

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

ODR No. 27502-22-23

Closed Hearing

Child's Name:

T.C.

Date of Birth:

[redacted]

Parent/Guardian:

[redacted]

Local Education Agency:

School District of Philadelphia
440 N. Broad Street, Suite 313
Philadelphia, PA 19130

Counsel for the LEA:

Kara A. Pullman, Esquire
2000 Market Street, Suite 2300
Philadelphia, PA 19103

Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

05/26/2023

INTRODUCTION AND PROCEDURAL HISTORY

The student, T.C. (Student),¹ is a middle-elementary school-aged student who resides and attends school in the School District of Philadelphia (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² as a child with autism.

Student is currently enrolled in a District elementary school receiving autistic and other support. In January 2023, the Parents filed a Due Process Complaint against the District challenging its programming for Student over the 2022-23 school year, seeking specific revisions to Student's program and a change in Student's placement. The District denied the claims and requested that no relief be awarded. The matter proceeded to an efficient due process hearing.³

It is necessary to understand the student's educational history prior to the 2022-23 school year in order to put the Parents' claims in context. Following review of the entire record and for all of the reasons set forth below, the claims of the Parents must be granted in part and denied in part.

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

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

³ References to the record throughout this decision will be to the Notes of Testimony (N.T.), School District Exhibits (S-) followed by the exhibit number, Parent Exhibits (P-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. The term Parents in the plural is used where it appears that one was acting on behalf of both. The parties were provided with procedural information well in advance of the hearing (HO-1), and participated in a conference call with this hearing officer after some period of delay (N.T. 27; HO-2) prior to the presentation of evidence.

ISSUES

1. Whether the District's special education program for Student as of late fall of the 2022-23 school year is appropriate for Student;
2. Whether Student's placement as of late fall of the 2022-23 school year is appropriate for Student;
3. If any aspect of Student's program and/or placement is inappropriate, should the District be ordered to make revisions to that program and placement; and
4. Whether the District should be ordered to provide an Independent Educational Evaluation at public expense?⁴

FINDINGS OF FACT

1. Student is a middle elementary school-aged student residing within the District who has been identified as eligible for special education under the IDEA as a child with Autism and a Speech/Language Impairment. (S-37.)

⁴ This final issue can be gleaned from a generous reading of the Complaint and was explicitly raised at the hearing (N.T. 420-21), although the District objected to what it considered to be efforts by the Parents to expand the claims beyond the Complaint itself (N.T. 24-25).

Early Educational History

2. Student was diagnosed with Autism at approximately three years of age, and evaluated for early intervention services in the fall of 2018. Services proposed in January 2019 were for specialized instruction (one hour per week) as well as speech/language (ninety minutes per week) and occupational therapy (forty-five minutes per week). (N.T. 149-50; S-1.)
3. The District conducted an evaluation of Student in the fall of 2019. Student was determined to be eligible for special education on the bases of Autism and a Speech/Language Impairment, with needs identified in the areas of basic reading and basic mathematics skills; receptive/expressive language; adaptive skills; social/emotional and behavioral skills; and fine motor skills. A Functional Behavioral Assessment (FBA) also identified three behaviors of concern: noncompliance, being off-task, and physical aggression. (S-6; S-7; S-9.)
4. An Individualized Education Program (IEP) was developed in November 2019 to address the identified needs. The District proposed a program of autistic support at a supplemental level (700 minutes each week) in addition to related services (speech/language and occupational therapy, a one-on-one paraprofessional). The Parents disagreed, and the District provided services comparable to those in early intervention, supporting Student in the general education setting with the full-time paraprofessional. (N.T. 226-28, 233-34; S-11; S-13.)⁵

⁵ This hearing officer takes notice of the statewide school closures beginning in March 2020 and continuing through the end of the 2019-20 school year pursuant to orders of the Governor of the Commonwealth of Pennsylvania due to the COVID-19 pandemic. Students returned to the District in person in the fall of 2021 (N.T. 235-36).

5. Student engages in problematic behavior at home and in school including noncompliance and tantrums. Student exhibits tantrum behaviors when transitioning between activities and areas both at home and within the school building. These behaviors have been exhibited at school since the 2019-20 school year, and Student's response to interventions is not consistent. (N.T. 45, 54, 64, 69-71, 73, 96-97, 228-29, 240-41, 263, 341-43.)

Paraprofessional Support in the District

6. The District's paraprofessionals are trained in Applied Behavior Analysis (ABA) but are not certified. (N.T. 311.)
7. Student's one-on-one paraprofessional has supported Student since entry into the District at the start of the 2019-20 school year. She has an excellent relationship with Student and is able to maintain instructional control. (N.T. 124, 228.)

