 2019 and into the 2019-20 school year. For all of these reasons, this hearing officer cannot conclude that the District denied her the opportunity to participate meaningfully in educational decisions regarding Student for the 2019-20 school year.

Substantively, based on Student's unique needs, the IU placement was reasonably calculated to be appropriate for Student based on information known in late summer of 2019. Among other things, Student needed a consistent routine, limited transitions, a low teacher to student ratio, behavioral support, and development of pre-academic skills and functional communication, as well as a variety of related services. Each of these needs were appropriately addressed during the 2019-20 school year in the program that was implemented.

The Parent did express concerns that Student was in a classroom with students with autism. However, the IDEA requires programming that is responsive to the child's needs, not based on disability classification. It was in this case. And, accordingly, the procedural failure to comply with LRE obligations did not also constitute a substantive denial of FAPE in this case.

The Parent also specifically challenges the District's response to Student's significant communication needs. One aspect of that contention is the absence of any ASL certified teachers or PCA during the 2019-20 school year. If Student relied on and was proficient in ASL, such an argument might hold greater traction than it does here. But Student's sign language repertoire has been quite limited and, during the 2019-20 school year, was used as only one prong of the total communication approach that everyone, including the Parent, agreed Student needed. The related argument questions the breadth of the communication plans, including the sufficiency of intensive language instruction. The record as a whole, however, supports a conclusion that the program offered and implemented for the 2019-20 school year was reasonably calculated to address Student's needs and confer meaningful educational benefit. While the Parent quite understandably was looking for more significant progress over the 2019-20 school year, an aspiration that was challenging to meet with Student's absences,¹¹ LEAs are required to program for disabilities in a way that is reasonably calculated to provide meaningful educational benefit, not maximum results. The remedy section below will, nonetheless, require the IEP team to reconvene before the start of the 2020-21 school year in order to make any revisions to Student's program as may be appropriate.

¹¹ It merits mention that Student's inconsistent attendance over the course of the school year was not within the Parent's control.

Remedies

Having found no substantive denial of FAPE, or a significant procedural violation, the equitable remedy of compensatory education is not warranted. However, the Parent also seeks an order directing the IEP team to convene and make appropriate revisions to Student's IEP.

Student's needs have undoubtedly changed since the start of the 2019-20 school year, and the school closure most certainly has had an impact as well. Student was making more than minimal progress on many of the IEP goals as of the end of the second quarter. Circumstances have changed since that time, and it is therefore appropriate and necessary for the team to meet to revisit Student's strengths and needs prior to the start of the 2020-21 school year and make any necessary revisions. Development of a new IEP will also afford the parties the opportunity to consider LRE principles in determining placement based on that IEP. The attached order provides directives to the team to meet all IDEA obligations.¹²

CONCLUSION

The District did commit procedural violations of the IDEA with respect to Student's evaluation and programming, but no substantive violations. The District did not discriminate against Student under Section 504 and the ADA. The IEP team will be ordered to reconvene prior to the start of the 2020-21 school year to consider any revisions to Student's program and placement as set forth below.

¹² It is respectfully suggested that the parties consider inviting an IEP facilitator, available through the Office for Dispute Resolution, to help the parties resume their efforts on collaborative decision-making.

ORDER

AND NOW, this 14th day of July, 2020, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's December 2019 ER is substantively appropriate for Student and the procedural delay was not prejudicial.
2. The District's program for Student for the 2019-20 school year did not comply with all procedural obligations in the law but was substantively appropriate.
3. Within twenty calendar days of the date of this Order, the District shall convene a meeting of Student's IEP team to consider revisions to Student's IEP.
 - a. The IEP team shall consider whether a reevaluation of Student is warranted. If a reevaluation of Student is determined to be appropriate and the Parent withholds consent to any portion thereof, there shall be no obligation by the District to evaluate Student before the triennial required reevaluation unless agreed by the parties.
 - b. The IEP team shall explicitly review and consider a new communication plan for Student.
 - c. The IEP team shall explicitly review and consider each of the annual goals to determine necessary revision.
 - d. The IEP team shall explicitly review and consider any and all related services, including parent counseling and training, to determine necessary revision.

- e. Following completion of the review and revision of the IEP, the team shall proceed to determine Student's placement consistent with least restrictive environment mandates and guidance by the Pennsylvania Department of Education.
 - f. If a decision is made for a change in placement, the team shall develop a plan for Student's transition to the new environment.
- 4. No further remedies are necessary or ordered.
 - 5. Nothing in this decision and order should be read to preclude the parties from mutually agreeing to alter any of its terms.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
ODR File No. 22778-1920