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Pennsylvania Special Education Hearing Officer Final Decision and Order

Closed Hearing

ODR File Numbers:

22659-19-20

22715-19-20

Child's Name:

D.S.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

August 10, 2020

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a middle elementary school-aged student in the Lower Merion School District (District), and is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² based on classifications of Autism, Intellectual Disability, and a Speech/Language Impairment. Student began residing in the District at the start of the 2017-18 school year when Student entered first grade. In September 2019 after a dispute arose between the parties, Student's Parents filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA, Section 504 of the Rehabilitation Act of 1973,³ and the Americans with Disabilities Act (ADA)⁴ over the 2017-18 and 2018-19 school years, including its initial evaluation. The District countered with its own Complaint to defend its evaluation of Student.

The case proceeded to a due process hearing with most sessions convening virtually due to the COVID-19 pandemic.⁵ At the hearing, the

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 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.

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. The admitted exhibits were noted in HO-5, but there was no S-100 identified or provided. By agreement, P-173 and HO-6 are hereby admitted. The record is quite voluminous for a variety of reasons, and citation to the record is not necessarily exhaustive. References to Parents in the plural will be made where it appears that one was acting on behalf of both,

Parent sought to establish that the District failed to comply with its FAPE obligations to Student throughout the time period in question, making demands for compensatory education and certain reimbursement including costs of a private evaluation. The District maintained that its special education program, as offered and implemented, and its own evaluation, were appropriate for Student and that no remedy was therefore warranted.

For the reasons set forth below, the claims of the Parents will be granted in part and denied in part; and, the District's claim on its Complaint will be sustained.

ISSUES

1. Whether the District denied Student FAPE in any respect during the 2017-18 and/or 2018-19 school year;
2. If the District did deny Student FAPE, whether Student is entitled to compensatory education;
3. If the District did deny Student FAPE, whether the Parents are entitled to reimbursement for private services they obtained;
4. Whether the District's evaluation of Student was appropriate; and
5. If the District's evaluation of Student was not appropriate, whether the Parents are entitled to reimbursement for their private evaluation?

and to the singular Parent to refer to Student's mother who was more actively involved in the educational program during the time period in question.

FINDINGS OF FACT

1. Student is middle elementary school-aged and resides in the District. Student is eligible for special education on the bases of Autism, an Intellectual Disability, and a Speech/Language Impairment. (N.T. 26-27; S-99.)
2. Student is nonverbal and has significant communication needs, and began using an alternative and augmentative communication device in 2016. (N.T. 166, 1161-62.)
3. Student was in a verbal behavior program⁶ during the 2017-18 school year and part of the 2018-19 school year, which focuses on communication skills. As part of the program, Students work individually with a teacher at a table and respond to task demands. (N.T. 667-69, 691-92, 895-96.)
4. For progress monitoring purposes, the District typically reports on the three most recent weeks so that the report is up to date, unless the goal tracks cumulative performance such as mastery of a number of sight words. (N.T. 717, 776-77, 778, 914-15, 1101-02.)

Prior Relevant Educational Programming

5. Student previously resided in another state with the family. That state conducted a reevaluation of Student in October 2016. The resulting report noted Student's behavioral history in the home, including manic episodes that created concern for Student's safety. At school, Student was observed to engage in loud vocalizations, tantrums, elopement, and self-injurious behaviors throughout the day for one second to thirty minutes, and was frequently non-

⁶ Verbal behavior programming is based on Applied Behavior Analysis principles.

compliant with directives. Student's performance when presented with task demands was highly inconsistent. (N.T. 1163; S-95.)

6. The October 2016 evaluation determined that Student qualified for special education based on Autism and Intellectual Disability. (S-95.)
7. The Parents did not agree with the other state's classification under Intellectual Disability. (N.T. 1293-94.)
8. The other state developed an Individualized Education Program (IEP) for Student in June 2017. Present level information reflected that Student engaged in problematic behaviors numerous times throughout the day despite progress reporting reflecting otherwise. Student's progress on speech/language goals was limited at the end of the 2016-17 school year due to difficulty with a new therapist and new setting sometime toward the middle of the school year. Student's performance on fine motor and pre-academic skills was largely prompt-dependent and inconsistent at school. The Parents reported better success at home especially with expressive communication. (S-2.)
9. The June 2017 IEP contained annual goals addressing behavior (decreasing loud vocalizations, self-injurious and aggressive behavior, and tantrums); increasing manding for requests for items or activities using the device or sign language; waiting when manding to access an item or activity; complying with demands; producing five functional words or word approximations (Student at the time reportedly used four words/word approximations despite progress notes reflecting that Student produced only two different consonant-vowel sounds at school); receptively identifying nouns

(numbers, symbols, and words); identifying letter sounds; receptively or expressly identifying ten functional words on a word list; using the device for participating in activities; navigating words on pages of print; matching letters to sounds; identifying sight words; matching numbers to quantities; developing fine motor skills (using a tripod grasp to copy; fastening and unfastening buttons and snaps; using scissors); and developing gross motor skills (throwing and catching a ball; hopping on one foot). The IEP specified participation in regular education for a majority of the school day. (S-2; S-95)

2017-18 School Year (First Grade)

10. The Parents contacted the District in August 2017 to enroll Student after a move from the other state, and completed registration on August 22, 2017. They also provided a copy of the IEP from the other state, and a meeting convened. (N.T. 1168-70; P-1 at 1-2, 7.)
11. From the Parents' perspective, the transition from the other state was difficult for Student and maladaptive behaviors increased. (S-8 at 1, 28.)
12. In September 2017, the District proposed a program of autistic support at a supplemental level with speech/language services for Student. That proposal was followed by a request for permission to conduct an evaluation, to which the Parents consented. (S-4; S-6.)

