

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

Pennsylvania Special Education Hearing Officer Final Decision And Order

Closed Hearing

ODR File Number:

26245-21-22

Child's Name:

M.E.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent:

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Local Education Agency:

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

09/09/2022

INTRODUCTION AND PROCEDURAL HISTORY

The student, M.E. (Student),¹ is currently a very early elementary school-aged student who qualified for and previously received early intervention services by an Infant/Toddler provider, and then by ELWYN, Inc. (the Local Educational Agency or LEA). Student has been identified as eligible for such services pursuant to the Individuals with Disabilities Education Act (IDEA).²

The transition to the LEA occurred in the summer of 2019. Disappointed with that transition and services provided by the LEA thereafter, the Parent in September 2021 retained a private provider and sought reimbursement. In the spring of 2022, the Parent filed a Due Process Complaint under the IDEA, Section 504 of the Rehabilitation Act of 1973,³ and the Americans with Disabilities Act,⁴ claiming that the LEA failed to provide Student with a free, appropriate public education beginning in July 2019 and demanding compensatory education and reimbursement for private services. The LEA denied each of those allegations, contending that some claims were beyond the statute of limitations, and that its program was appropriate in any event, so no relief was due. The case proceeded to a due process hearing.⁵

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.

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, and LEA Exhibits (S-) followed by the exhibit number. Citations to duplicative exhibits may not be to all.

Following review of the record and for all of the reasons set forth below, the Parent's claims must be granted in part and denied in part.

ISSUES

1. Whether the LEA denied Student a free, appropriate public education under the IDEA and Section 504 beginning in July of 2019;
2. If the LEA did deny Student a free, appropriate public education at any time beginning in July 2019, should Student be awarded compensatory education and/or should the Parent be awarded reimbursement for private services?

FINDINGS OF FACT

1. Student is currently a very early elementary school-aged student residing in the geographic area served by the LEA. Student has been identified as eligible for special education under an Autism classification. (N.T. 34 S-5.)
2. When Student experiences frustration in trying to communicate, Student engages in problem behavior. (N.T. 48, 250-51, 921-22.)
3. Student experiences significant difficulty with transitions and alterations to routine. (N.T. 34-35, 85, 165-66.)
4. Student also experiences difficulty with changes in service providers, but does benefit from the pairing process with a new therapist that typically would take multiple sessions to accomplish. (N.T. 50-51, 84, 165-66, 323-24.)

Early Educational History

5. Student was provided with services through an Infant/Toddler early intervention (EI) program prior to transitioning to the LEA in July 2019. Student was diagnosed with [redacted] before birth. (N.T. 37-38, 624; S-5.)
6. An evaluation by the Infant/Toddler provider was completed in July 2019. At that time, based on scores on a standardized assessment (Battelle Developmental Inventory, Second Edition) as well as observations and parent interview, Student exhibited delays in cognitive, communication, social-emotional, physical, and adaptive development; Student's sensory processing deficits were also noted. Student was eligible for EI services based on Developmental Delay. (S-6.)
7. Special designed instruction was recommended in that July 2019 evaluation to address attending to adult-directed tasks, initiation and maintenance of social interactions, receptive and expressive language skills, gross motor (strength and mobility), and fine motor skills. On the latter, Student exhibited deficits with fine motor skills, activities of daily living, and had significant sensory needs. (N.T 290-92; S-6.)

Entry into LEA Preschool Programming July 2019

8. When Student first transitioned to the LEA, Student's used a variety of means to communicate, including single-syllable vocal utterances, gestures, some sign language, and picture symbols. Student did not have a communication device. (N.T. 46; S-6 at 10; S-34 at 5.)
9. A meeting convened with the LEA in July 2019 that the Parent attended. The IEP that was developed incorporated the information from the Infant/Toddler evaluation, and summarized additional Parent

input. The IEP contained goals addressing use of a learned communication system for requests; following one-step commands; sustained engagement in interaction or activity with familiar adult; and initiation of social interactions with peers and adults. (S-37.)

10. Specific strategies for supporting goal development in the July 2019 IEP included trial modes of communication; a total communication approach; visual choices and supports; language opportunities during free play; targeted vocabulary for the home; modeling; a prompt hierarchy (most to least for new skills; least to most for fading); a preference assessment; practice in the natural environment; and highly motivating objects and activities. (S-37.)
11. This IEP provided for specialized instruction (2 hours/week) in addition to occupational, physical, and speech/language therapy (2 hours/week for each), all provided in the home. The Parent approved the Notice of Recommended Educational Placement (NOREP). (N.T. 43; S-36; S-37.)
12. With the transition to the LEA in July 2019, Student was provided with occupational, physical, and speech/language therapy as well as specialized instruction. (P-5; S-3.)
13. Student's IEP was revised in early August 2019 to include goals for other related service providers: gross motor skills (walking independently with balance, core strength, and coordination and control); and fine motor/adaptive skills (self-feeding with utensils, using a writing instrument). Additional strategies added included practice of skills; consistent location for feeding; and predictable daily routines. Eligibility for services during scheduled breaks was also determined. (S-35.)

Fall 2019

14. Student was diagnosed with Autism by a developmental pediatrician in October 2019. After Student's Autism diagnosis, the Parent was immediately concerned that Student's communication and behavioral deficits were not addressed by the LEA, particularly since the pediatrician assessed for Autism based on an asserted regression with communication skills. (N.T. 56-58; S-5 at 6.)
15. Student's IEP was again reviewed, and slightly revised, in November 2019. At that time, the special instructor and related service providers reported that Student was getting to know the team, and was making initial progress on IEP goals but with more variability in gross motor skills. Specifically, Student was engaging in joint attention and developing use of communication systems; beginning to respond to name; increasing time on task; beginning to interact with a familiar adult; and using utensils with prompting and grasping writing instruments. The Parent also reported ongoing skill development at home. No concerns with behavior were raised at that time. The Parent approved the NOREP that identified Student under the Autism classification, and confirmed the continuation of services. (S-33; S-34.)
16. Student's IEP team met again in December 2019 and agreed to a plan of compensatory services for missed speech/language therapy services, which the Parent approved. (S-31; S-32.)