2021-22 School Year

8. A meeting of Student's IEP team convened to develop a program for the 2021-22 school year. At that time, the District proposed that Student be provided with autistic support services outside of the general education classroom. More specifically, the District proposed both autistic and learning support at a supplemental level with some participation in general education. The Parents did not agree with the autistic support recommendation, but did agree to learning support and general education. (N.T. 177-78, 183-84, 249; S-24; S-30.)
9. The proposed IEP for the 2021-22 school year provided goals targeting speech/language skills; behavioral regulation, task completion, and transitioning throughout the school day; and basic

reading and mathematics skills. Related services (speech/language and occupational therapy (to support sensory needs), paraprofessional support) were also included. The proposed IEP was updated in November 2021 to incorporate newly obtained information on Student's present levels. (S-24; S-30.)

10. The District proposed reducing Student's occupational therapy services over the 2021-22 school year because Student had met the goal and made progress in that area. The Parents responded that Student should be provided with additional behavior services rather than occupational therapy because of the reported progress. (N.T. 190-94, 245, 247-48.)
11. Student began receiving learning support in the 2021-22 school year. The learning support teacher provided direct instruction in language arts and mathematics, and also reviewed grade-level content for the general education classes. Student worked on IEP goals in learning support, and has been in the learning support class for forty-five minutes twice each day. (N.T. 337-40, 358-61.)
12. Student exhibited problematic behavior during the 2021-22 school year, including noncompliance, task refusal, tantrums, and elopement. Student frequently needed to be removed from the general education setting and learning support classes because of those behaviors, despite various intervention strategies such as a rewards system. (N.T. 340-44; S-33.)
13. A District Board Certified Behavior Analyst (BCBA) conducted observations of Student in the fall of 2021 because Student's behaviors were becoming more frequent and significant. Student had returned to the school setting at the start of that 2021-22

school year after remote learning. The BCBA did not have any recommendations to address Student's behaviors beyond those that were already provided. (N.T. 241-44, 252-53, 262, 310, 327-28, 345.)

14. The Parents arranged for private Applied Behavior Analysis (ABA) services in June 2022 both in the home and at school at the District's suggestion when the Parents asked for an ABA-certified paraprofessional. A behavior technician assigned to Student for the entire school day and overseen by the behavior specialist has observed Student at school approximately once per week and collaborated with school staff. A behavior technician also works with Student weekly in the home and daily during extended school breaks. (N.T. 46-49, 57, 70, 75-77, 81, 116-18, 133-34, 202-03, 209, 255-56, 311.)
15. A private board-certified behavior analyst (BCBA) and the private behavior specialist conducted a Functional Behavior Assessment (FBA) when those services began. (N.T. 59-61, 120-26, 142.)
16. A treatment plan was developed following the FBA to address Student's behaviors. The Parents did not grant permission for the private behavior specialist to share that plan with school staff. (N.T. 84-86, 202, 214-15.)
17. The treatment plan addressed Student's tantrums, noncompliance, and time-on-task, as well as daily living skills. Replacement behaviors and strategies included functional communication training and development of peer interaction skills. A token board

reward system was developed for and used at school. (N.T. 86-87; P-10.⁶)

District Reevaluation Fall 2022

18. The District completed a reevaluation in November 2022 and issued a Reevaluation Report (RR). Summaries of observations by general and special education teachers, a speech/language therapist, and the school psychologist were included. (N.T. 408; S-37.)
19. Parental input into the November 2022 RR included concerns with communication including expressive and receptive language. Their general written input merely referenced that from the previous IEP. (S-35 at 18-19; S-37.)
20. Input into the November 2022 RR from the general education teacher reflected Student's difficulty participating in activities in that setting, and noted that Student was frequently outside of that environment because of behaviors. Student was reportedly on task for only approximately seventy minutes in the general education setting, or 20% of time there. This teacher recommended that the team consider how much Student would participate in the general education setting. (S-37 at 7, 9.)
21. Formal assessments for the November 2022 RR included speech/language (Goldman-Fristoe Test of Articulation – Third Edition, Oral and Written Language Scales – Second Edition); reading and mathematics skills; adaptive behavior (Vineland Adaptive Behavior Scales – Third Edition); and the Behavior

⁶ The treatment plan provided does not appear to be complete, but the witness who testified to its contents did not have the plan available to review at the time of the hearing (N.T. 44, 58) despite this hearing officer's confirmation that the parties must arrange for dissemination of the hard copy exhibits to witnesses (HO-2 at 14, 19).