October 2017 IEP

13. The District developed an IEP for Student in early October 2017. That IEP noted that Student was not exhibiting some skills that the prior state had reported. Parent concerns at that time included

Student learning the names of peers, having a consistent paraprofessional, and Student's daily schedule. (S-7.)

14. Needs identified in the October 2017 IEP were for receptive, expressive, and pragmatic language skills including peer interactions; pre-writing skills; functional pre-academic skills; fine motor skills; self-regulation and self-help skills; focus, attention, and time on task; social skills; making transitions throughout the day; and leisure skills. (S-7.)
15. The October 2017 IEP essentially incorporated the goals from the June 2017 IEP with a few minor revisions to reflect current performance. Occupational therapy goals were revised to add letter tracing to the copying goal and zippers to the fastening goal. (S-7.)
16. Program modifications and items of specially designed instruction (SDI) addressed sensory needs and fine motor skill weaknesses; multisensory instruction with errorless teaching; planned generalization; ongoing checks for retention of mastered skills; pairing of adults and reinforcers; visual representations; a visual schedule with notice of times for transition and tasks; varied task demands; clear directions with repetition and practice; modeling and choices; faded prompting; facilitated peer interactions; positive reinforcement with a behavior plan; and reduced distractions with preferential seating. (S-7 at 46-51.)
17. Student's October 2017 IEP provided for occupational (small group and individual) and speech/language therapy (small group and individual) and a full time paraprofessional. The program was one of supplemental autistic and speech/language support, with participation at the start of the school year in the regular education

setting during homeroom, morning routines, lunch, recess, special classes, science and social studies multisensory activities, and special classes and activities. (S-7 at 52, 55-57.)

Fall of 2017

18. Student was in a new autistic support classroom at the start of the 2017-18 school year. When the school year began, Student's teacher had experience teaching an autistic support classroom but had not been trained or experienced specifically in verbal behavior. (N.T. 32-33; S-88.)
19. The autistic support classroom had five students and four paraprofessionals in addition to the teacher at the start of the 2017-18 school year. The paraprofessionals rotated among the students throughout the day but at some point only one or two of them were assigned to Student for a majority of the day. (N.T. 34-35, 38, 99-100, 143-44, 871.)
20. The autistic support classroom at the start of the 2017-18 school year was not large enough for the class, and they moved to a new, much larger room in October 2017. (N.T. 37-38, 105-06, 1175.)
21. Student's schedule changed a number of times during the first two months of the 2017-18 school year. (P-74.)
22. At the start of the 2017-18 school year, Student was not demonstrating skills that the other state had reported in its goal baselines, and required significant prompting. (N.T. 76, 81-85, 1178.)
23. Student used an iPad that was owned and customized by the family for communication from the start of the 2017-18 school year, but the

setup of that device could interfere with Student's acquisition of vocabulary. There was a period of time when the device would not hold its charge. When that occurred at school, Student used paper copies of the device icons that the Parents created. (N.T. 212-13, 222-23, 241-42, 894-95, 101, 1022-23, 1050-51, 1106-08, 1181, 1210, 1235-36.)

24. Student participated in the regular education classroom with a paraprofessional for morning activities, some specials, lunch, and recess at the start of the 2017-18 school year. Later in the year, Student also participated in science, social studies, and some writing activities in the regular classroom. Student required prompting and cues to participate and maintain attention, and at times engaged in self-injurious behavior. (N.T. 40-41, 47-49, 62, 147-49, 392, 394, 397, 405-12, 417-21, 428-29, 433-34.)
25. At some point in the fall of 2017, after all students completed reading assessments, the regular education teacher began providing reading instruction to the whole group before students would participate in centers independently working on literacy skills including writing. Small groups would also do guided reading with the teacher. Student only was in guided reading one time that school year because of behaviors. (N.T. 400-03, 413-17.)
26. The students in the autistic support classroom during the 2017-18 school year worked on IEP goals individually with the teacher or a paraprofessional. (N.T. 55.)
27. An IEP meeting convened in October 2017, at which the team discussed the skills that Student was not demonstrating that Student reportedly exhibited in the other state. (N.T. 87-88.)

28. A SETT⁷ meeting also convened in October 2017. (P-12; P-28.)
29. A new teacher took over the autistic support classroom in October 2017. That teacher also had experience as an autistic support teacher but not with verbal behavior. (N.T. 137-39.)
30. Student exhibited withdrawn behavior at home when the autistic support teachers changed and the Parents believed that Student did not respond well to those changes. (N.T. 1199.)
31. Student's first autistic support teacher for the 2017-18 school year had no training on the device application Student used for communication prior to the start of school. She and the paraprofessionals did have some training on that application by a speech/language therapist. The second teacher had some experience with the application but no formal training. (N.T. 34, 36-37, 103-04, 139-40, 213-14, 245-46, 276-77.)
32. The speech/language therapist during the 2017-18 school year had some experience and previous training on the program Student used for communication. (N.T. 208-09.)
33. Student was reluctant to use writing utensils at the start of the 2017-18 school year and required prompting. Student also required support to pick up and begin to use a pair of scissors. (N.T. 322-23, 367-69.)

⁷ This process examines the Student, Environment, Tasks, and Tools for assistive technology services and equipment.

