

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

## **Pennsylvania Special Education Due Process Hearing Officer**

### **Final Decision and Order**

**ODR No. 27576-22-23**

#### **CLOSED HEARING**

**Child's Name:**

E.W.

**Date of Birth:**

[redacted]

**Parents:**

[redacted]

**Counsel for Parents:**

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**Local Education Agency:**

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**Hearing Officer:**

Cathy A. Skidmore, Esquire

**Date of Decision:**

07/07/2023

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student, E.W. (Student),<sup>1</sup> is a mid-elementary school-aged student who resides and attends school in the Parkland School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> as a child with Autism and a Speech/Language Impairment; and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.<sup>3</sup>

In January 2023, the District sought the consent of the Parents to change Student's placement from one of supplemental learning support to multiple disabilities support. The Parents did not approve that proposal, and filed a Due Process Complaint against the District under the IDEA and Section 504. As remedies, the Parents sought maintenance of the supplemental learning support placement or, in the alternative, a different placement that includes interaction with typical peers, as well as compensatory education. The District countered that Student's needs could no longer be met in the supplemental learning support environment, that the more restrictive placement was necessary and appropriate, and it denied that any relief was due.

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<sup>1</sup> 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).

<sup>2</sup> 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).

<sup>3</sup> 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).

Following review of the record,<sup>4</sup> and for all of the reasons set forth below, the claims of the Parents must be granted in part and denied in part.

## **ISSUES**

1. Whether the District's program as implemented over the 2020-21, 2021-22, and 2022-23 school years was appropriate for Student;
2. If the District's program over the 2020-21, 2021-22, and 2022-23 school years was not appropriate for Student, is Student entitled to compensatory education; and
3. Whether the District's proposal to change Student's placement is appropriate?

## **FINDINGS OF FACT**

1. Student is a mid-elementary school-aged student residing within the District who has been identified as eligible for special education under the IDEA on the bases of Autism and a Speech/Language Impairment. (S-1.)
2. Student experienced developmental delays at a young age and was first identified as having Autism at the age of five years; Student also has several other medical conditions. Student qualified for early intervention services. (N.T. 53; P-3; S-1.)

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<sup>4</sup> 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 one Hearing Officer Exhibit (HO-1). Citations to duplicative exhibits are generally not to all. A pendency order was issued after the Complaint was filed (HO-1).

3. Student has had home-based ABA services for many years. Those services focused on functional communication and daily living skills as well as compliance and problem behaviors, using principles of Verbal Behavior and ABA. Student exhibited growth in the home with working toward a promise reinforcer without problematic behaviors, as well as with tacting and manding (two Verbal Behavior operants). (N.T. 61, 66, 111, 269, 274-75, 286-87, 849-55, 870-71, 887-88; P-1; P-25.)
4. Student has historically had communication deficits because of apraxia, but does use some verbal word approximations in addition to an Augmentative and Alternative Communication (AAC) device and some sign language approximations. Student is not consistently able to communicate effectively, including wants, needs, and when Student does not feel well. Student needs an educational program that emphasizes verbal behavior and functional communication. (N.T. 67-68, 233, 236-37, 509-12, 775-77, 814-15; S-1; S-16.)
5. At home, Student has engaged in yelling, tantrumming, and self-injurious behavior, but elopement is not concerning in that environment. Student has also been physically aggressive toward family members. Yelling at home typically occurs when Student is not feeling well or is dysregulated. (N.T. 68-70, 303, 671; P-25.)
6. At school, Student has engaged in hitting, swiping items, elopement from the classroom, yelling/screaming, and self-injurious behavior throughout that environment. Student's elopement over the 2022-23 school year typically was as to a specific area rather than the classroom. (N.T. 202-03, 608, 660-63, 778-80; S-32; S-36.)
7. Student's behavior at school is variable day to day, and Student's inability to communicate effectively is a major reason for that variability. As a result, the reasons for Student's behaviors are not

well known, which complicates implementation of behavioral programming. (N.T. 177, 283-84, 616; S-18 at 16-17; S-32.)