Spring 2020

17. Progress reporting prior to March 2020 noted that Student continued to increase use of communication devices to make requests; independently sustain joint attention across opportunities; sustain joint attention with adults and peers; initiate interactions with peers during

play; and use utensils for feeding and grasp writing instruments with prompting. Student's progress on gross motor skills remained variable. (S-29.)

18. A trial of an augmentative alternative communication (AAC) device began with Student in February or March 2020, but was discontinued before completing that trial when services were provided remotely due to the pandemic. (N.T. 743-45; S-29 at 12.)
19. The LEA began to provide remote services in March 2020 as a result of the COVID-19 pandemic.⁶ Student did not benefit from remote services, but became frustrated and exhibited aggressive behavior or elopement, even when session duration was shortened. Other concerning behaviors were observed at home outside of the sessions. Services were discontinued at the request of the Parent with agreement of the rest of the team, and the team met weekly with the Parent instead and provided consultation and suggested activities. (N.T. 59-62, 68, 101-02, 143-48, 185-86, 203-04, 231, 295, 297-98, 303, 745-47, 813-15, 989-91, 1012; S-7 at 2.)
20. Student's IEP team meet for the annual review in June 2020. At that time, Student reportedly continued to increase sustained social interactions with peers and adults; increase time on task; follow one- and two-step commands with prompts; and use different forms of communication to engage including making requests and interacting with a sibling. However, Student's fine motor, adaptive, and sensory

⁶ This hearing officer takes notice of the statewide school closures beginning in March 2020 and continuing through the end of the 2019-20 school year pursuant to orders of the Governor of the Commonwealth of Pennsylvania, see <https://www.governor.pa.gov/newsroom/governor-wolf-announces-closure-of-pennsylvania-schools/> and <https://www.governor.pa.gov/newsroom/governor-wolf-extends-school-closure-for-remainder-of-academic-year/> (last visited September 6, 2022). The later announcement expressly made the closures applicable to early intervention programs.

processing skills regressed due to the service interruption, and problematic behaviors became concerning. The Parent continued to work with Student at home with consultations. (S-29 at 6-7.)

21. New annual goals in the June 2020 IEP addressed following one-step directions; verbally or with a learned communication device making varied requests; and engaging in an activity with a familiar adult. Previous goals were maintained for initiating and sustaining social interaction and play with adults and peers; gross motor skills; and using utensils and writing instruments. Additional strategies in this IEP included repetition of verbal directives; visual cues; breaks as needed; and use of a variety of materials. (S-29.)
22. The June 2020 IEP provided that Student was eligible for services during scheduled breaks. A plan for transitioning to school-age programming was also included. The addition of 6 hours per month of behavior support was made, and otherwise the level of service for the special instruction and related services remained the same as before. The Parent approved the NOREP. (S-28; S-29; S-30.)
23. Also in June 2020, a newly assigned Board Certified Behavior Analyst (BCBA) for providing the behavior support asked the Parent to complete daily surveys about Student's day and behaviors in order to identify possible consistencies. Student's difficult behaviors did not reflect any consistent pattern to the BCBA. (N.T. 817-19, 859.)

Summer to Fall 2020

24. In July 2020, the LEA offered to return Student to in-person services, but the Parent declined for pandemic-related health and safety reasons.⁷ (N.T. 78, 103-04, 639-40.)
25. Student began private behavior services beginning in approximately November 2020 through insurance. This private therapist, a registered behavior technician, began working with Student via remote sessions, often with an LEA instructor or therapist. When co-treating with LEA providers, this technician provided behavioral support. (N.T. 224-25, 228-29, 233, 252; S-5 at 4, 6.)
26. Remote services resumed for Student in approximately November 2020. Those sessions were phased in, lasting about 30 minutes in the beginning before increasing to 45 minutes, and the specialized instruction was the first to return in person. As more sessions were held, Student would exhibit difficult behavior both during and after, but some sessions were more productive than others. The weekly team meetings also continued. (N.T. 188, 225, 229, 298, 748-49, 818-19, 856, 993-94, 1012, 1015-16.)
27. Another IEP meeting convened in December 2020 to consider Student's need for COVID Compensatory Services (CCS).⁸ At that time, Student was exhibiting regression or limited progress with related service needs, but not specialized instruction. A new goal was added to the IEP to address sensitivity to various textures during play

⁷ Student is reportedly immunocompromised, and other immediate family members have health conditions. (S-38 at 8.)

⁸ COVID Compensatory Services (CCS), pursuant to the guidance by the Pennsylvania Department of Education, is a process for LEAs to determine its students' entitlement to such services. The guidance has been revised from time to time and may be found at <https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/COVID-19-Compensatory-Services.aspx> (last visited September 6, 2022).

activities based on regression. Additional strategies in this IEP included provision of wait time; use of choices; and differential reinforcement. The Parent approved the NOREP for CCS through one additional weekly session each of occupational, physical, and speech/language therapy for a period of three months at which time progress would be reviewed. (N.T. 994-95; S-26; S-27.)

28. Another trial of a different AAC device began in December 2020, and for a third device in February 2021. That last trial was successful, and Student obtained a device very similar to the third. (N.T. 750-55.)