Assessment System for Children – Third Edition (BASC-3) rating scales. Deficits were noted in all of these areas. On the BASC-3, Student’s teacher endorsed clinically significant concerns with adaptive skills, anger control, developmental social disorders, emotional self-control, executive functioning, and negative emotionality; other behavioral areas of concern were considered to be less significant and consistent with autism. (S-37 at 12-20.)

22. No occupational therapy-related assessments were included in the November 2022 RR despite a recognition that Student previously qualified for those services, which were discontinued at the request of the Parents and not because Student no longer needed them. (S-37 at 2.)
23. The November 2022 RR identified Student’s strengths to include compassion and kindness toward others, gross motor skills, self-advocacy skills, and improved speech/language and reading skills. Needs identified in the November 2021 RR included behavior (physical aggression, tantrums, elopement, task refusal, self-regulation); adaptive and daily living skills; and functional communication and social skills. Difficulties with transition continued to be a concern. (S-37 at 8-9.)
24. The November 2022 RR concluded that Student remained eligible for special education on the bases of Autism and Speech/Language Impairment and recommended a highly structured setting with a low student-to-teacher ratio. (S-37.)

2022-23 School Year

25. Student entered the [redacted] grade at the start of the 2022-23 school year. In the general education classroom, there are twenty-five students. Student also continued with the same level

- of learning support services during the 2022-23 school year as in the prior school year, in a class of seven students. (N.T. 346, 438.)
26. Students in the general education class in Student's grade are expected to independently transition frequently throughout the school day. (N.T. 391-93.)
 27. Student entered the 2022-23 school year engaging in the same difficult behaviors at school with the addition of some physical aggression toward staff. The District continued to implement the behavioral strategies and collaborate with the private ABA service providers. (N.T. 347-49, 360-64, 442-48, 450, 452-57, 468-70, 486-87.)
 28. A District BCBA observed Student at school during the 2022-23 school year and collaborated with the private ABA service provider. (N.T. 328.)
 29. The private ABA service providers meet regularly with Student's school team to discuss behaviors and strategies to address those behaviors. They also collaborated on a preference assessment. (N.T. 98-100, 110, 111, 270-72.)
 30. Several different private behavior technicians have been assigned to Student over the 2022-23 school year. The technicians who left expressed concerns with their ability to provide services without interference by District staff, particularly the use of the token board, by providing rewards before one was earned. (N.T. 80-83, 87, 90-91, 94, 440-41.)
 31. After the District learned of the concerns of the private ABA service providers regarding interference with its implementation of the treatment plan, a meeting convened to discuss a solution. The

team agreed to have more collaboration between the private ABA behavior technician and the District's paraprofessional; and to implement different strategies including planned ignoring and identification of places where Student could become regulated. (N.T. 273-74, 376-77, 396-97, 450-51.)

32. In November 2022, the District convened an IEP meeting for Student after not receiving responses from the Parents to invitations. The Parents were unable to respond or attend for medical reasons. (N.T. 140-41, 266-67; S-38.)
33. The IEP developed in November 2022 identified a number of areas of need including speech/language, academic skills, social skills/peer interactions, and behavior. Student's absence from the general education classroom due to behaviors was noted as a major concern. (S-39.)
34. Goals in the November 2022 IEP addressed speech/language, behavior (task completion and participation, transitioning appropriately), and reading and mathematics skills. Speech/language and full-time paraprofessional support were provided as related services. The proposed program was one of autistic and learning support at a supplemental level, with the former 160 minutes each day and the latter 90 minutes each day. (N.T. 355-56; S-39.)
35. The District implemented the November 2022 IEP including autistic support after the Parents failed to return the Notice of Recommended Educational Placement (NOREP). The team also reduced the number of transitions throughout Student's school day. (N.T. 267-70.)

36. Another meeting convened in December 2022 with the Parents to review the most recent IEP with slight revisions. The Parents did not approve the NOREP accompanying that IEP. (S-42.)
37. The District's autistic support class works at a slower pace than general education classes but the same instruction is provided. Social-emotional regulation is a focus of that class. There is a paraprofessional assigned to the class along with the teacher for the maximum of ten students. (N.T. 250-51; 465.)
38. The autistic support students participate in an inclusive morning welcome routine, then continue with morning routine activities in the autistic support class. Students also participate in mathematics and academic activities and review/practice in that setting. (N.T. 467-68, 475-76.)
39. Student has had speech/language therapy in small group during the 2022-23 school year. Student has exhibited growth on speech/language goals over the school year. Student has also engaged in unprompted interactions with peers in the autistic support setting that had not been observed in general education. (N.T. 286-88, 484-89, 495.)
40. Student's problematic behaviors have continued over the 2022-23 school year. Student experiences particular difficulty with transitions and, when removed from the setting due to tantrums after task refusal, Student becomes upset when the prior activity was not continuing. (N.T. 448-50, 458-59.)
41. Student's difficult behaviors decreased after the December 2022 program was implemented and fewer transitions were required. (N.T. 106, 302-04.)