8. Student engages in community-based activities such as team sports and engages with peers outside of school. (N.T. 66-67, 99, 432-33.)
9. Student requires structure and routine in order to be successful. (N.T. 141, 226.)

### **Entry into District 2019-20 School Year**

10. The District first evaluated Student in the spring of 2019 in anticipation of Student's entry [redacted] that fall. (S-1.)
11. Student entered the District in the fall of 2019 in a program of supplemental learning support with a replacement curriculum for reading, writing, and mathematics. (S-2 at 8.)

### **2020-21 School Year**

12. An Individualized Education Program (IEP) was developed in April of 2020 for implementation through the spring of 2021. Although a Functional Behavior Assessment (FBA) had been planned for the spring of 2020, the school closures due to the COVID-19 pandemic in March 2020 prevented its completion. (S-2.)
13. The April 2020 IEP provided a summary of Student's home services including its own FBA. That FBA identified noncompliance with directives, appropriate social skills, and communication/coping skills as the target behaviors. The District conducted remote observations from November 2019 through February 2020 and identified the target behaviors of concern as verbal outbursts, aggression toward others, and self-injurious behaviors. (S-2 at 12-14.)
14. The April 2020 IEP identified a number of areas of strength for Student including some early academic readiness skills. Identified educational

needs were for additional academic readiness skills in the areas of listening comprehension, early reading, and mathematics; speech/language (articulation, receptive and expressive language); occupational therapy skills (fine motor, self-regulation, and self-help); and behavior (following directions, decreasing aggression, and increasing social interactions.) (S-2 at 18-19.)

15. Annual goals in the April 2020 IEP addressed sound identification; listening comprehension with a baseline to be determined; number identification; identifying quantities by counting; recognizing relative concepts such as short, wide; pre-writing skills; speech/language (imitating sounds, increasing word utterances, tacting); and behavior (task-compliance without aggression). Baselines were to be updated in the fall of 2020 after schools reopened. (S-2 at 7, 23-31.)
16. The April 2020 IEP included a number of program modifications/items of specially designed instruction, including replacement curricula for reading, language arts, mathematics; a PBSP; an AAC device; one-on-one support by a trained adult; visual supports; a structured routine; reduced distractions; sensory regulation strategies; social stories; clear expectations and directions; fine and gross motor skill supports; and backward chaining for self-care skills. (S-2 at 32-34.)
17. The April 2020 IEP proposed learning support at a supplemental level. Occupational, physical, and speech/language therapy were identified as related services. (S-2 at 34, 36-37.)
18. Student remained in the home setting with remote instruction over the 2020-21 school year at the Parents' election. Student's home-based behavioral service team assisted Student with accessing the programming after the Parents declined District-offered services in the home. (N.T. 858-59; S-33 at 10.)

19. Student's IEP was revised in February 2021 to reflect eligibility for Extended School Year (ESY) services. (S-5.)

### **April 2021 IEP**

20. A new IEP was developed in April 2021. At that time, identified educational needs were summarized as: additional academic readiness skills in the areas of listening comprehension, early reading (sight words including in phrases and sentences), and mathematics (counting, basic concepts); speech/language (receptive and expressive language, functional communication, articulation); occupational therapy skills (fine motor, self-regulation, and self-help); and behavior (following directions, decreasing aggression, and increasing social interactions.) (S-6 at 22.)
21. Annual goals in the April 2021 IEP addressed sight words; reading comprehension; number identification; counting objects; understanding positional and spatial concepts; fine motor skills (writing first and last name); speech/language (sound production, answering comprehension questions, increasing word utterances, following verbal directions); and behavior (compliance with directives without aggression). (S-6 at 25-32.)
22. The April 2021 IEP retained a majority of the program modifications/items of specially designed instruction from the previous IEP, while adding provisions for Student's return to the school building in the fall of 2021. (S-6 at 33-34.)
23. The April 2021 IEP proposed learning support at a supplemental level, with Student participating in the regular education setting for homeroom, whole group reading, special classes, lunch, and recess; and outside of that setting for reading, writing, mathematics, and speech/language therapy. Occupational, physical, and

speech/language therapy were identified as related services, with BCBA consultation. Student was eligible for ESY services in 2021. (S-6 at 35-38.)