Spring 2021

29. An IEP meeting convened again in January 2021 to discuss options for conducting a reevaluation. The team agreed to a Functional Behavior Assessment (FBA) to be followed by a Positive Behavior Support Plan (PBSP), along with a record review. This IEP provided brief updates reflecting the gradual resumption of remote services. An additional 12 hours of behavior support was added so that the FBA could be conducted. The Parent approved this NOREP. (S-24; S-25.)
30. The LEA conducted an evaluation of Student with an Evaluation Report (ER) issued in March 2021. Because of pandemic restrictions, that evaluation was completed through a record review, Parent report, and direct observation. (S-5.)
31. The March 2021 ER summarized Student's functioning across domains, with Student exhibiting weaknesses in each. Cognitively, Student was performing well below age expectations and had needs in the areas of communication, social/emotional, physical, and adaptive development, as well as behaviorally. (S-5.)

32. The March 2021 ER also reflected regression in skills due to interruption in services as a result of the pandemic, particularly in the areas of physical and adaptive development. (S-5.)
33. The Parent reported primary needs with communication, gross motor (walking) skills, and sensory processing for the March 2021 ER. An assessment of Student's sensory profile revealed a higher than expected level of response to auditory, visual, touch, oral, and sensory processing stimuli, as well as movement and body positioning. The results suggested that Student presented with sensory processing patterns and responses significantly impacting Student's functioning across environments. One-on-one direct support for the school setting was recommended. (S-5 at 17-19.)
34. The March 2021 ER concluded that Student remained eligible for services based on Autism. Needs identified by that evaluation were for development of skills in attending to adult-directed tasks, initiation and maintenance of social interactions, receptive and expressive language, gross motor strength and mobility, and fine motor functioning. (S-5.)
35. An FBA was also completed in March 2021 to understand the setting events for and consequences of behaviors through data collection. The behaviors of concern identified based on interviews and rating scales from the team including the Parent were self-injury, physical aggression toward others and objects, tantrumming (successive behaviors), and noncompliance with adult directives. Each behavior was defined. (N.T. 820-22; S-7.)
36. The March 2021 FBA identified the hypothesized functions of Student's behaviors as primarily to escape and delay task demands. The FBA

recommended that Student learn to request a break appropriately and increase tolerance to non-preferred activities. (S-7.)

37. A PBSP was developed following the March 2021 FBA. That plan provided a number of prevention and antecedent strategies; replacement behavior (requesting a break); and consequences for the replacement behavior (reinforcement). A goal in the PBSP was for Student to functionally request a break without interfering behaviors. (S-8.)
38. Student's IEP team met again in early March 2021 to review the ER and FBA, and revise and update the IEP accordingly. (S-23.)
39. At the time of the March 2021 IEP meeting, Student had accomplished the goals for initiating and sustaining social interaction and play with adults and peers, as well as engaging in an activity with a familiar adult. The gross motor goal was removed and replaced with a different goal reflecting use of a [mobility device] which would be more functional in a school environment; the goal for using utensils and writing instruments were also removed due to regression and was replaced with similar goals. This IEP retained the goals for following one-step directions; verbally or with a learned communication device making varied requests; and sensitivity to textures. Additional strategies in this IEP included discrete steps for feeding. (S-23.)
40. New behavior goals addressed requesting a break, task completion, and social interactions/play without concerning behaviors. Strategies to promote those goals included pairing with adults; systematic differential reinforcement; choices; visual schedules, timers and warnings for transitions; frequent preference assessments; positive reinforcement; consequences for noncompliance; and functional

communication training. The Parent approved the NOREP for this IEP. (S-22; S-23.)

41. Student resumed in-person services in March 2021, including the private behavior therapy. The LEA services were phased in gradually. (N.T. 71, 104, 142, 148, 232, 347, 826.)
42. Student continued to exhibit difficult behaviors when in-person services resumed, but reportedly more so during occupational and physical therapy sessions than in speech/language and special instruction where very few concerns were noted. (N.T. 827-29, 995-97.)
43. When Student's in-person services with the BCBA resumed, she provided coaching and modeling to the therapists and teacher for addressing Student's behaviors. By sometime in June 2021, those therapist began sending detailed and continuous email messages to the BCBA about the sessions, even those that she observed and about which they had discussions. Some of those communications involved the Parent and/or other LEA team members and related to behaviors not identified as impeding Student's learning. (N.T. 832-37, 885; P-21; P-22; S-38.)
44. An annual IEP review meeting convened in late May 2021. At that time, after in person services resumed, Student was: maintaining attention to non-preferred tasks for greater durations; following one-step directions for preferred activities; awaiting delivery of an AAC device after successfully completing a trial; continuing to develop appropriate expressive and receptive language skills; demonstrating improved gross motor skills; exhibiting less sensitivity to textures; and increasing independence with self-feeding. Updated progress on those skills as related to the goals was included, with a new goal for the

anticipated communication device. The gross motor skill goal was revised to increase expectations and a stair goal was added; a new fine motor skill goal was added along with increased expectations on the self-feeding goal. The behavioral goals for requesting a break, task completion, and engaging in social interaction/play goal were also revised to increase expectations or be better suited to remaining in the home environment. Other goals also increased expectations (making requests, task completion). Additional strategies were included to support the feeding goal. (S-21.)

45. Student's related service levels remained the same in the May 2021, with the exception of occupational therapy that increased to 3 hours each week. An Applied Behavior Analysis (ABA)-trained personal care assistant (PCA) was also added for 2 hours each day, and behavior support increased to 10 hours per month. The Parent approved the NOREP but indicated disagreement with the behavior support and concern that the increase was inadequate. (N.T. 355; S-20; S-21.)
46. The team discussed transition to [redacted] at the May 2021 meeting, but the Parent declined, believing that Student was not yet ready for a school setting. (N.T. 126-27, 607; S-21 at 7.)
47. After the May IEP meeting, Student's BCBA began to provide skills training to the team members because they reported uncertainty in how to implement the PBSP, particularly the occupational and physical therapists. She also began using a fidelity checklist with the team members to discuss her findings with each of them. (N.T. 650, 840-44, 853, 888.)