42. District professionals are uncertain of the reasons for some of Student's difficult behaviors. Sometimes specific interventions are successful for a period of time before they are no longer effective, and Student responds inconsistently to demands. (N.T. 301, 307-08, 325, 349-50, 362-63, 370-71, 374-75, 383-84, 390, 444, 448-49.)
43. The Parents did and do not agree that Student should be provided autistic support outside of the general education environment. (N.T. 140-41.)
44. The Parents believe that Student needs a class size with a small ratio of students to adults, as well as additional related services in the areas of occupational and speech/language therapy in addition to counseling. Occupational therapy services are necessary because of Student's sensory needs. (N.T. 144-49; P-7.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. The burden of persuasion 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 administrative due process complaint. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, who assume the role of fact-finders, are also responsible for making credibility determinations of the witnesses

who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible as to the facts as they recalled them. With few exceptions, the testimony was generally consistent, and any contradictions are attributed to lapse in memory or to differing perspectives rather than any intention to mislead.

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: Substantive FAPE

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. 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 its local educational agencies (LEAs), meet the obligation of providing FAPE to an eligible student 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). 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*, 580 U.S. 386, 400, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

Individualization is, thus, the central 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). Rather, the law demands services that are reasonable and appropriate in light of a child's unique circumstances, and not necessarily those that his or her "loving parents" might desire. *Endrew F., 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." *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," but progress is not measured by what may be ideal. *Dunn v. Downingtown Area School District*, 904 F.3d 248, 255 (3d Cir. 2018)(emphasis in original).

General IDEA Principles: Procedural FAPE

The special education program is developed by a team that includes the parent(s); at least one regular education teacher if the student will or may participate in regular education; at least one special education teacher, and an LEA representative, among other participants. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §§ 300.320, 300.321(a). From a procedural standpoint, the family including parents have "a significant role in the IEP

process.” *Schaffer, supra*, at 53. 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). 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).

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.

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 also 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 Third Circuit in *Oberti* identified a two-pronged test for making a determination of whether a student’s placement is in conformity with the LRE mandate in the IDEA. The first prong involves consideration of whether the child can, with supplementary aids and services, be educated successfully within the regular classroom. 995 F.2d at 1215. If placement outside of the regular classroom is determined to be necessary, the second prong requires an assessment of

whether the child has been included with non-disabled children to the maximum extent possible. *Id.*

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*, 580 U.S. at 402. 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)).

Evaluation Requirements

Substantively, 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 the child's individual needs are appropriately examined.

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 available assessments and observations. 34 C.F.R. § 300.305(a).

In Pennsylvania, LEAs are required to provide a report of an evaluation within sixty calendar days of receipt of consent, excluding summers. 22 Pa Code §§ 14.123(b), 14.124(b). Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child

determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1).

Finally, when parents disagree with an LEA’s educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). However, “[a] parent has the right to an independent educational evaluation at public expense *if* the parent disagrees with an evaluation obtained by the public agency.” 34 C.F.R. 502(b)(1). A parent’s refusal to consent to an LEA evaluation thus precludes their ability to obtain an IEE at public expense. *M.S. v. Hillsborough Township Public School District*, 793 F. App’x 91, 93 (3d Cir. 2019). Whether or not the LEA funds an IEE, a private evaluation that meets agency criteria and shared with the LEA must be considered. 34 C.F.R. § 300.508(c).

The Parents’ Claims

The first issue is whether the District’s proposed program and placement of learning and autistic support at a supplemental level is appropriate for Student. Parents contend that autistic support is far too restrictive and is not based on Student’s actual needs, which they believe can be met in the general education setting. The District counters that Student’s needs are significant, cannot be meaningfully addressed in general education, and are appropriately met in the program it has proposed and implemented.