24. A PBSP was also developed in April 2021 based on the District's understanding that the problem behaviors served the functions of escaping/avoiding a demand and accessing a preferred item or activity. The PBSP identified a number of antecedent strategies (including frequent movement breaks; sensory breaks; availability of the AAC device; concise language; support for transitions; reinforcers); identified replacement behaviors (compliance with directives, communicating need for a break, functional communication for wants and needs); and specified consequences for both replacement (reinforcement) and problematic behaviors (continuing the demand; blocking; returning to the demand). (S-8.)

### **Fall 2021**

25. The District's BCBA met with the IEP team members for consultation weekly beginning with the start of the 2021-22 school year. Staff was also trained on Student's PBSP, and the BCBA observed them at times with Student. The BCBA reviewed behavior data collected by staff. (N.T. 162, 166, 169-70, 172, 175, 180-81, 205, 211, 233-34, 605-06, 617-18, 621, 639-40, 803.)
26. Student entered the 2021-22 school year attending school in the District. The District planned to conduct the FBA that fall, but the Parents asked for an Independent Educational Evaluation (IEE) with an FBA part of that process. (N.T. 207-08; P-10.)
27. An FBA is essential to informing, and provides the underpinning for, a PBSP. (N.T. 206, 474-75).



28. The FBA was delayed while the Parents decided on an independent BCBA, although the District BCBA believed conducting that assessment as soon as possible was important. (N.T. 210-11; S-33 at 8-9.)

### **Independent Evaluations**

29. The IEE included evaluation by private occupational, physical, and speech/language therapists in the fall of 2021. (S-15 at 14-17.)
30. The psychological portion of the IEE was completed with a report issued on February 1, 2022 by a private neuropsychologist. (S-16.)
31. The private neuropsychologist observed Student at school in both the regular education and learning support settings. The report reflected that Student was more focused in the learning support environment when comparing the two. (S-16 at 7-8.)
32. The private neuropsychologist attempted to administer an assessment of intellectual ability, but Student was not able to complete any test items due to behavior and dysregulation. On an instrument measuring receptive vocabulary, Student attained a percentile score of less than 0.1 (standard score of 48), suggesting an estimated verbal IQ score in approximately the same range. (S-16 at 9-10.)
33. Rating scales were used for assessment of adaptive behavior for the IEE, with the Parents, special education teacher, and paraprofessional completing the forms. The Parents' ratings differed: the mother's were all in the low average to very low range, with the father's mainly in the very low to extremely low range. The District's ratings were generally all in the very low to extremely low range, indicating more significant deficits in the school setting. (S-16 at 10-11, 14.)
34. The private neuropsychologist obtained rating scales of emotional and behavioral functioning from one of the Parents, the special education

teacher, and the paraprofessional (Behavior Assessment System for Children – Third Edition). These results were variable between home and school, with the District raters reporting more significant concerns than at home. The special education teacher’s ratings were in the at-risk to clinically significant range on all domains, with the paraprofessional reporting less concern with anxiety, somatization, and adaptability. The Parents endorsed clinically significant concerns only with leadership and functional communication; and at-risk concerns with somatization, atypicality, and withdrawal. (S-16 at 10, 14.)

35. Assessment of social responsiveness for the IEE was conducted through rating scales completed by the paraprofessional, special education teacher, and Parents. Results varied across raters, with the Parents having only mild concerns in two areas (restricted interests and repetitive behaviors, social motivation). The District raters both reflected severe concerns across areas on this instrument. (S-16 at 10, 14.)
36. Educational recommendations in the IEE included a highly structured setting with a small student to teacher ratio; full time one-on-one support; and consideration of a different placement in light of Student’s behavior, communication needs, frustration tolerance, and self-regulation skills. Structure, routine, and consistency were noted to be critical to Student’s future success. (S-16 at 12-13.)
37. The independent FBA was completed in February 2022 with observations of Student in school over a single day. The behaviors of concern identified were self-injury, aggression toward others, and yelling. (N.T. 470-72, 524; S-17 at 3-4.)
38. The independent FBA included a synthesized contingency analysis of Student’s problem behavior, which involved intentional creation of

settings that were more likely than not to lead to those behaviors. The BCBA conducting this analysis determined that, because Student's self-injury and aggression was occurring daily at school, provoking the behaviors did not present a greater risk of injury to self or others. (N.T. 475-76; S-17.)