Summer 2021

48. By June 2021, Student was frequently engaging in difficult behaviors during sessions with the private and some LEA providers. (N.T. 233-34, 236-37, 252, 314-15.)
49. A number of changes in staff providing services to Student changed in the summer of 2021. (N.T. 237-38.)
50. By early summer 2021, LEA providers were impeded from providing behavioral interventions by the Parent and the advocate, and there was little collaboration from them. (N.T. 709-10, 835-36, 923-24, 998-1000, 1018-19; S-38.)
51. The Parent requested an emergency IEP meeting in June 2021 because of the behaviors Student was exhibiting particularly during therapy sessions, and her concern that these were at a crisis level. The IEP noted increased behaviors and some regression in several areas. The goals were not changed, but consultation hours for the special instruction teacher and related service providers were added. The team agreed that all providers would collect Antecedent-Behavior-Consequence (ABC) data as requested by the Parent and advocate. The Parent approved the NOREP but also disapproved it, indicating an interest in mediation. (N.T. 67-70; S-18; S-19.)
52. Student's behaviors remained problematic after the June 2021 IEP meeting, and another meeting convened in mid-July. Shortly after that meeting, Student's IEP was revised to add an occupational therapy goal inadvertently omitted from the May 2021 revision, that for doffing clothing items. (N.T. 114-15, 348-59; P-22 at 121; S-17.)
53. In July 2021, Student's special instructor left the team because she was concerned about the expectations and demeanor of the Parent's

advocate that ultimately impacted her relationship with the Parent. (N.T. 998-1000.)

54. Another IEP meeting convened in late July 2021 at which Student's behaviors were again discussed as well as the changes in staff. Student's IEP was updated to reflect Student's performance on the goals and a recommendation to continue with all of those. The team also noted some ongoing concerns with behavior and lack of progress, particularly with occupational and physical therapy services. (N.T. 77, 153-54, 244, 315.)
55. The occupational and physical therapists in late July 2021 recommended that both those services increase by an additional hour per week. That request was not granted, but 2 additional hours of behavior support per week were added. A positive behavior support consultant was added to the team who provided some training on data collection and implementing the PBSP. She consulted with the current BCBA providing service for Student and observed sessions. (N.T. 310-12, 408-09, 613-14, 654-55, 904, 907-08, 943-44; S-16 at 6, 60.)
56. The BCBA asked to be removed from Student's team in approximately early July 2021 because the relationship among team members was deteriorating, and that impacted her ability to fulfill her role for Student. (N.T. 851, 885-86.)
57. Also July 2021, the Parent asked that the current PCA be removed from Student's therapy team. She later asked that no therapist from the agency of those removed team members be assigned to Student. Student's trained PCA was not replaced due to staffing shortages. (N.T. 117-18, 130-31, 422-23, 676, 703.)

58. The positive behavior support consultant transitioned from consulting to providing direct services after the BCBA left and the PCA was removed. (N.T. 914-16.)
59. Student's behavior reportedly continued to worsen after the July 2021 IEP meeting. (N.T. 319.)
60. Updates to the late July 2021 IEP reflected variable performance with physical therapy/gross motor skills and occupational therapy/fine motor skills, with behaviors interfering with progress. Speech/language skills, on the other hand, reflected some gains since the May meeting including use of the new AAC device. (S-16.)
61. The Parent returned the late July 2021 NOREP, approving the increase in behavioral support but disagreeing with the lack of increase in occupational and physical therapy services and questioning whether the behavior support increase was adequate. She also noted that the special instructor had not yet been replaced. (S-14.)
62. Student's longtime occupational therapist was removed from the case by the LEA in late summer 2021 because of a perceived conflict of interest, due to the therapist's concurrent employment by the agency conducting the IEE. At least one other outside agency administrator shared that concern. (N.T. 389-90, 414-16.)
63. An additional IEP meeting convened in August 2021 to follow up on the late July meeting. The team discussed the possibility of again increasing behavior support; and Student's speech/language pathologist reported success with some of the PBSP strategies. However, the occupational and physical therapist continued to express concerns about interfering behaviors including the procedure for Student requesting a break as well as regression in skills, and asked for training on collecting the ABC data that the Parent and advocate

requested, with that task impeding the therapy sessions. The behavior specialist explained that ABC data collection by the therapists was not necessary. The team also discussed ensuring that the AAC device was available for all sessions and described additional consultations to occur for the team; and the hours of behavior support increased to 14 hours each month. Lastly, the input reflected a recent recommendation from Student's developmental pediatrician for a full time ABA program in the home. (N.T. 157, 659; P-15; S-13.)

64. The Parent did not approve the NOREP for the August 2021 IEP and again indicated an interest in mediation. (S-12.)

Independent Educational Evaluation Summer 2021

65. The Parent obtained an Independent Educational Evaluation (IEE) that was funded by the LEA and completed in late August 2021. (N.T. 79-80, 109-10, 515; P-10.)
66. Three remote observations in the home were conducted by two different BCBAs in the summer of 2021 for the IEE. The observers provided detailed descriptions of what was observed in the report. (P-10 at 2-9, 36-38.)
67. The Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) was administered for the IEE. This assessment has 3 levels of various verbal and related skills which typically developing children generally master by the age of 48 months. Student attained a score of 8.0 out of a possible 170, all at the first level. (P-10 at 10-14.)
68. A VB-MAPP Barrier Assessment was also administered for the IEE which identified a number of significant barriers impeding language and skill acquisition: behavior problems; instructional control; impairment to mand, tact, motor imitation, echoic, listener, and

intraverbal repertoires; weak visual perceptual skills and social skills; prompt and reinforcement dependence; scrolling responses; impaired scanning skills and conditional discrimination; failure to generalize; weak motivating operations; self-stimulation; and articulation weakness. (P-10 at 19-22.)