December 2017 Evaluation

34. The District school psychologist conducted an observation of Student for the December 2017 Evaluation Report (ER). Observations by two of the teachers were also included. (N.T. 458-59; S-8 at 2-5.)
35. The December 2017 ER summarized previous records and added input from the related service providers. The occupational therapist detailed Student's sensory processing abilities using a standardized assessment tool. That professional also summarized Student's fine motor, gross motor, and self-help skills using informal measures including observations. (S-8 at 4-8.)
36. Speech/language input into the December 2017 ER provided a summary of receptive and expressive language skills and social skills. A summary of the initial SETT process meeting was also included that provided steps to be taken for use of the device throughout the school day. (S-8 at 8-11.)
37. The Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) was administered in November 2017 to assess Student's discrete language and learning skills and was included in the December 2017 ER. Results based on information from a team of professionals working with Student reflected that Student demonstrated some skills, but significant weaknesses across all domains were noted. Barriers to acquisition of learning and language skills included low repertoires, prompt dependency, and difficulty with maintaining attention and generalizing skills across environments and individuals. (S-8 at 15-19.)
38. Student's cognitive ability was assessed for the December 2017 ER, but Student was not able to respond to a sufficient number of

questions on the verbal portion of the test. Using the nonverbal portion only, Student's score was estimated to be 47 (< 0.1 percentile). The cognitive assessment instrument is accepted in the field of psychology and is valid and reliable. (N.T. 486; S-8 at 20.)

39. The Parents and autistic support teacher completed the Social Responsiveness Scale - Second Edition for the December 2017 ER. The scores reflected deficits across domains with milder concerns of the Parents in some areas. That instrument is valid and reliable. (N.T. 488-89; S-8 at 20-23.)
40. The Parents and autistic support teacher also completed the rating scales from the Adaptive Behavior Assessment System – Third Edition (ABAS-3) for the December 2017 ER, with both indicating low to extremely low functioning across composites and skills. That instrument is valid and reliable. (S-8 at 23-24; N.T. 488-89.)
41. A functional behavioral assessment (FBA) for the December 2017 ER focused on personal boundaries, physical aggression, and self-stimulation including vocalizations. The FBA did not identify any hypothesized functions of the behaviors, but episodes of those were limited during the process. (S-8 at 11-14.)
42. Assessment of gross motor and related skills was also conducted for the December 2017 ER. Results did not reflect a need for physical therapy services. (S-8 at 24-25, 27.)
43. Needs identified in the December 2017 RR were for functional academic skills; receptive, expressive, and functional communication skills; social language and interpersonal/interaction skills; and fine motor, self-help, and self-regulation skills. Student also needed to increase attention to tasks, and to be provided with opportunities for

breaks and sensory input, facilitation when using stairs, and supervision for safety. Student was determined to be eligible for special education on the bases of Autism and an Intellectual Disability. (S-8 at 27-29.)

44. The December 2017 ER recommended a highly structured instructional program; participation with typical peers; direct speech/language and occupational therapy; and behavioral support. (S-8 at 29-30.)
45. The Parents did not agree with the Intellectual Disability classification. (N.T. 1293-94.)
46. In December 2017, the Parents retained a private speech/language therapist for Student. (N.T. 1204.)
47. Student had a third autistic support teacher beginning in December 2017. Around that time, the practice of rotating the paraprofessionals ended to promote consistency for the students. (N.T. 864-65, 870.)
48. The third autistic support teacher had training in verbal behavior programming after she began teaching in Student's classroom. (N.T. 898-99.)
49. A SETT update meeting convened in mid-December 2017 at which time the speech/language therapist described the ongoing training provided to staff on the device (demonstrations), and Student's increased use was reported. The team discussed ongoing data collection of Student's use of and need to learn vocabulary. (S-11 at 27-28.)

December 2017 IEP and Revisions

50. Student's IEP team met in December 2017 but the Parents were not able to attend. The needs identified in that IEP were those set forth in the December 2017 RR and described the functional academic skills as reading and mathematics readiness. (S-11.)
51. The December 2017 IEP contained goals addressing making requests with the iPad or a board; greeting others; identifying common objects; following directions to perform actions; functional play; identifying letters of Student's name; identifying sight words; identifying numbers; demonstrating one to one correspondence; tracing letters; using fasteners; cutting with scissors; and reducing problem behaviors (self-injurious and aggressive behavior, compliance with directives). A PBSP was also provided and included antecedent strategies including teaching replacement behaviors, specific replacement behaviors, and consequences. (S-11 at 51-76.)
52. The speech production goal was removed from the December 2017 IEP so that Student could focus on use of the device. (N.T. 268-69.)
53. The December 2017 IEP incorporated the existing SDI and added behavior supports (identifying the hypothesis of the vocalization and personal boundary behaviors to gain attention or escape or avoid a demand); facilitation of play; practice identifying body parts; modeling for letter identification; and modeling of the device with prompting. Many of the SDI were incorporated into the PBSP. (S-11 at 77-84.)
54. Student's December 2017 IEP again provided for occupational (individual) and speech/language therapy (with an increase to three individual sessions per week) and a full time paraprofessional. The

type and level of support program remained the same, as did participation in the regular education setting. (S-11 at 84, 87-88.)

55. Additional IEP meetings convened in January and February 2018 that the Parents attended. Revisions made to the IEP were the removal of the goals for greetings and motor actions; the addition of a goal for responding to yes/no questions; and revision to the goal for making requests to add use of fifteen different words to make two to four word requests and one to three word comments. There was also new SDI: opportunities to imitate motor actions; exposure to qualitative mathematics concepts; visuals for "WH" questions; paraprofessional observations of the device use in speech/language therapy; and regular meetings to review progress; speech/language therapy was specified as three individual sessions and one session pushed into the classroom. Student was determined to be eligible for extended school year (ESY) services. (S-13; S-16; S-17; S-18.)
56. The Parents ultimately approved the February 2018 IEP in March, but noted that they had concerns that were expressed in meetings. (S-20.)

Spring 2018

57. The IEP team convened again at meetings in March and April 2018. At that time, Student's problematic behavior was reportedly decreasing after increases in January and February. (S-22.)
58. The IEP resulting from the March and April 2018 meetings revised the letter identification goal to expand to other letters, and added a goal for identifying letter sounds. (S-22.)
59. Additional SETT meetings convened in February and April 2018. (S-22 at 7-10.)