39. The hypothesis of the independent FBA was the same as that determined in the home and by the District: that the functions of Student's behaviors were to avoid or escape a demand, and to gain access to preferred items or activities. (S-17 at 7.)
40. Student's responses to the synthesized contingency analysis in the independent FBA suggested that Student's problem behavior would tend to decrease with appropriate environmental conditions and support the development of necessary functional communication skills. This analysis suggested that Student would respond well to appropriate behavioral interventions. (N.T. 491, 504, 520-21.)
41. The independent BCBA observed inconsistent responses from school staff to Student's problem behaviors. Consistent intervention is crucial in addressing behavioral challenges. (N.T. 485, 497-98.)
42. Educational recommendations in the independent FBA were for a comprehensive, function-based approach to addressing problem behavior; significant BCBA involvement; assessment of comprehensive language and functional skills by a BCBA together with an educational program focusing on acquiring those language and functional skills; direct explicit instruction with prompting and error-correction procedures; and additional data collection. (S-17 at 9-10.)

### **April 2022 IEP**

43. In April 2022, the team met to develop a new IEP. Needs identified at that time were for sight word reading; basic mathematics concepts and

counting; behavior (compliance/following directions, reduced aggression); social engagement; speech/language (articulation, functional communication, receptive and expressive language); and occupational therapy (self-regulation, fine motor skills, bimanual skills, and self-help skills). (N.T. 231S-18 at 24.)

44. Annual goals in the April 2022 IEP addressed reading sight words and phrases with learned sight words; answering reading comprehension questions; number identification; counting and identifying quantities; identifying positional or spatial concepts; fine motor skills (writing name); speech/language (sound and phrase production, identifying functional items, answering WH questions); and behavior (compliance, reduced aggression. All goals had baselines, and a PBSP was included. (S-18 at 28-36; S-19.)
45. The April 2022 IEP retained the program modifications/items of specially designed instruction from the previous IEP and added opportunities for a rest break. (S-18 at 37-38.)
46. The April 2022 PBSP identified a number of antecedent strategies (including a visual schedule with one task visible; prediction of expectations; behavioral momentum; mixing easy and hard tasks; praise; the AAC device; first-then strategy); identified replacement behaviors (a token economy; communicating need for a break; functional communication for attention); and specified consequences for both replacement (reinforcement) and problematic behaviors (calming procedure; blocking; returning to demand). (S-19.)
47. The April 2022 IEP proposed learning support at a supplemental level, with Student participating in the regular education setting for homeroom, whole group reading, special classes, lunch and recess; Student would be outside of that environment for reading, writing,

mathematics, and speech/language therapy. Occupational, physical, and speech/language therapy were identified as related services along with BCBA consultation, and Student was eligible for ESY services in 2022. (S-18 at 39-42.)

48. Another meeting convened in late April 2022 with the private evaluators to review their reports. Change of placement was considered but the Parents sought to retain Student in the program of supplemental learning support. Speech therapy was increased in the IEP with a focus on Verbal Behavior and daily living skills, and a new item of specially designed instruction addressed functional and daily living skills. (N.T. 218, 228, 563-64, 809; S-20; S-22 at 1.)
49. At a June 2022 IEP meeting, Student's IEP was further revised. The behavior goal was revised based on current information and increased expectations; new goals for manding for a break and mastering activities of daily living were added. New items of specially designed instruction provided for error correction techniques for behavior and errorless learning with prompt fading. (S-22.)