69. On the VB-MAPP Transition Assessment for the IEE, Student scored very low, indicating that Student is not ready for a less restrictive educational setting. (P-10 at 23- 25.)
70. The IEE also included a functional analysis of its identified disruptive behaviors, which defined 13 such behaviors. A number of trials in the home were conducted that indicated that the various behaviors were exhibited for access to attention, access to tangibles, escape from tasks, and automatic positive reinforcement. The IEE evaluators opined that the focus of Student's behavior plan should be on antecedents rather than topography of behavior. However, the analysis included a number of behaviors that the LEA had not identified as impeding Student's learning, such as grunting and crying. (P-10 at 26-29; S-7.)
71. Speech/language evaluation conducted as part of the IEE included the VB-MAPP results and results of several other instruments, as well as observations in the home during speech/language and occupational therapy sessions. This portion of the IEE identified significant needs in speech/language skills (receptive, expressive, and social engagement/play), with a recommendation to focus on prelinguistic skills, social engagement, and play skills. (P-10 at 51-59.)
72. A physical therapy evaluation for the IEE was based on observation and anecdotal information as well as several more formal measures (including the Peabody Developmental Motor Scales – Second Edition

and Developmental Assessment of Young Children – Second Edition, Physical Development Gross Motor Subtest). The IEE identified physical therapy needs in the areas of balance, strength, control, and coordination. (P-10 at 45-50.)

73. Occupational therapy evaluation for the IEE was conducted through several measures of adaptive behavior, with weaknesses across domains (communication, daily living, socialization, and motor skills); sensory processing with several areas noted to be outside of expectations; and fine motor and related skills reflecting significant weaknesses with fine motor and functional skills. (P-10 at 59-68.)
74. A number of recommendations were provided by the IEE for the IEP team to address Student's needs with respect to basic language and communication skills, behavior including motivation, and functional living skills, all with an emphasis on ABA principles. Service recommendations were for full time (40 hours per week) of services through a PCA trained in ABA; 30 hours per month of BCBA consultation and support; intensive teaching trials based on the VB-MAPP; language instruction in the natural environment; a PBSP to include pairing of staff and materials, a gradual transition to demands from pairing, interspersing difficult tasks with those less demanding, and the promise procedure of reinforcement; a transdisciplinary approach to include all providers and the Parent; and occupational, physical, and speech/language therapy for 3 hours each week. (P-10 at 68-101.)

Fall 2021

75. Student's IEP was slightly revised on September 3, 2021. The summary of the August 2021 IEP was updated to specify that the occupational and physical therapists did not believe that Student's

behaviors were impacting progress, but that an additional weekly hour for each therapy would provide more opportunities for repetition and practice. This input also reflected the limited time the ABA-trained PCA was in place before the Parent asked for her removal. (S-11.)

76. Another IEP meeting convened in late September 2021 when the IEE was reviewed. The LEA recommended based on the IEE that Student transition to a half day program of specialized instruction, therapies, and ABA and behavior support. The Parent did not approve that NOREP. (N.T. 659-61, 954.)
77. In late September, the Parent elected to provide private therapy for Student because of the continuation of challenging behaviors and her dissatisfaction with responses she received to various inquiries of the LEA. The LEA ceased providing services as of September 23, 2021, and a private provider affiliated with the agency that conducted the IEE began. (N.T. 85-86; S-5 at 261.)

Private Services Fall 2021

78. The private behavior therapist continued in the same manner after LEA services were discontinued and replaced by private services, but they increased to 5.5 hours each weekday just before the transition. (N.T. 258-59, 267, 274-75, 281-82.)
79. The private agency is implementing a majority of the recommendations in the IEE but Student is not yet ready for some of the proposed goals. However, the private agency is only providing approximately 14 hours per month of BCBA services, 1 hour per week of speech/language and occupational therapies, and no PCA support, because of the cost to the Parent. (N.T. 483-84, 547-48, 552-53; P-9.)

Final IEP

80. Student's IEP team met one final time at the end of September 2021, including one of the IEE evaluators. The document was revised to, among other things, incorporate results of the IEE. (S-10.)
81. Updates to Student's present levels as of the end of September 2021 were also provided for the revised IEP. At the time, Student had a new occupational, physical, and speech/language therapists, special instructor, and behavior support specialist, although the occupational and physical therapists were part of Student's team in the summer of 2021. The month of September was largely devoted to pairing new and returning staff with Student. (S-10 at 13-14.)
82. A majority of Student's existing goals were removed from the September 30, 2021 IEP based on changed circumstances, and updated with new goals. As of that date, Student's goals addressed [redacted]; using stairs; fine motor skills (hand-eye coordination, dexterity); self-feeding different foods; use of writing implements; doffing clothing; participating in adult-directed activities without problem behaviors; accepting wait time for preferred activities/items; following one-step directions; peer imitation of motor/play skills; matching objects; and making requests with a learned communication system. (S-10.)
83. The September 30, 2021 IEP included strategies to promote goal progress, most of which were in previous IEPs, and included: systematic, differential reinforcement; pairing with adults; engaging activities, warnings for transitions with timers; choices; visual schedules; visual supports; frequent preference assessments; functional communication training; varied materials; social reinforcement; forward/backward chaining and task analysis for self

care including doffing clothing; most to least prompting for errorless learning; opportunities for exposure to and use of fine motor coordination; multisensory play items; modeling; interspersing difficult demands with easy tasks; verbal cues; practice; first – then expectations; multimodal communication; aided language stimulation; wait time; obtaining attention before directions; and repeated directions. (S-10.)