60. The IEP team convened again in May and June 2018. The goal for greetings was removed and added as an item of SDI. (S-23; S-24; S-25; S-26.)
61. Student generally required prompts and modeling to communicate and respond during the 2017-18 school year, and performance was overall inconsistent. (N.T. 85, 227-33, 256-57, 270-72, 278, 291-93, 912, 939-40, 944-45.)
62. Progress monitoring reports at the end of the 2017-18 school year reflected progress on the goal for using of 15 different words to make 2-4 word requests and 1-3 word comments; inconsistent but limited progress on the goal for responding to yes/no questions; progress on the goal for identifying common objects; progress on the functional play goal, progress on the goal for identifying letters; progress on the goal for identifying sight words; progress on the identifying numbers goal; inconsistent performance on the goal for demonstrating one to one correspondence, progress on the goal for tracing letters; limited progress on the goal for requesting help or expressing feelings; progress on the goal for scissor cutting; limited and inconsistent progress on the self-injurious behavior goal; limited progress on the goal for compliance with directives; progress on the goal to follow three-step routines; and unknown progress on the new goal for identifying letter sounds. On a few of the occupational therapy and behavior goals and objectives, the reports were more anecdotal than not. (P-78; S-26 at 65-98.)
63. By the end of the 2017-18 school year, Student was still exhibiting inconsistent work habits and social skills but emerging skills in pre-academic and content areas, with slightly better developed skills in

special class areas. Student was absent on twelve school days. (S-73 at 37-39, 44.)

64. The speech/language therapist missed twelve sessions with Student during the 2017-18 school year. An unknown number of occupational therapy sessions were also missed. (N.T. 298, 339, 355.)
65. The Parents were in continuous communication with District staff about Student over the entire 2017-18 school year. (P-5; P-6; P-8 – P-11; P-13 – P-19; p-13 – P-21; P-25; P-26; P-29 – P-31; P-35 – P-41; P-45 – P-50; P-52 – P-56; P-59; P-61; P-62; P-64 – P-74.)
66. In July 2018, the District agreed to the Parents' request for tutoring over the summer after ESY ended and offered to provided missed speech/language and occupational therapy sessions in the fall. Student was not able to participate in tutoring and the Parents declined the make-up sessions because they would occur during the school day. (N.T. 1284-85, 1296; P-84; S-27.)
67. Student essentially maintained progress on the targeted IEP goals during ESY 2018. (P-82.)

2018-19 School Year (Second Grade)

68. Student had the same autistic support teacher from the second half of the 2017-18 school year for the first half of the 2018-19 school year. The District also agreed to provide Student with a consistent full time paraprofessional for the 2018-19 school year. (N.T. 865; S-30.)

69. There were five students including Student in the autistic support classroom during the 2018-19 school year. Each student had a one-on-one paraprofessional. (N.T. 665.)
70. Student had the family-owned iPad at the start of the 2018-19 school year, but the District decided to purchase one for Student in September 2018. That device arrived in the fall of 2018 and the District transferred some of the folders from the home device to the District device. Student had access to both but mainly used the home iPad outside of speech/language therapy during the 2018-19 school year.⁸ (N.T. 993-94, 1012, 1018-21, 1024, 1059-60, 1108, 1110-13, 1232; P-87.)
71. Student's occupational therapist for the 2018-19 school year was not formally trained on the application Student used for communication, but did receive some informal training throughout the school year. (N.T. 527-28.)

Private Neuropsychological Evaluation

72. Student was privately evaluated by a neuropsychologist in May of 2018. Part of that evaluation was a classroom observation at school. (S-31.)
73. The report of the private neuropsychologist, considered to be an Independent Educational Evaluation (IEE), issued in September 2018. (S-31.)
74. Assessment of Student's cognitive ability for the IEE yielded results in the very low range on two instruments (one with a score below the

⁸ Over the summer of 2019, a private speech/language therapist worked on one of devices to make them more consistent. (N.T. 1136-38, 1140, 1238.)

0.1 percentile, one below the first percentile) with an estimated IQ of 42. (S-31 at 10.)

75. Student's adaptive skills were assessed for the IEE through the ABAS-3 rating scales completed by the Parents and a teacher, revealing deficits across subtests and composites.⁹ Visual-spatial and visual-motor skills were also impaired. (S-31.)
76. Academic performance assessment for the IEE reflected significant weaknesses across areas, with scores on all subtests below the first percentile. (S-31 at 13-14.)
77. Results of social and emotional functioning through rating scales completed by both Parents and two teachers were indicative of some concerns with areas of executive functioning (one of the Parents), and with clinically significant behavioral concerns with withdrawal and attention problems (one of the Parents) and atypicality (one teacher). A moderate level of characteristics of Autism were also noted. (S-31 at 14-15, 26-29.)
78. The IEE included speech/language assessment that reflected significant deficits in expressive, receptive, and pragmatic language skills. (S-31 at 10-12.)
79. The IEE determined that Student met criteria for an Autism Spectrum Disorder and an Intellectual Disability. The evaluators made a number of recommendations for educational programming, including intensive individualized instruction, typical peer models, preteaching and reteaching of skills, access to the iPad at all times, practice and

⁹ As in the District's 2017 ER, the scores on assessments of cognitive ability were discrepant from those for adaptive functioning. (S-31.)

repetition, multisensory presentation, a consistent full-time paraprofessional, and principles of Applied Behavior Analysis. (S-31.)

