

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:

25874-21-22

Child's Name:

T.J.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

07/15/2022

INTRODUCTION AND PROCEDURAL HISTORY

The student, T.J. (Student),¹ is an early elementary school-aged student in the Tredyffrin-Easttown School District (District). Student has been most recently identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² as a child with Intellectual Disability and Speech/Language Impairment.

In a prior decision in February, 2022, this hearing officer upheld the District's most recent evaluation on its Due Process Complaint filed after the Parents sought an Independent Educational Evaluation at public expense.³ The Parents filed their own Complaint in December 2021 under the IDEA, Section 504 of the Rehabilitation Act of 1973,⁴ and the Americans with Disabilities Act (ADA).⁵ In essence, the Parents challenged the District's programming for Student over the 2020-21 and 2021-22 school years as not appropriate in various respects, demanding compensatory education and specific directives going forward. The District denied those assertions and contended that its program complied with all applicable mandates such that no remedy was warranted. The case proceeded to a due process hearing with

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 *T.J. v. Tredyffrin-Easttown School District*, ODR No. 25622-2122KE (Skidmore, February 19, 2022).

⁴ 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).

⁵ 42 U.S.C. §§ 12101-12213.

development of a rather extensive evidentiary record made necessary due to the complexities involved.⁶

Following careful review of the entire record, and for all of the reasons set forth below, the claims of the Parents must be granted in part and denied in part. Specific directives to the team are also set forth in the attached order.

ISSUES

1. Whether the District's special education program for Student for the 2020-21 and 2021-22 school years was appropriate for Student procedurally and substantively;
2. Whether the District complied with its obligation to provide Student's program in the least restrictive environment;
3. If the District's special education program for Student for the 2020-21 and/or 2021-22 school years was not appropriate, should Student be awarded compensatory education; and
4. Whether specific directives should be ordered for Student's program going forward?

⁶ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. HO-5 set forth the admitted exhibits, and HO-6 which followed (relating to an extension of time for closings and this decision) is hereby admitted. The term Parents is used where it appears that one or the other was acting on behalf of both as well as to refer to both. The parties also stipulated to incorporation of the record from the prior decision referenced *supra* n. 3 (N.T. 2111). Citations to that record will include the ODR File No. in parentheses: (26522). The citations throughout this decision generally do not include duplicative references and are not necessarily exhaustive in light of the breadth of the record.

FINDINGS OF FACT

1. Student is an early elementary school-aged student in the District and is eligible for special education under the IDEA. Student is currently identified under the disability categories Intellectual Disability and Speech/Language Impairment. (N.T. (25622) at 29-30; S-146.)
2. [redacted] Student does exhibit independent communication and daily living skills at home and in the community with family that are not observed at school. (N.T. 597-99, 601, 616, 1063-64, 1146, 1201, 1455-59, 1463, 1473; P-2; S-5 at 2-4; S-152.)
3. Student has a rare congenital condition that usually is characterized by, among other things, developmental delay and impairment of verbal language skills. Student has a Speech/Language Impairment, relying on an Augmentative and Assistive Communication (AAC) device as a primary means of communication, but does use some verbal speech. Student additionally has a [medical device], and has difficulty maintaining an appropriate body weight. (N.T. (25622) at 79, 105-06; N.T. 1433-36, 1471; S-5 at 6; S-24.)
4. Student has been diagnosed with childhood apraxia of speech, a disorder that impairs motor sequencing and the individual's speech production, yielding inconsistent speech patterns. Student also has been diagnosed with related disorders including phonological disorder, and oral apraxia which impairs Student's oral motor movements including sequencing of those movements. Student's childhood apraxia of speech is considered to be severe. (N.T. 438, 442-44, 447-48, 453, 524-25, 1854-55; S-6.)
5. Student has a significant need to learn receptive and expressive language, in addition to ongoing learning to operate the AAC device. (N.T. 245-46.)