### **2021-22 and 2022-23 School Years**

50. Student had a dedicated one-on-one paraprofessional at school who was provided registered behavior technician training, and was the same person for both school years. (N.T. 161, 602-04, 638.)
51. Student's BCBA for both school years was the same District professional. (N.T. 188, 234, 238-39.)
52. Student's speech/language therapist provided training on the AAC device during sessions with Student, and the therapist also modeled its use. (N.T. 807-08.)

53. A typical school day began with arrival and homeroom in the regular education setting followed by whole group instruction in the regular education setting; instruction in the learning support classroom; a specials class; lunch and recess with typical peers; an afternoon meeting in the learning support class with another session of instruction; and content area instruction in the regular education setting. (N.T. 656-60, 665-66.)
54. Student had very limited interaction with typical peers but did occasionally model them. Student had some interaction with peers in the learning support class during calendar time, but Student was generally isolated from the other students with use of a study carrel to minimize distractions and work individually. Student's interaction was generally with the teacher or paraprofessional only. (N.T. 664-65, 677, 679, 680, 788-91, 800, 822; S-18 at 18.)
55. The VB-MAPP assessment was completed in the fall of 2022. This instrument reflected Student's need for development of verbal language including echoics, manding, tacting, and intraverbals. Student scored at a level two, which corresponds to children ages eighteen to thirty months. (N.T. 232-33, 787-88, 809-11; S-25 at 15-16.)
56. Push-in sessions with the speech/language therapist during the 2022-23 school year were for special classes, and included significant modeling and prompting for Student to engage with peers. (N.T. 801-02.)
57. Student's IEP was revised on several occasions over the course of the 2022-23 school year. In August 2022, new items of specially designed instruction provided for daily living/functional skills opportunities; fluid opportunities for inclusion with typical peers; discrete trial training; and

instruction to peers about Student's needs and interacting with Student. (S-23.)

58. In November 2022, new IEP goals were added with baselines based on the results of the VB-MAPP: manding, tacting, answering WH questions, and counting to an identified number. Other goals were revised to reflect new baselines; a few goals were removed because of the VB-MAPP results (reading sight words, reading comprehension, number identification, writing name), and the social skills goal was also removed. Individual and small group speech therapy would be provided in a therapy setting. (S-25.)
59. Student's problem behavior increased in December 2022 into January 2023. Data reflected that Student's behavior led to removal of all other students from the learning support classroom on three occasions in December 2022 and on five occasions over January 3-11, 2023. (N.T. 188, 238; S-15 at 7-8.)
60. The Parents were contacted on two or three occasions over the 2022-23 school after Student was restrained. (N.T. 70-73, 668-70.)
61. Another meeting of Student's IEP team convened in January 2023. The District issued an invitation for that meeting, but the Parents advised that they would not attend a meeting to discuss a possible change in placement. (N.T. 132-33, 135-36; S-29 at 7; S-38 at 1, 3-6.)
62. The Parents objected to the change in placement because they believed that Student's "original programming" was not complete (N.T. 448). (N.T. 446-448.)
63. The District members of the IEP team met in January 2023. Following that meeting, the District proposed a program of full-time multiple disabilities support (MDS) at a District location that was not Student's neighborhood school. Student would participate in the regular

education setting for special classes, lunch, and recess as long as Student was not frustrated or significantly disruptive. This IEP added provisions for ABA/Verbal Behavior instruction. (S-29; S-30.)

### **The Proposed Placement**

64. The Parents observed the proposed MDS classroom in the spring of 2023. (N.T. 83-85, 421, 702-03, 742-45.)
65. The proposed MDS class is comprised of students in the three highest elementary school grades in the District. Students in that class generally have needs in the areas of communication, behavior, and sensory functioning. (N.T. 324-26, 357-59.)
66. The proposed MDS class may be considered to be very comparable to autistic support, and an autistic support professional provides consultation to the special education teacher. (N.T. 354-57, 758.)
67. The District's MDS class proposed for Student had seven to eight students during the 2022-23 school year. In addition to the special education teacher, there are four paraprofessionals who have had training in registered behavior therapy. These paraprofessionals work with all of the students in the classroom. (N.T. 172-73, 189, 191, 326, 331-33, 759-60.)
68. The proposed MDS class focuses on language and functional skills with the students, including activities of daily living in a highly structured environment. Principles of ABA, including Verbal Behavior, are implemented throughout the day in all programming for the students. (N.T. 219, 330, 333-35, 360, 371-73, 701, 706-13, 793-94.)
69. The autistic support / verbal behavior program implemented in the proposed MDS class provides scripted instructions for staff that promotes consistent implementation. (N.T. 706-08.)