84. The September 30, 2021 IEP maintained the consultative service levels at 30 minutes/week for team members; maintained the behavior specialist services at 14 hours/month; decreased speech/language therapy to 45 minutes twice weekly; decreased physical therapy to 45 minutes twice weekly; decreased occupational therapy to 45 minutes twice weekly; increased specialized instruction to 2.5 hours daily; and increased PCA support to 4 hours each day between home and a school setting. (S-10.)
85. After the September 30, 2021 IEP meeting, the LEA proposed to provide the services in an early childhood special education classroom with an ABA-trained PCA and behavior support for a half day, and PCA and behavior support services in the home. The Parent did not approve that placement because private services were in place. (N.T. 120-21, 660; S-9.)
86. As of December 2021, Student made incremental gains with many skills across domains since October 2021, although progress has been variable over time. (N.T. 259, 276, 328-30; P-9; P-17.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

In general, the burden of proof may be viewed as consisting of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parent who filed a Complaint seeking 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. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, who assume the role of fact-finders, are 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 as he or she recalled them. The Parent testified to her genuinely held beliefs that only she, as the Parent, could relate. All of the service provider and evaluation professional witnesses testified with professionalism even when describing experiences that were not wholly positive. Contradictions among accounts may be attributed to lapse in memory or recall, or to differing perspectives, rather than any intention by a witness to mislead or exaggerate. The weight accorded the evidence, however, was not equally placed, as is noted *infra* where applicable.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

General IDEA Principles

The IDEA requires each of the states to provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. 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.

The various states, through local educational agencies (LEAs), meet the obligation of providing FAPE to an eligible student through development and implementation of an IEP which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court has confirmed, an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

Individualization is, thus, the central consideration for purposes of the IDEA. Nevertheless, an LEA is not obligated to "provide 'the optimal level of services,' or incorporate every program requested by the child's parents."

Ridley School District v. M.R., 680 F.3d 260, 269 (3d Cir. 2012).

Additionally, a proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made.”

D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010);

see also *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031,

1040 (3d Cir. 1993)(same). “The IEP *must aim* to enable the child to make

progress.” *Dunn v. Downingtown Area School District*, 904 F.3d 248, 255

(3d Cir. 2018)(emphasis in original). IEP development, of course, must

follow and be based on an evaluation as monitored and updated by changes

in the interim. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320-300.324.

Evaluation Principles

In conducting an evaluation or reevaluation, the law imposes certain requirements on LEAs to ensure that sufficient and accurate information about the child is obtained:

(b) Conduct of evaluation. In conducting the evaluation, the public agency must—

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

(i) Whether the child is a child with a disability under § 300.8;
and

(ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

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

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

34 C.F.R. §§ 300.304(b); *see also* 34 C.F.R. § 303(a). 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).

Where a parent obtains an independent educational evaluation and provides it to the LEA, regardless of its funding, the team must consider its results in making programming decisions. 34 C.F.R. § 300.502(c). This provision does not, however, require the LEA to adopt or accept all of its recommendations.

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family including parents have “a significant role in the IEP process.” *Schaffer, supra*, at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b). 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 have the right to control it. *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 [LEAs] 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).

General Section 504 and ADA Principles

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

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). Further, the substantive standards for evaluating claims under Section 504 and the ADA are essentially identical. See, e.g., *Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those two statutes, particularly when considered together with claims under the IDEA. See,

e.g., Swope v. Central York School District, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 and ADA claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

With respect to a retaliation claim, the issue is whether an LEA engaged in retaliation against Student related to Student's disability and the Parent's advocacy for Student.

The elements of a retaliation claim require a showing by the filing party (1) that they engaged in a protected activity, (2) that defendants' retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or her rights, and (3) that there was a causal connection between the protected activity and the retaliatory action.

Lauren W. v. DeFlaminis, 480 F.3d 259, 267 (3d Cir. 2007)(citations omitted). To establish the requisite causal connection a plaintiff usually must prove either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link. *Id.* (citations omitted).

Temporal Scope of the Claims

The IDEA expressly provides that a party "must request an impartial due process hearing on their due process complaint within two years of the date the parent or public agency knew or should have known about the alleged action which forms the basis of the complaint." 20 U.S.C. §

1415(f)(3)(c); see also 34 C.F.R. § 300.511(e).⁹ In other words, “[t]he IDEA statute of limitations is triggered when the parent knew or should have known about the action that forms the basis of the complaint.” *J.L. v. Ambridge Area School District*, 2008 U.S. Dist. LEXIS 54904, * 28-29, 2008 WL 2798306 (W.D. Pa. July 18, 2008). The language in *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 614 (3d Cir. 2015), focuses on the accrual of a cause of action “once...a reasonably diligent plaintiff would have discovered the facts constituting the violation.” 802 F.3d at 614. That question may be a complex one in any particular case. See, e.g., *Avila v. Spokane School District 81*, 852 F.3d 936, 944 (9th Cir. 2017).

The Parties’ Claims

Before turning to the issues raised by the Parent, who filed this action, it is appropriate to address the LEA’s contention that the scope of the claims should be limited to the two-year period prior to the filing of the Complaint. This issue begins with consideration of the Complaint that challenged programming from Student’s entry into the LEA program in July 2019, and sought relief from that time period forward. As the Parent observed, however, the LEA did not raise the statute of limitations in any prehearing filing. Importantly, the statute of limitations is an affirmative defense. See *J.L. v. Ambridge Area School District*, 2008 U.S. Dist. LEXIS 54904, **28-29, 2008 WL 2798306 *10 (W.D. Pa. 2008). In court proceedings, under various rules of civil procedure, an affirmative defense may be deemed to be waived if not raised. At this administrative level, however, there are no formal rules of civil procedure.

⁹ The IDEA also expressly provides for two specific exceptions to the two-year limitation period, permitting claims beyond that timeframe to a parent who was prevented from requesting the hearing as a result of a specific misrepresentation that the LEA resolved the problem, or withholding of mandated information. 20 U.S.C. § 1415(f)(3)(D); see also 34 C.F.R. § 300.511(f). However, the Parent has not here asserted that either is applicable.