6. The software on Student's AAC device, Literacy Acquisition through Motor Planning (LAMP), requires the user to learn the motor planning sequences for specific sounds, words, and other forms of language by selecting symbols that have multiple meanings. Selecting a symbol or icon takes the user to a new page with different symbols for various parts of speech that enable the user to produce a phrase. For example, a symbol depicting a rainbow when selected takes the user to a page with categories of verbs and adjectives commonly associated with colors. The software maintains categories such as specific parts of speech in the same place on various pages, thereby simplifying the motor planning for similar phrase types. This process known as semantic compaction focuses on core icon arrays and sequences that are an efficient means to convey meaning. (N.T. 246-47, 251-54, 1405-07, 1410-11, 1869-72.)
7. Because Student is dependent upon the AAC device, Student has difficulty with play skills, including those that typical peers demonstrate. (S-145 at 10.)
8. The Parents have had extensive training with AAC devices and LAMP. (N.T. 1431-33, 1503-04; P-178.)
9. Student exhibits significant sensory dysregulation with deficits across all eight sensory systems. In the educational setting, such dysregulation can be addressed through a sensory diet that can help a student increase attention and focus over time. This diet serves as a prescription for activities throughout the day developed by a trained occupational therapist who also must continually monitor its effectiveness through formal data collection. (N.T. 775-780, 782-83, 803-06, 810-11, 1433-35.)

10. Because of Student's sensory dysregulation, Student may not appear to be engaged or paying attention, but Student's eyes looking away does not necessarily mean that Student is not engaged. (N.T. 786-88.)
11. Student sometimes chooses sensory activities for reinforcement, which sometimes overlaps with sensory regulation activities and tools. (N.T. 1630-31.)

Early Educational History and Ongoing Private Services

12. Student entered the District after the family's move from another state following the 2018-19 school year. At that time, the Parents reported that Student used English and a foreign language native to the family's heritage. (S-1; S-2.)
13. A protocol was developed for Student in the other state before moving to the District providing for a number of foundational elements that, when present, assisted Student in readiness to learn and engage at school: Hydration, Nutrition, Sensory regulation (calmness), Music incorporation, Impact (accepting Student's communications regardless of modality), Learning from peers' modeling, and Expected delay to provide wait time (HN SMILE). This protocol was shared with and used by the District. (N.T. 993-95, 1462-64; P-202; S-3 at 7; S-5 at 1.)
14. Student attended a [redacted] summer program in 2019 through the local Intermediate Unit (IU) before transitioning to the District for [redacted]. (N.T. 1440-41; P-50; S-5 at 1.)
15. The Parents have provided private services for Student since relocating to Pennsylvania addressing speech/language (including AAC) and occupational therapy. (N.T. 1440-44; P-12; P-13; P-14; P-15; P-16.)
16. A private occupational therapist provided consultations with Student beginning in the fall of 2020 along with several intensive treatments

through the spring of 2021 focused on sensory regulation, body awareness, and postural control. (P-14.)

17. Student remotely attended a private AAC camp during the summer of 2021. Student also attended an intensive summer program for AAC, and a full AAC evaluation was recommended at that time. (N.T. 1549; P-5; P-12; S-126.)
18. A private speech/language pathologist provided ten sessions with Student in the spring and summer 2021 to address expressive language deficits. A second private speech/language pathologist provided ten motor speech sessions and eight AAC sessions in the summer of 2021. This second private speech/language pathologist recommended DTTC for Student. (P-15; P-16.)
19. Student has had private reading tutoring beginning in October 2021. Those sessions are once each week for sixty minutes. The tutor has experience with verbal behavior and sometimes incorporates some of its elements into her instruction with Student. She focuses on decoding, sight words, comprehension of words and sentences, and listening comprehension of passages with Student. (N.T. 348-49, 361-62, 374-75.)