Fall 2018

80. Another SETT meeting convened in September 2018 followed by IEP meetings in September, October, and November. Revisions were made to the occupational therapy goals (making a purposeful mark in place of tracing letters because Student was not performing the latter); removing the fastener goal and adding it as an item of SDI); the functional play goal; and the PBSP (revising the behavior goals to address increased safe behavior, requesting a break, and following three-step directions. The Parents did not agree with removing the tracing goal. New goals for engaging in reciprocal conversations with a peer and keyboarding were also added, as was an SDI for consistent terminology regarding behaviors. The PBSP was also revised to incorporate additional items of SDI. (N.T. 548-49, 596-98, 609, 1230-31; S-32; S-33; S-34; S-35; S-36; S-37; S-38; S-40; S-41.)
81. An SAS Toolkit (Supplementary Aids and Services Consideration Toolkit) meeting convened in October 2018. The District professionals thoroughly completed all aspects of the Toolkit. (S-71.)
82. Student was assessed again using the VB-MAPP in November 2018. Student exhibited more skills in some areas (manding, listener responding, independent play, social behavior/social play, motor imitation, classroom routines/group skills), and remained at the same level in other areas (tacting, visual performance/match to

sample, spontaneous vocal behavior, intraverbals). (S-43 at 8-10; P-51; S-76.)

83. Student participated in the regular education classroom with a paraprofessional for morning activities, social studies, science, reading, and writing instruction as well as special classes, lunch, and recess. Some of the classroom-based activities were in large or small groups. (N.T. 674-75, 809-23, 844-45.)
84. Progress monitoring during the first trimester of the 2018-19 school year on the December 2017 IEP as revised reflected progress on the goal for using of 15 different words to make 2-4 word requests and 1-3 word comments; progress on the goal for responding to yes/no questions; progress on the goal for identifying common objects; progress on the functional play goal; progress on the letter identification goal; mastery of the sight word goal; progress on the identifying numbers goal; progress on the one on one correspondence goal; progress on the purposeful mark goal; inconsistent performance on the goal for cutting with scissors; regression on the goal for self-injurious behavior; limited progress on the goal for identifying letter sounds; and limited progress on the new keyboarding goal. On the new keyboarding goal, the report was somewhat anecdotal. (P-78; S-41 at 73-116.)
85. A new IEP was developed in December 2018. Current information about Student's performance and functioning was summarized, and needs remained the same as in the prior IEP. (S-43.)
86. The December 2018 IEP contained goals addressing identifying letters; identifying targeted letter sounds; identifying sight words matched with pictures; identifying "who" in a picture; identifying

numbers; answering and asking questions or commenting; recognizing own name; demonstrating one to one correspondence; identifying common items in the environment; identifying characteristics of objects; recognizing patterns; reciprocal conversations with a peer; turn-taking; facilitated social interactions; cutting with scissors; making a purposeful mark; copying letters; using a keyboard; reducing problem behaviors (self-injurious and aggressive behavior outbursts); requesting help or a break; and following three-step directions. (S-43 at 37-77.)

87. The December 2018 IEP maintained the existing SDI and the PBSP, but added SDI for targeting core vocabulary, facilitated structured play, and communication of new behaviors or messages that needed to be added to the device. (S-43 at 73-88.)
88. Student's December 2018 IEP again provided for occupational (individual) and speech/language therapy and a full time paraprofessional. The type and level of support program remained the same. Student would participate in the regular education setting for morning meeting, lunch, recess, physical activity/snack time, science, social studies, and special classes. (S-43 at 92-93.)
89. The Parents approved the December 2018 NOREP in mid-January 2019. (S-44.)

Spring 2019

90. Student had a different autistic support teacher for the second half of the 2018-19 school year because the first went on maternity leave. There was a period of time in December and early January when the two overlapped so the second teacher could become acclimated to

the class. She had previous experiencing providing autistic support. (N.T. 662-63, 670-72, 677-78.)

91. The second autistic support teacher had experience with and training on the application Student used on the device. The regular education teacher had experience with and informal training on that application. (N.T. 666, 805-06.)
92. The second autistic support teacher had some informal training in verbal behavior programming prior to and after January 2019. (N.T. 666-67.)
93. Student's IEP team met again in January, February, and March 2019 and discussed and updated progress. Student's speech/language therapy was changed from the push-in session to small group, and Student was determined to be eligible for ESY services. (S-45; S-46; S-48; S-49; S-50; S-51; S-52; S-53.)
94. Verbal behavior programming ceased for Student in March 2019 at the Parents' request. (N.T. 740.)
95. Student's IEP team convened in April, May, and June 2019. The letter sound identification goal was revised to add matching pictures with the letter sounds; the sight word goal was revised to remove the pictures; the comprehension goal was revised to include "what" and "where" questions; the one on one correspondence goal was revised to require manipulatives representing addition; the recognizing patterns goal added the use of manipulatives; the purposeful mark goal was changed to writing within a space; the tracing letters goal was changed to copying; and prompts were removed from the keyboarding goal. New goals were added to identify coins and compare size of manipulatives, and the letter

tracing and copying goal was renewed. The goal for identifying common items was discontinued at the Parents' request. The SDI section added provisions for practice in comparing items, identifying numbers, and identifying letter sounds so those goals were also eliminated. The speech/language small group returned to a push-in session. The Parents approved the June 2019 NOREP. (S-54; S-55; S-56; S-57; S-59; S-61; S-62.)