The Parent's own testimony is that she became concerned in the fall of 2019 about the LEA's ability to properly program for Student's communication and behavioral needs following the Autism diagnosis. She did not file her Complaint until March of 2022, well beyond the two-year timeframe after she knew, or at least should have known, that she may have had a basis for a claim against the LEA. There is, accordingly, simply is no basis to expand the scope of the claims.

Regardless of whether there is a waiver, however, the Parent's claims have as a foundation the acceptance by the LEA of the Infant/Toddler evaluation conducted just prior to Student's transition and without its own additional assessments. That evaluation was based on various sources of information including a standardized assessment considering all relevant domains, and yielded information that provided a sufficient basis for determining eligibility and the need for provision of specially designed instruction. The Parent's contention that the Infant/Toddler evaluation was "cursory" (Parent's closing at 4) does not truly appear to suggest that the evaluation failed to meet requisite criteria, but rather that the LEA did not seek to conduct additional assessments, specifically measures of behavior and the VB-MAPP and. (*Id.*) However, in July 2019, Student was not exhibiting behaviors that were of concern in the educational setting that should have led to further evaluation; and, simply because additional instruments could have been used does not render an evaluation inappropriate for purposes of special education programming. Moreover, Student had yet to be identified with Autism at that time. There is no evidence in the record to preponderantly establish that the VB-MAPP or any other assessment was necessary in order to determine Student's needs in July 2019. On the contrary, the LEA here reasonably accepted that very recent evaluation and developed an IEP based on its content and input from the Parent.

With respect to programming from July 2019 through March 2020, and assuming without deciding that there has been no waiver of the affirmative defense, the Parent has similarly failed to establish a denial of FAPE. Student's IEP targeted and addressed each of Student's identified needs, and was regularly reviewed and revised as needed. Progress updates reflected gradual but steady progress toward IEP goals, with some variability that is not unexpected given Student's age and recent transition to preschool programming. Student also began to trial an AAC device in that timeframe. There simply is no evidence from which one might conclude that the LEA programming prior to March of 2020 was inappropriate for Student in light of Student's strengths, needs, and unique circumstances.

The pandemic, of course, had a major impact on Student, as it did all students. The LEA attempted to provide remote services, with which the Parent certainly cooperated, but Student did not benefit from those services. The team together decided to terminate remote services and instead meet weekly for consultation. This hearing officer finds this approach, to which both parties agreed, both reasonable and necessary under the circumstances. Student was also immunocompromised, so there was no choice but to suspend direct EI services.

Those remote services resumed in late fall 2020 with a wholly appropriate gradual reintroduction. Student had clearly regressed in most if not all skill areas, and the parties agreed to provide CCS for all related service provider sessions that had been deferred. The specialized instruction resumed first, and the Parent does not appear to challenge the absence of CCS for those sessions in the interim. Even if she had, the testimony of the special instructor that Student quickly regained lost skills and returned to making progress was persuasive (Finding of Fact 27) and was uncontradicted in the record.

Student's progress after in-person services resumed in the spring of 2021 was, unfortunately, limited, with behavioral manifestations that were particular impediments during occupational and therapy sessions. The Parent clearly viewed Student's behaviors as more extreme and critical than did the LEA providers. Nonetheless, the LEA acted quickly, convening a number of IEP meetings to address Student's behaviors and revising the IEP as needed. The Parent also challenges its March 2021 ER, however, on much the same bases as its acceptance of the Infant/Toddler evaluation. The March 2021 evaluation, which involved an FBA, did not include additional assessments under the circumstances of the continuing pandemic and Student's health. Again, merely because the March 2021 evaluation could have included additional assessments does not render it invalid, and the Parent's comparison with the later IEE does not lead to the conclusion that the LEA evaluation was in any way inadequate.

The substance of the IEPs through the end of the summer of 2021 were appropriate based on the information known at the time, which meets the IDEA standard for appropriateness. Quite disappointingly, and for varied reasons, staff turnover for Student's services was ongoing, some at the request of the Parent, some decided by the LEA, and some either naturally occurring or determined by the staff member alone based on experiences with the Parent and advocate. It is difficult to fault the Parent for asking that staff members she perceived as ineffective be replaced, or to fault a provider for resigning because he or she felt the services were ineffective because of the Parent's expectations and demands. Natural circumstances experienced by many of these individuals are part of life both within and beyond the field of education. Still, the continual transition to new service providers was less than ideal in light of Student's difficulty accepting new staff members without some period of adjustment through pairing. Even

more importantly, staff shortages led to missed services to which Student was entitled under the law.

In her testimony, the Parent expressed concern that Student's communication needs were not adequately considered in light of Student's use of sign language (N.T. 46-48) and that no behavioral services were provided following Student's newly identified Autism diagnosis (N.T. 56-58). The evidence does not, however, support these concerns as existing in the fall of 2019, or even into the spring of 2020 before the pandemic. It was not until June 2020 that behaviors became a growing concern that was not adequately addressed by the existing IEP and PBSP, and, again, the LEA responded promptly as it was required to do. The Parent also suggested that Student did not make progress on the IEP goals but they were discontinued anyway (N.T. 65-66), whereas the record reflects that goals were revised on an ongoing basis depending on Student's performance and the need to adjust expectations, rather than removed. The LEA's programming was responsive to Student's strengths, needs, and unique circumstances throughout that time period based on information known and as it became available. Although Student's behavioral needs did not vanish, the LEA developed effective behavior plans to address and improve them, which is what the IDEA requires, not perfection. In sum, the Parent has failed to establish a denial of FAPE based on the development and content of the various IEPs and, except for staffing levels in the summer of 2021, their implementation.