70. The District's BCBA consults with staff in the proposed MDS class on program implementation. (N.T. 171, 336-37, 710, 713-14.)
71. A typical school day for students in the proposed MSD class during the 2022-23 school year began with homeroom in the regular education setting. Students also participated in special classes with typical peers; morning meeting, social skills instruction, and station rotations are in the MDS classroom. The students had lunch and recess in the regular education setting, and some students also have another class with typical peers. The students then had afternoon meeting followed by additional station rotations in the MDS classroom and adapted special classes in other settings. Some students attended additional content area classes in the regular education setting. The day concluded with job-related tasks and dismissal. The paraprofessionals supported the students in all settings. (N.T. 191-92, 326-30, 338-40, 359-60, 362-63, 366-67, 702, 716-17.)
72. Many students in the proposed MDS classroom have been provided with related services, and most use an AAC device although one is verbal. (N.T. 368-70, 793.)
73. Reverse inclusion opportunities are provided weekly in the proposed MDS class. Students are also able to participate in field trips and other special activities with their typical peers. (N.T. 362-66, 371.)
74. Students in the proposed MDS class have opportunities for individual, small group, and whole group learning. (N.T. 330-32, 375-76.)
75. The school where the proposed MDS is located has two sensory rooms: one that provides for activities, and one that provides a calm environment. (N.T. 383-85, 715, 746-47.)
76. All staff in the proposed MDS class have had training in ABA principles. (N.T. 706-08.)

## **DISCUSSION AND APPLICATION OF LAW**

### **General Legal Principles**

In general, the burden of proof is viewed as comprising 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 for 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 “ equipoise.” *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be generally credible as to the facts, with some exceptions noted below. The weight accorded the evidence, however, was not equally placed.

The testimony of the District and private BCBA's was quite persuasive with respect to Student's educational needs in light of behavioral presentation. The heartfelt testimony of Student's paraprofessional, who likely is the person at school who knows and understands Student best, was similarly convincing. The Parents, by contrast, minimized the severity of Student's behaviors, and that testimony was contradicted rather than corroborated by other witnesses and the documents of record. While one might understand their reasons for doing so in light of their position on the

issues, this decision must be based on the evidence. Other testimony is discussed further below as warranted.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited.<sup>5</sup> 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 is comprised of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Some 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.

Through local educational agencies (LEAs), states 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."

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<sup>5</sup> A number of the District exhibits have text that is cut off at the margins, and evidently better versions could not be located.

*Andrew F. v. Douglas County School District RE-1*, 500 U.S. 386, 399 (2017).

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

### **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).

LEAs are required to have available a “continuum of alternative placements” in order to meet the educational and related service needs of IDEA-eligible children. 34 C.F.R. § 300.115(a); 22 Pa. Code § 14.145. Furthermore, the “continuum” of placements in the law enumerates settings that grow progressively more restrictive, beginning with regular education classes, before moving first toward special classes and then toward special schools and beyond. 34 C.F.R. § 300.115.

### **General IDEA Principles: Compensatory Education**

It is well settled that compensatory education may be an appropriate remedy 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); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

## **General IDEA Principles: Procedural FAPE**

From a procedural standpoint, the family including parents have “a significant role in the IEP process.” *Schaffer, supra*, 546 U.S. at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b). 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); *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 565 (3d Cir. 2010).

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

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

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

The IEP team should work towards a general agreement, but the public agency is ultimately responsible for ensuring the IEP

includes the services that the child needs in order to receive a free appropriate public education (FAPE). It is not appropriate to make IEP decisions based on a majority "vote." If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint.

*Letter to Richards*, 55 IDELR 107 (OSEP 2010); see also 64 Fed. Reg. 48 at 12472 (1999) (same).