Entry Into District Fall 2019

20. The District adopted the Individualized Education Program (IEP) from the other state, with a few modifications, following a meeting at the start of the 2019-20 school year. This IEP addressed speech/language, occupational, and physical therapy needs including daily living skills; attention and distractibility; peer relationships/social skills; and pre-academic skills. (S-3.)⁷

⁷ The Notice of Recommended Educational Placement (NOREP) at S-4 reflects disapproval by the Parents of this proposal, but this timeframe is beyond the scope of the issues presented.

21. The District evaluated Student following enrollment and issued an Evaluation Report (ER) in late September 2019. (S-5.)
22. Assessment of developmental functioning for the September 2019 ER revealed significant delays across domains (visual reception, fine motor, receptive language, and expressive language) but areas of relative strengths and weaknesses in each. Assessment of academic achievement was discontinued. (S-5 at 14-15.)
23. Student's adaptive behavior was assessed through parent rating scales for the September 2019 ER, which revealed significant delays in all domains (communication, daily living skills, and socialization) and subdomains. (S-5 at 15-18.)
24. Assessment of speech/language functioning was also conducted for the September 2019 ER. Student's deficits included articulation as well as receptive, expressive, and pragmatic language skills. (S-5 at 18-26, 40-41.)
25. Assessment of physical and occupational skills for the September 2019 ER yielded results that indicated needs in both areas and recommendations for those therapy services. More specifically, physical therapy needs included balance, large motor, and ball skills; occupational therapy weaknesses were identified for fine motor skills, sensory regulation, coordination, and postural control. (S-5 at 26-41.)
26. The September 2019 ER determined that Student was eligible for special education based on Other Health Impairment and Speech/Language Impairment. A determination based on Intellectual Disability was deferred to a future date. A number of needs were identified in the areas of pre-academic (early literacy and beginning mathematics skills), speech/language, gross motor, fine motor, sensory, self-regulation, attention/focus, daily living, and social skills. (S-5.)

27. The Parents provided additional clarification and information after completion of the ER, disagreeing with some of the content particularly in descriptions of school observations. (P-202.)
28. A private speech/language consultation was obtained by the Parents in December 2019. Among this pathologist's recommendations was Aided Language Stimulation (ALS), a strategy wherein a communication partner would use verbal speech while also (after gaining the AAC user's attention) modeling the communication on the AAC device by selecting the appropriate icon sequence.⁸ The Parents provided the written consultation report to the District in December 2020 and the team discussed the ALS recommendation at a December 2020 IEP meeting. (P-7; P-135; S-52 at 10.)
29. A private speech/language evaluation was conducted by a different speech/language pathologist⁹ in early 2020 with a report issued in February. At that time, this pathologist provided diagnoses of Severe Reception/Expressive Language Disorder, Severe Mixed Speech Disorder (Childhood Apraxia of Speech, Phonological Disorder), and Oral Apraxia. (S-6.)
30. The private speech/language pathologist provided results of a number of assessment instruments in the February 2020 report, identifying a variety of related strengths and weaknesses. A number of recommendations were provided in the educational environment: a low student to teacher ratio, embedded speech/language support throughout the day, and a placement with an intensive program of speech/language services to include use of the AAC device, practice of mastered speech

⁸ This consultation did not, however, describe the additional step of Student then having the opportunity to generate the same motor sequence, discussed *infra*. He did include this element of ALS in his testimony (N.T. 264-68.)

⁹ Although more than one speech/language pathologist was involved in this evaluation, the singular is used for ease of discussion and simplicity.

targets throughout the school day (distributed practice), and training/guidance of staff. Individual daily motor speech therapy and language therapy sessions as well as regular push-in services and consultation were also suggested. Dynamic Temporal Tactile Cueing (DTTC) was expressly referenced with specific elements of that approach described in relation to Student's areas of deficit, as was a total communication approach which accepts communication regardless of format (which, for Student, generally meant verbal speech and use of the AAC device). (S-6.)