It is also prudent to address here the parties' dispute over the collection of ABC data by the related service providers as the Parent requested. Both of the LEA witnesses with significant experience in behavior support, one a BCBA, provided convincing testimony on the lack of utility of that data (N.T. 844-47, 869, 910-13, 961-63) that was not focused on the target behaviors identified as impeding Student's learning; and, moreover,

clearly prevented the related service therapists from providing the services they were required to provide while they focused on completing forms provided by the Parent and advocate. Similarly, the testimony of the LEA behavior support consultant that an increase in those services was appropriate rather than an increase in occupational and physical therapy services (N.T. 913-14), particularly in light of the concerns they observed because these therapists were collecting needless data, was quite cogent. The Parent's expectations for this unnecessary information went far beyond meaningful participation, and these circumstances do not establish a denial of FAPE by the LEA.

The next issue is whether the IEP proposed in late September 2021 following the IEE completion was an offer of FAPE. The Parent contends that it did not, such that she should be awarded reimbursement for her expenditures in procuring the private services. The IEE, as detailed as it was, included some content that leads to questions about the criticism of LEA service providers during observations. The testimony of two of the individuals observed was persuasive in explaining the activities with which they engaged with Student and the reasons therefor (N.T. 715-16, 720-23, 757-61), and militates strongly against accepting their criticism of those isolated, remote observations in light of the record as a whole. The related opinion of the one IEE evaluator regarding Student's lack of progress over time was similarly discounted as based on her very limited understanding of the LEA's actual program. And, though not determinative, her obvious if understandable interest in assisting the Parent as the then-current service provider cannot be overlooked in evaluating her testimony.

The IEE made a number of recommendations for programming, basing those on ABA principles foundationally, and identifying 40 hour per week of support, along with related services, and 30 hours per month of BCBA oversight and consultation. The September 2021 IEP provided for most of

these recommendations in one form or another. Critically, a majority of the strategies in that IEP were also in previous IEPs for Student, rather than the IEE providing significant new information and programming guidance. All of the IEP revisions made by the LEA throughout the time period in question were based on Student's then-current functioning, including the behavioral presentation that arose over the summer. Moreover, the testimony of the very experienced LEA behavior support consultant (N.T. 927-28) was persuasive, and consistent with the record as a whole, that Student simply is not yet ready for full-time programming of 40 hours each week. Although the private provider is not providing that level of service for other reasons, there is no evidence to contradict that opinion. The record simply does not preponderantly establish a denial of FAPE in the September 30, 2021 IEP and proposed program and placement, and the Parent's dissatisfaction with the LEA cannot overcome the appropriateness of its program.

The Parent also contends that the LEA dismissal of the occupational therapist in late summery 2021 was retaliatory in contravention of Section 504, a claim that is based on mere supposition. The testimony of the LEA representative as to the reason for the removal was, however, convincing and provided a legitimate basis for its decision (Finding of Fact 62). As such, the Parent has failed to establish any causal connection between the dismissal and Student's disability or her advocacy, and this claim must be dismissed.

Remedies

The Parent seeks both compensatory education for any FAPE denial, and reimbursement for her private program expenses. This latter remedy is similar to, and must be considered in light of, the standard test for tuition reimbursement.

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).

As discussed above, the LEA did not deny Student FAPE from July 2019 through March of 2021. After Student resumed in-person services in the spring of 2021, the only grounds for concluding that FAPE was denied was for missed sessions due to lapses between providers. This remedy encompasses the period of time between March 2021 and the termination of LEA services in September 2021, during which an LEA special instructor was not replaced, and any periods that no PCA was available for Student. The parties shall be directed to meet to determine the number of hours that Student was entitled to but did not have those services for purposes of a compensatory education award. In the event no agreement can be reached, an alternate award is set forth in the attached order.

The award of compensatory education is subject to the following conditions and limitations. Student's Parent 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. The compensatory education may not be used for services, products, or devices that are primarily for leisure or recreation.¹⁰ Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age ten (10). The compensatory services shall be provided by appropriately qualified professionals selected by the Parent. 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 LEA is located.

Tuition Reimbursement

Parents who believe that an LEA is not providing or offering FAPE to their child may unilaterally place him or her in a private school and thereafter seek reimbursement for tuition. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). Such is an available remedy for parents to receive the costs associated with their child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v.*

¹⁰ The standard language precluding use of the compensatory education for educational and related services that should appropriately be provided by the LEA is not applicable since Student has aged out of preschool programming.

Department of Education, 471 U.S. 359 (1985); *Mary Courtney T.*, *supra*, 575 F.3d at 242.

Here, the LEA did not deny Student FAPE in its program offer in late September 2021. Accordingly, having not met the first prong of this test, no further relief is warranted.

CONCLUSIONS OF LAW

1. The LEA did not deny Student FAPE between July 2019 and March 2021.
2. The LEA did fail to provide FAPE between March and September 2021 after the special instructor and ABA-trained PCA were dismissed and not replaced. The LEA did not deny FAPE in any other respect.
3. The LEA did not retaliate against the Parent or Student.
4. Student is entitled to compensatory education.
5. The Parent is not entitled to any reimbursement for expenses.

ORDER

AND NOW, this 9th day of September, 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The LEA did not deny Student FAPE between July 2019 and March 2021. Between March and late September 2021, the LEA failed

to provide FAPE for the periods within which a special instructor and trained PCA were not provided.

2. The LEA did not retaliate against the Parent or Student.
3. No later than September 23, 2022, the parties, or their designees, shall meet to calculate the number of hours that Student was not provided services by a special instructor or trained PCA through the September 2021 date that services were terminated by the Parent. If the parties cannot reach agreement, Student shall be provided with seven (7) hours of compensatory education, which is equal to that provided by the September 30, 2021 IEP for those services, for each day that preschool services were available from the LEA from August 1, 2021 through the date that LEA services were terminated.
4. Student is awarded the number of hours of compensatory education determined pursuant to ¶ 2 hereof. All of the conditions and limitations on that award set forth above are expressly made a part hereof as though set forth at length.
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

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 26245-2223LE