While it is certainly understandable that the Parents desire to have Student participate in general education for a large part of the school day, a position they have held since Student entered into the District, the evidence is more than preponderant that Student at this time has needs that cannot be met in that setting with accommodations and supports. The *Oberti* test requires consideration of whether the child can be successful in the general education environment with supplementary aids and services; and if

placement outside of that setting is considered, there must be an assessment of whether the child has been included with typical peers to the maximum extent possible. Student is spending very little productive time in the general education classroom, and behaviors clearly impede both Student's learning and that of others. Despite a significant level of services and support in general education, including two dedicated adults, problematic behaviors have continued to increase in both frequency and severity. Student's difficulty with transitions is particularly challenging in the general education setting and cannot be remedied at this time in that environment.

This hearing officer must therefore conclude that the District's proposal in November 2022 and currently implemented was reasonably calculated to yield meaningful educational benefit including permitting Student to participate with typical peers to the maximum extent possible, and Student has exhibited growth with that program. Even the Parents agree that Student needs a structured classroom environment with a low student-to-teacher ratio, something that is provided in the autistic and learning support programs but is not available in general education. Accordingly, this claim of the Parents must fail. This is not to say, of course, that Student may never participate more in general education than is occurring currently, but at this time the District has not violated its LRE obligations.

The second issue is whether the Parents are entitled to an IEE at public expense. They did not specify what their concerns with the District's November 2022 RR, but did contend during the hearing that they did not provide consent to the District to conduct that evaluation. As noted above, however, an evaluation by a public agency is a necessary prerequisite to a parent's ability to obtain an IEE at its expense. Even if a revocation of consent were found and considered to be a procedural violation, the Parents have not established that they were significantly impeded from participating

in programming development or that a substantive denial of FAPE occurred as a result of the District's November 2022 reevaluation.

The District's RR of Student in the fall of 2022 utilized a variety of assessment tools, strategies, and instruments (rather than any single measure) to gather relevant functional, developmental, and academic information about Student. The District expressly incorporated input from the teachers and that provided by the Parents, and summarized several observations of Student. The November 2022 RR further reviewed existing data and available information that was gathered, identifying a number of Student's areas of strength and weakness. Finally, this RR determined Student's eligibility for special education with programming recommendations to address Student's unique profile and presentation that was based on the totality of that information.

With one exception, the November 2022 RR met all requirements under the law. The one area of suspected disability that both parties agree is a concern for Student was not assessed: Student's occupational-therapy related (sensory) strengths and needs. The parties have divergent perspectives on why this area was no longer part of Student's program as of the fall of 2021, but it is clear that such assessment is necessary to have a full understanding of Student's special education needs. Accordingly, the District will be ordered to provide an independent occupational therapy evaluation at public expense.

In addition, although two FBAs have been conducted (one by the District in the fall of 2021 and one by the private ABA provider in the spring or early summer of 2022), and there is significant behavioral data and input in the November 2022 RR, Student's behavior remains a major challenge. This is so despite ongoing collaboration including District BCBA involvement in both the 2021-22 and 2022-23 school years. The effectiveness of the collaboration between the District and private ABA provider is thus

uncertain, and with Student having been receiving autistic support for the past few months, a new FBA in the school setting is warranted at this time. Thus, the District shall also be ordered to provide an independent FBA at public expense.

These independent evaluations are intended to provide the IEP team with objective results that will inform the program development going forward, and must be completed as soon as practicable and limiting any delays resulting from the summer break. The team should, of course, consider the extent of Student's participation in general education with appropriate supports as part of every programming decisions.

CONCLUSIONS OF LAW

1. The District's proposed program of autistic and learning support along with general education participation in the fall of 2022 was appropriate.
2. The District must provide an IEE at public expense in the areas of occupational therapy and behavior, two areas that were not part of the November 2022 RR.

ORDER

AND NOW, this 26th day of May, 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's program for Student proposed and implemented after the November 2022 IEP was and is appropriate for Student.

2. The Parents are not entitled to an IEE at public expense except for the areas of occupational therapy and an FBA.
3. Within ten calendar days of the date of this Order, the District shall provide to the Parents (a) not less than three (3) qualified individuals to conduct an independent occupational therapy evaluation and (b) not less than three (3) qualified individuals not affiliated with the private ABA provider to conduct an FBA in the school setting. Within ten calendar days of the date of this Order, the Parents shall provide their selection for both individuals. In the event that the parents do not provide their selections, the District may choose the evaluators from the same lists. The District may share all available information requested by the evaluators without express consent of the Parents, who must comply with all reasonable requests of the evaluators.
4. Following completion of the ordered IEEs and issuance of those reports, which shall be provided as soon as practicable, the District shall convene a meeting with the Parents, the independent evaluators, and its members of the IEP team to review the results and discuss revisions to Student's IEP and PBSP. The Parents may invite the private ABA therapist(s) to that meeting.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 27502-22-23