31. Student's IEP was revised in May and June 2020. This IEP included annual goals addressing needs in the areas of early literacy (letter identification); early mathematics (one to one correspondence); social skills (cooperative play); physical therapy (balance, large motor skills, eye-hand coordination); occupational therapy (fine motor, visual-motor, and visual perception); and speech/language therapy (articulation, receptive language, expressive/pragmatic language (using verbal speech or AAC device), target word production, and use of the AAC device). (S-7 at 41-54.)
32. Program modifications and items of specially designed instruction at the time of the May and June 2020 revisions were extensive and included: direct small group instruction in language arts and mathematics in a special education setting; explicit teaching across the day; active learning; instruction across settings; opportunities for re-exposure and practice; multi-modal instruction; consistency; motivational consideration; visual schedules and adult facilitation; one-on-one support; speech/language therapy approaches, activities, and strategies (incorporating the suggestions of the February 2020 private evaluation including DTTC, distributed practice of target words at school and at home, and multisensory cuing); use of the AAC device throughout the

school day; physical therapy; occupational therapy including sensory strategies and a key guard for the AAC device; recommendations for feeding from a physician; and training for staff with ongoing consultation. (S-7 at 55-68.)

33. Student's program as of the May and June 2020 IEP revisions was one of learning support at a supplemental level, with Student participating in regular education with accommodations, and outside of that environment during individual academic instruction and related services. The following related services were specified: speech/language, physical, and occupational therapy; assistive technology; social skills instruction; and a personal care assistant (PCA). The Parents approved the Notice of Recommended Educational Placement (NOREP). (S-7 at 69-73; S-8.)
34. The District ordered a key guard for Student for the AAC device prior to the start of the 2020-21 school year. (N.T. 1941.)
35. Student remotely attended a private AAC camp in the summer of 2020. Student also attended remote small group instruction and social skills sessions through the District's Extended School Year (ESY) program. (S-9; S-12 at 10.)

District Staff Training 2020-21 and 2021-22 School Years

36. Student's teachers for the 2020-21 school year were provided consultation with and training by the CCIU and a District speech/language therapist regarding Student's AAC device prior beginning of that school year. (N.T. 983, 1021, 1113-16, 1725, 1866-67.)
37. The District occupational therapist assigned to Student consulted with staff over the 2020-21 and 2021-22 school years, including regular meetings of Student's professionals. (N.T. 1587-88.)

38. The IU feeding specialist provided training to District staff before Student returned to school in person for lunch during the 2020-21 school year. (N.T. 874-75)
39. An IU professional from the IU, a properly credentialed speech/language pathologist with a specialty in AAC, provided training to and consultation with District staff regarding Student since the fall of 2020. (N.T. (25622) at 36-42; S-119; S-121.)
40. Student's teachers for the 2021-22 school year were provided consultation with and training by the CCIU and a District speech/language therapist regarding Student's AAC device prior beginning start of that school year. (N.T. 15-18, 104-05, 1196-98, 1204-06, 1236-37.)
41. Student's speech/language pathologists at the District during the 2020-21 and 2021-22 school years were trained in, and used DTTC with, Student during therapy. They also met and consulted with staff on a regular basis. (NT. 1855-58, 1906-08, 1975, 2004-08, 2011-12, 2065-69.)
42. Student's team met frequently and regularly during the 2020-21 and 2021-22 school years to discuss Student's programming. (N.T. *passim* and at 16-17, 72, 1204-05.)

Consultation and Communication 2020-21 and 2021-22

School Years

43. The District provided regular consultations from related service providers throughout the time period in question and the school team met frequently and regularly. (N.T. *passim* including at 1770-73, 1778; S-91; S-165.)

44. The parties engaged in ongoing communication over the 2020-21 and 2021-22 school years. (See, e.g., P-83 through P-92, P-99, P-107 through P-110, P-146, P-166, P-179; S-32; S-33; S-36; S-37; S-59; S-70; S-84; S-85; S-87; S-88.)