96. Student at times engaged in self-injurious behavior during the 2018-19 school year, usually hitting self or the table with a hand. Student also engaged in aggression (attempting to hit someone or something) in addition to vocalizations such as screaming and crying, especially for the first half of the school year during regular education activities. At times it was necessary for the other students to leave the room. (N.T. 764, 823-25, 833-34, 1032-33, 1077-78; S-39.)
97. Student remained prompt dependent during the 2018-19 school year, particularly with expressive communication where performance was inconsistent at times. (N.T. 996, 1065-69.)
98. By the end of the 2018-19 school year, progress monitoring reflected mastery of the goal for identifying letters; progress on the goal for identifying targeted letter sounds, some progress on the goal identifying sight words matched with pictures; unknown progress on identifying "who" in a picture because the District needed photos from home; mastery of the goal for identifying numbers; progress on the goal for answering and asking questions and commenting, master of the goal to recognize own name; some progress on demonstrating one to one correspondence; some progress on the goal for identifying characteristics of objects; progress on the goal for recognizing patterns; unknown progress on the reciprocal

conversations goal, progress on the turn-taking goal; progress on the goal for facilitated social interactions; progress on the goal for cutting with scissors; some progress on the goal for making a purposeful mark; progress on the keyboarding goal; progress on the copying goal; progress on the self-injurious and aggressive behavior goal including outbursts by requesting help or a break; and progress on the goal for following 3-step directions. There was baseline information only on the new goals. (P-148; S-61 at 53-94.)

99. Over the course of the 2018-19 school year, Student was exhibiting somewhat more consistent work habits and social skills over the prior year, with beginning development of skills in pre-academic and content areas. Student was absent on nine school days. (S-73 at 36-37, 43.)
100. The Parents were in continuous communication with District staff about Student over the entire 2017-18 school year. (P-85; P-86; P-88; P-95 – P-100; P-103 – P-105; P-107; P-108; P-111 – P-113; P-119 – P-140; P-142 – P-144; P-154)

2019-20 School Year

101. Student remained enrolled in the District in the 2019-20 school year. In addition to conducting a reevaluation, Student's team has continued to meet and revise Student's program. The Parents did not raise any claims with respect to the 2019-20 school year. (N.T. 15, 24-25; S-67; S-99.)

General Educational Findings

102. The District staff implemented the provisions in Student's various IEPs. (N.T. *passim*.)

103. The IEP meetings regarding Student that were held approximately monthly were regularly between forty-five and ninety minutes or more in duration. (N.T. *passim*.)
104. All of the District professionals possess the necessary education, credentials, and experience to evaluate, develop programming, and provide services for Student. (S-77 – S-93; S-96; S-97.)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. It should here be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who filed the Complaint that led to this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipose.” *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible as to the facts. There were, understandably, lapses

in memory and recall, and the documentary evidence was quite helpful for development of the record. Any inconsistencies in the various accounts are attributed to imprecise recollections as well as the parties' differing perspectives, rather than on intention to mislead.

The weight accorded the evidence, however, was not equal. The opinions of Student's former lay advocate, specifically, were not persuasive with respect to the issues presented; therefore, her testimony was not credited particularly with respect to IEP implementation, a topic on which she lacked any real expertise. The testimony of the District professionals who worked with Student is credited over accounts that were not based on first-hand information or ongoing observations. Credibility is discussed further below as necessary.

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 considered, as were the parties' comprehensive closing statements.

General IDEA Principles: Substantive FAPE

The IDEA requires 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 state, through its local educational agencies (LEAs), meets 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). Fairly recently, the U.S. Supreme Court 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 the central consideration for purposes of the IDEA; as such, the crucial and primary focus of a child’s IEP is to respond appropriately to identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. 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 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*; *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.” *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). Nonetheless, the IEP team is required to monitor the student’s response to the programming that is provided,

including progress toward IEP goals, in order to make appropriate revisions as may be necessary. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320, 324.

Substantive FAPE: IDEA Evaluation Requirements

Substantively, an IEP follows and is 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 the child’s individual needs are 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 classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a).

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). Here, the Parents obtained the private evaluation on their own and now seek reimbursement. The evaluation standards above, however, still govern the issue in this context.

Substantive FAPE: Least Restrictive Environment

A critical premise in the IDEA is the obligation 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).

In *Oberti*, the Third Circuit adopted a two-part test for determining whether a student has been placed into the LRE as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, be educated successfully within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the child has been included with non-exceptional children to the maximum extent possible. *Id.*

It is also significant that FAPE and LRE are related, but separate, concepts. In other words, an LEA can be in noncompliance with the LRE mandate but still provide FAPE. *A.G. v. Wissahickon School District*, 374 Fed. App'x 330 (3d Cir. 2010) (citing *T.R.*, *supra*, at 575, 578); see also *H.L. v. Downingtown Area School District*, 624 Fed. App'x 64 (3d Cir. 2015).

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family has "a significant role in the IEP process." *Schaffer, supra*, 546 U.S. 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).

Full participation in the IEP process does not mean, however, that an LEA must defer to parents’ wishes. *See, e.g., Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999)(noting that IDEA “does not require school districts simply to accede to parents' demands without considering any suitable alternatives,” and that failure to agree on placement does not constitute a procedural violation of the IDEA); *see also Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D. Md. 2002)(explaining that “parents who seek public funding for their child's special education possess no automatic veto over” an LEA’s decision). If the parties are not able to reach a consensus, it is the LEA that must make a determination, with parents 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).

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). With respect to the ADA issues, the substantive standards for evaluating claims under Section 504 and the ADA are also essentially identical. *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 statutes. *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). Accordingly, the coextensive Section 504 and ADA claims will be addressed together with those under the IDEA.

Application of Interstate Transfer

Where a child was not previously provided with special education by an LEA but by a different state, the IDEA includes an interstate transfer provision that is designed to ensure that the child's current program essentially follows him or her to the new LEA, unless the parties otherwise agree. That provision applies until a new appropriate program is developed:

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

20 U.S.C. § 1414(d)(2)(c)(i)(II); *see also* 34 C.F.R. § 300.323(f). This provision replaces the usual protection of pendency principles. *M.R. v. Radnor Township School District*, 202 F.3d 642, 651 (3d Cir. 2002).

The Parties' Claims

Logically, the issues shall be addressed beginning with the District's evaluation, followed by the programming for each of the school years at issue, and, if applicable, remedies for the asserted FAPE denials. This progression recognizes the principle that special education programming must be based on, and respond to, evaluation of strengths and needs.