### **The Parents' Claims**

The most logical starting point in the discussion is the major claim that was the focus of the hearing: whether Student's program and placement should essentially remain the same or be changed as the District proposes. The Parents contend that this decision is governed by LRE principles, and they argue that the MDS placement is more restrictive than the learning support setting. Resolution of the claim presented, however, is not so straightforward in this case.

The *Oberti* and *Kingwood* cases addressed the issue of when students with disabilities may be removed from the regular education setting. That is not the question here, where the parties do not disagree on whether Student should spend a significant part of the school day outside of the regular education environment. Their differences at their core are over whether that time should be spent in learning support or MDS. Neither of these placements is automatically more restrictive than the other; both qualify as "special classes" in the implementing federal regulations. 34 C.F.R. § 300.115(b)(1). Moreover, both the current learning support program and

the proposed MDS program provide for nearly comparable time in regular education, thus rendering them relatively the same in terms of restrictiveness.

The Parents are genuinely convinced of and resolute on their position on this issue, but it is not one that is supported by this record. The private BCBA as well as their private neuropsychologist recommended in the spring of 2022 that Student's program primarily emphasize acquisition of functional communication. These professionals explicitly supported the District's suggestion at that time that consideration be given to a change in placement, despite the Parents' objections. The private BCBA provided very persuasive testimony that, at Student's level, functional communication must be initially focused in a one-on-one setting with staff and Student, and that involvement of peers would follow at a later time (N.T. 569). He also described the program of functional communication to begin with manding and tacting in addition to functional skills (N.T. 509, 566), essentially describing the program now proposed by the District for the intensive Verbal Behavior provided in that language-rich setting. Further, despite the label of the program in the District, to which the Parents evidently object, the LEA representative provided convincing testimony that the program is truly one of autistic support where all of the private BCBA's recommendations can be implemented (N.T. 699, 703-04, 723-30), all of which was corroborated by the knowledgeable testimony of the special education teacher in the MDS setting (N.T. 322-99).

The Parents contend that all of the support Student needs can be adequately provided in the learning support environment with increased staff training. This hearing officer cannot conclude that additional training would turn the learning support environment into the intensive and language-focused program that is available through the MDS proposal. Even if it could, and accepting the premise that the learning support setting is less



restrictive than the MDS setting, Student's time in that environment has been described as isolating, with Student generally working individually with an adult, with peers in a different part of the room and outside of Student's view, rather than engaging in meaningful interactions or even receiving what may be considered parallel instruction.

The inescapable conclusion on this record is that the proposed MDS placement is appropriate for Student as well as the least restrictive at this time.<sup>6</sup> The Parents' additional concern that Student would lack peer models of verbal speech because other children in the MDS class had devices was contradicted by the District's persuasive testimony by its speech/language therapist (N.T. 795). Student will participate on a regular basis with typical peers who can provide the modeling from which Student benefits.

The next issue is whether Student's program over the 2021-22 and 2022-23 school years was appropriate under the applicable legal standards. The Parents do not challenge programming by the academic and related service providers, and agree that Student has made meaningful progress in all of those areas. Indeed, that concession is part of their argument in support of maintaining Student in the supplemental learning support environment. They do, however, contend that the District's behavioral programming was inadequate and amounted to a denial of FAPE.

The District intended to conduct an FBA when Student returned to school so that an appropriate PBSP could be developed in the school setting upon Student's return in the fall of 2021. The Parents' request for an

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<sup>6</sup> The Parents' preference for the school that a sibling attends was addressed in the pendency ruling, but it merits repeating that the IDEA "does not create a right for a child to be educated" at his or her neighborhood school. *Lebron v. North Penn School District*, 769 F.Supp.2d 788, 801 (E.D. Pa. 2011). LEAs generally have broad authority to determine sites for providing special education services as a matter of policy, and children with disabilities are not necessarily entitled to be educated in the neighborhood school as long as the selected location is appropriate. *White v. Ascension Parish School Board*, 343 F.3d 373, 382-83 (5<sup>th</sup> Cir. 2003).

independent FBA was honored, but that report was not completed until April 2022. It must also be recognized that Student had not been in a District setting in person prior to the fall of 2021, and some period of adjustment and acclimation was necessary before revisions to the PBSP could have been considered.