The District's Evaluation

The District's December 2017 ER clearly utilized a variety of assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student, all relating to areas of suspected disability. More particularly, the District summarized results of available information from previous evaluations and the input from the Parents; included observations of Student; incorporated available classroom- and curriculum-based assessment data; obtained and reported input and assessment results from teachers and related service providers; conducted assessment of Student's current cognitive ability; and included measures of Student's social/emotional/behavioral functioning, supplemented by a formal FBA. The rating scales included assessment of autism-related characteristics. All of the District professionals responsible for preparing the ER are qualified for their roles.

The District's December 2017 ER determined Student's eligibility for special education under several IDEA categories and made recommendations for the IEP team to address Student's identified needs. All of this evidence together preponderantly supports the conclusion that the District's December 2017 ER was sufficiently comprehensive to identify Student's

special education and related service needs in all areas related to suspected disability and, accordingly, met IDEA criteria.

The Parents challenge the ER on a number of grounds: the instrument used for cognitive ability; the lack of standardized assessments by the speech/language therapist; the lack of standardized assessments by the occupational therapist; and the completeness of the FBA. These shall be addressed briefly but none warrants a different conclusion on the December 2017 ER.

With respect to the cognitive instrument, it is valid and reliable and the District school psychologist provided persuasive testimony on the reasons she felt comfortable using it with Student. Moreover, it was wholly consistent with the results obtained by the former state (using different instruments) and even with those for the later completion of the IEE. There is simply nothing in this record that suggests that the District's ER was flawed on this basis.

With respect to the speech/language and occupational therapy assessments, each included a standardized measure as well as informally obtained information including observations and performance at school. Certainly functioning based on something other than standardized instruments should be part of any evaluation. And, again, the District also had the previous evaluation from the other state that, even though not set forth in detail in the December 2017 ER, was explicitly referenced.

The FBA did not, as the Parents observe, result in hypothesized functions of the problematic behavior. The reason, however, was that Student did not exhibit the behaviors frequently enough during the process. The FBA did identify skill deficits and successful interventions for addressing Student's behaviors which, when viewed as a whole, informed the IEP team in its development of a PBSP.

In sum, the District's 2017 ER was in compliance with the IDEA. The Parents were free to, and did, obtain an IEE, but they are not entitled to public funding of that evaluation.

FAPE Claims

The main focus of the hearing was the Parents' assertion that the District denied Student FAPE in many respects. At the outset of this portion of the Discussion, it is important to recognize that Student was not exhibiting skills at the former state's school to the degree that the Parents suggest and that they evidently observed at home. For example, the prior state's IEP noted that Student was not using as many words/word approximations at school as Student reportedly used at home, and Student engaged in problematic behavior at school throughout the school day despite reports of improvement in that area. Student also was prompt dependent. It is also important to keep in mind that Student experienced significant difficulty with the transition to Pennsylvania and the new home and school environments, an understandable factor that certainly impacted Student's performance in the District's building at the beginning. The specific areas that the Parents challenge shall be addressed individually.

First, the Parents argue that various changes to the District staff and classroom resulted in inconsistent programming and ultimately denied Student FAPE. While the need for the change in classroom was unfortunate, it occurred within approximately one month of the start of the school year when Student was still acclimating to the move. Student had a visual schedule to prepare for activities and transitions throughout the day. The need for additional teaching staff or classroom space is often not something that can be readily ascertained in advance, and this hearing officer cannot conclude that these necessary changes operated to deny Student FAPE on any substantive grounds.

Another contention is that the District failed to ensure that Student was meaningfully included in the regular education environment to the maximum extent appropriate. Here, the IEP team considered with each new IEP the extent to which Student would participate with typical peers, and thoughtfully considered and completed an SAS Toolkit in the fall of 2018. It is clear that Student could not, with supplementary aids and services, remain in the regular education environment for the entire school day; indeed, Student exhibited a number of behaviors particularly in that setting. With minor exceptions, Student did participate with typical peers as provided by the IEPs. Student's demonstrated needs for intensive interventions that could not be provided in the regular education classrooms and impeded further inclusion. Accordingly, the District did not ignore its LRE obligations, and the evidence does not support a substantive denial of FAPE on this basis.

Next the Parents challenge, and they focused at the hearing on, the District's failure to retain some of Student's raw data and provide it to them. It is true that some of the progress monitoring reports at times lacked precise detail as to in some of the IEP goals and objectives. But there is no reason, on this record, to suspect that the District professionals were not taking and analyzing data on an ongoing basis, and accurately summarizing it for purposes of progress monitoring and IEP meetings. The District was not obligated to provide an ideal program, but one that was appropriate, as will be discussed further below. That all of the raw data was not maintained after the conclusion of a school year or provided to the Parents does not equate to a denial of FAPE in this case. In addition, there is nothing in the applicable law that requires the District to provide a detailed verbatim summary of a student's school days for families. Furthermore, the reports that were provided to the Parents on an ongoing basis, such as the communication logs, cannot be read to set forth with specificity all that

Student and the District staff members were doing throughout the day. The Parents' dedication and advocacy toward Student are laudable and perfectly understandable, and their involvement with programming decisions is exemplary, but their desire for more detailed data and information was not required to be met in this case for purposes of FAPE.

Moreover, the District was extraordinarily diligent in convening meetings of Student's team at which progress, among other things, was routinely discussed. The IEPs were regularly revised as needed based on Student's performance, which ranged from mastery of skills to a need for reduced expectations; additional goals were added as necessary. Doing so was wholly appropriate and was what the IDEA required. In a related argument, the Parents also assert that the District failed to provide NOREPs contrary to legal mandates. Such is a procedural violation that is tempered significantly by the ongoing meetings and communications as well as IEP revisions. The Parents had access to the IEPs and played a significant role in their development and review. There is simply nothing in the record to suggest that the District denied the Parents the opportunity to participate meaningfully in educational decision-making.

The Parents also claim that Student did not make progress across domains during the 2017-18 and 2018-19 school years. In most areas, including academic, behavioral, social, and fine motor skills, Student's progress was undeniably incremental, and perhaps too gradual from a parent's perspective. Nevertheless, the District's special education programming required consideration of Student's unique strengths, weaknesses, and circumstances. In each of those areas, the evidence is preponderant that the District's programming included consideration of Student's academic and functional levels as well as Student's potential. The fact that Student at times did not perform consistently on discrete skills in the various IEPs does not mean that Student failed to make strides toward

remediation of educational and functional deficits; on the contrary, the record as a whole establishes that Student experienced not insignificant growth in all of these areas over the relevant time period. Student's IEP goals and objectives must be read in their entirety together with the progress monitoring; that the latter reports may have had a few flaws does not overcome the overarching trend toward better developed and more age appropriate academic, behavioral, social, and fine motor skills during the school years at issue. Student will of course require intensive services into the future in order to continue exhibiting growth and acquisition of skills, more consistency, and better generalization of skills across settings. These considerations, however, do not support a finding of a substantive denial of FAPE with respect to these skills.

The one area that does reflect a major concern with performance and progress is in Student's speech/language needs, and particularly the iPad for expressive communication. During the 2017-18 school year and into the fall of 2018, Student did not have a District-supplied iPad for communication despite IEP goals and objectives that recognized its critical function to provide a means for Student to communicate. Even after the District iPad was available, Student used both devices that were undisputedly different. Student's need to learn to use both systems almost certainly impacted Student's ability to communicate and, as a result, contributed to problematic behaviors. There was also no plan for ensuring that Student used the device consistently between home and school, something that given Student's profile was clearly a key to Student's ability to expressively communicate effectively and across settings. Although the District must be deemed to have some reasonable period after Student's enrollment to ensure that Student's needs were identified and met, a period during which Student was still experiencing difficulty with the transition from the other state, certainly by the start of the second trimester or 60 school days into the 2017-18

school year, it was obligated to propose appropriate program for all of Student's speech/language needs. That should have included either device trials or the purchase of a District iPad together with adequate staff training to respond to Student's identified expressive language deficits. The District chose the latter option, but delayed doing so. This failure to provide appropriate programming amounted to a denial of FAPE in this respect, and warrants a remedy.

The District contends that, because of the interstate transfer provisions, it could not be faulted for any programming implementation prior to its own evaluation. However, Student was entitled to comparable services that included consistent access to and use of an AAC device during the school day with trained staff. Accordingly, this argument lacks merit.

Remedies

The Parents seek both compensatory education and reimbursement for privately obtained services. In this hearing officer's view, it is appropriate to award one or the other, but not both.

Compensatory Education

Compensatory education may be an appropriate form of relief where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has also endorsed an alternate approach, sometimes described as a "make whole" remedy, where the award of compensatory education is crafted "to restore the child to the educational path he or she would have

traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014) (accepting the *Reid* Court’s more equitable, discretionary, and individually tailored calculation of this remedy). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

There was no evidence presented in this case that would guide or support a “make whole” compensatory education award. The standard method of providing an award for the period of the deprivation shall therefore be utilized.

The Parents suggest that an award of full days of compensatory education is warranted, which is appropriate in some cases. *See Keystone Central School District v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education, affirming an award of full days). Student’s expressive communication deficits undoubtedly impacted Student throughout the day, including behaviorally. However, the remedy must be equitable under the circumstances and, here, this hearing officer does not conclude that Student was denied FAPE across the school day. On the contrary, as set forth above, Student did make appropriate progress with respect to all areas of weakness, including speech/language and behavioral needs. The delay in providing a dedicated District iPad for expressive communication was but one aspect of Student’s program. On balance, and providing a period of reasonable rectification, the award will be ninety minutes of compensatory education for each school day that Student attended from the 61st school day of the 2017-18 school year through the last school day of the 2018-19

school year to remedy the deprivation.¹⁰ Student is also entitled to compensatory education for the total amount of missed speech/language and occupational therapy services.

The award of compensatory education is subject to the following conditions and limitations. Student's Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's educational and related services needs, including parent training. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age sixteen (16). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

¹⁰ See 22 Pa. Code §§ 11.1 and 11.3(a)(providing for a minimum of 900 hours of instruction in a school term of 180 days at the elementary level). Each school day for Student was 5 hours, and 90 minutes is approximately one quarter of the total day rounding up to the next half hour.

CONCLUSION

The District's December 2017 evaluation was appropriate for Student. Student was denied FAPE in the areas of communication and occupational therapy during the 2017-18 and 2018-19 school year, and is entitled to compensatory education. The Parents are not entitled to reimbursement for the IEE or privately retained services.

ORDER

AND NOW, this 10th day of August, 2020, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's December 2017 evaluation of Student was appropriate under the applicable legal principles.
2. Student was denied FAPE during the 2017-18 and 2018-19 school year in the areas of speech/language and occupational therapy.
3. Within fifteen days of the date of this Order, the District shall determine the number of hours of speech/language and occupational therapy that were not provided, and communicate that information to the Parents.
4. Student is entitled to ninety minutes of compensatory education for each school day that Student attended from the 61st school day of the 2017-18 school year through the last school day of the 2018-19 school year, in addition to the number of hours determined pursuant to ¶ 3 hereof.

5. All of the conditions and limitations on that award set forth above are expressly made a part hereof as though set forth at length.
6. The Parents are not entitled to reimbursement for the IEE or services privately obtained.
7. Nothing in this 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, Esquire
HEARING OFFICER
ODR File Nos. 22659-19-20
22715-19-20