The independent FBA confirmed the District's hypotheses on the function of Student's problem behaviors. While the program implemented over the 2021-22 school year did not include many of the private BCBA's recommendations, the District certainly understood by the start of the second semester of the 2021-22 school year that the then-current PBSP needed significant revision. The private BCBA provided extremely convincing testimony following his analysis that Student would respond well to an appropriate environment with the development of functional communication skills. His additional testimony that consistent implementation was a key element of improvement to Student's behavior, suggesting that despite the well-intentioned efforts of all of the District staff in the spring of 2022, the program as a whole was not providing appropriate support for Student's behaviors.<sup>7</sup> Certainly by February 1, 2022 the District was in a position to propose a necessary change in placement with the type of program proposed in January 2023. Although its efforts to continue to collaborate and work with the Parents is commendable, this hearing officer concludes that its failure to take that step at that time resulted in a substantive denial of FAPE to Student and warrants a compensatory education remedy.

Student's problematic behavior was inconsistent at school throughout the time period in question, but clearly impacted Student's performance

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<sup>7</sup> The private BCBA's criticism of the District's IEP and PBSP because they do not reflect the type of detailed implementation content that a clinical program might (N.T. 499-503, 514-15, 517-18) does not render these documents inappropriate. The information he believes is necessary can be adequately addressed through training of the staff who work with Student.

each and every school day to some extent. As an equitable award that balances better days behaviorally with those that were worse, this hearing officer concludes that Student should be provided with three (3) hours of compensatory education for each day that school was in session and Student attended from February 1, 2022 through the end of the 2021-22 school year and each day that school was in session and Student attended from the start of the 2022-23 school year through the date of the pendency order.<sup>8</sup>

This award 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 any of Student's identified educational and related services needs as determined by a qualified professional. 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 fourteen (14). 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.

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<sup>8</sup> Students at the elementary school level are entitled to 900 hours of instruction per school year over 180 school days, equating to 5 hours per day. 22 Pa. Code §§ 11.1, 11.3. The three hour award reflects half of a school day rounded up.

Finally, this hearing officer makes the following observations. The timing of this decision is such that Student will begin to attend the proposed placement at the start of the 2023-24 school year, which allows for the natural transition of change when starting a new grade. The attached order includes an additional provision for planning for that transition to assist the parties as they resume working together collaboratively as a team. The parties may wish to consider a facilitator at the next IEP meeting to guide the discussion now that this hearing has concluded.

### **CONCLUSIONS OF LAW**

1. The program and placement proposed by the District in January 2023 was appropriate for Student.
2. Certain programming provided by the District over the 2021-22 and 2022-23 school years was not appropriate for Student and amounted to a denial of FAPE.
3. Student is entitled to compensatory education for the FAPE denial.

### **ORDER**

AND NOW, this 7<sup>th</sup> day of July, 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's program and placement proposed in January 2023 was appropriate for Student.

2. The District denied FAPE to Student in one respect over the 2021-22 and 2022-23 school years.
3. Student is entitled to three (3) hours of compensatory education for each day that school was in session and Student attended from February 1, 2022 through the end of the 2021-22 school year, and each day that school was in session and Student attended from the start of the 2022-23 school year through the date of the pendency order on February 10, 2023. The conditions set forth above apply as though set forth herein at length.
4. Within ten calendar days of the date of this order, the District shall convene a meeting of Student's IEP to revise the January 2023 proposal to include a plan for Student's transition to the new program and placement similar to that provided when Student began in-person learning. The IEP shall specify all times that Student will participate with typical peers in the regular education setting such as for homeroom. The team shall further determine whether any additional revisions are necessary for the start the 2023-24 school year.
5. 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.

/s/ Cathy A. Skidmore

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Cathy A. Skidmore, Esquire  
HEARING OFFICER  
ODR File No. 27576-22-23