2020-21 School Year

45. Student's IEP team met in August 2020 to plan for the delivery of educational and related services as schools began to re-open,¹⁰ providing for fully remote, hybrid, and transitional models of instruction. Student would continue to have PCA support either remotely or, when in person, in the school setting. Opportunities for Student to visit the school building before returning was also included. At that time, Student's articulation goal was removed and the expectations for the target word production goal were increased, with the District incorporating a 17-point scale developed by one of the Parents' private speech/language pathologists. Student would participate in regular education except during direct language arts and mathematics instruction, social skills, and the therapy sessions in the program of learning support at a supplemental level. (S-12.)
46. The Parents did not approve the August 2020 NOREP. (S-14.)

Fall 2020

47. The District began the 2020-21 school year remotely for all students. In September 2020, students receiving special education services were able to return to school. (N.T. 968.)

¹⁰ 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 July 1, 2022).

48. The Parents asked that the District provide a PCA in the home when Student was provided remote services, but that request was not granted. One of the Parents or a behavioral therapist was present during remote instruction and related services, and sometimes both would be, assisting Student. (N.T. 1069, 1883-85.)
49. A private pediatrician provided recommendations for Student in September 2020 for sensory stimulation throughout the day at regular intervals through exposure to visual, background sound (music) tactile, olfactory, oral, and movement stimulation. A second pediatrician also at that time recommended ice chips for sensory and hydration needs. Other physician recommendations included skin care, supervision in the bathroom, hydration, and care of the [medical device]. (P-17; P-18; P-19.)
50. Student began the 2020-21 school year remotely through October 2020. When remote, Student participated in morning meeting and some mathematics instruction with the regular education class. Science and social studies were also remote in regular education but asynchronous. Related services were provided remotely with supports provided to the Parents including materials. (N.T. 964-65, 1000-03, 1103-04, 1597-1603, 1881-85, 1901.)
51. The Parents did not return Student to school until October because they remained concerned about Student's safety and nutrition, and requested a feeding plan, sensory plan, and safety plan. They again requested a PCA in the home. Student returned for half days in the morning and would go home for lunch and the afternoon. (N.T. 1458-59; P-37.)
52. An IU feeding specialist who was initially consulted in February 2020 conducted a remote feeding evaluation in September 2020. (N.T. 848-49, 851, 861; S-17.)

53. At the time of the feeding evaluation, the Parents were concerned about Student's nutritional needs being met at school, as well as biting and chewing skills and independence with feeding. The specialist recommended a feeding plan with consultation by a speech/language pathologist. (N.T. 849, 853, 904; S-17.)
54. Another IEP meeting convened in late September 2020. Parent concerns at that time included Student understanding the daily schedule and making transitions; Student understanding expectations from different individuals during the day; inconsistent reinforcement; and Student's needs for sensory activities, a sensory diet, posture stability, and flexibility in duration of sessions. (S-21; S-22; S-23;)
55. The Parents approved the October 2020 NOREP after the September meeting, but noted concerns remaining to be addressed, specifically Student spending time in the regular education classroom and using the AAC device with peers. That meeting convened later in October 2020. (S-26; S-34.)
56. When Student returned to school for half days in October 2020, Student continued to attend morning meeting in the regular education classroom and was remote for a portion of mathematics instruction, with science and social studies still asynchronous and conducted remotely. At the request of the Parents, Student's special education instruction and related services were provided during the half day mornings at school; however, at times, not all services could be provided in the morning so reading instruction was decreased, and some remote afternoon sessions were offered to the family. Student's reading and mathematics instruction was either one-on-one with the special education teacher or in a small group of two students. (N.T. 968-71, 977-79, 999, 1008-09, 1012-13, 1103-06, 1134-35.)

57. After Student returned to school in person, Student had access to various sensory activities and items both in the regular and special education classrooms. Some of the items/activities that Student preferred were too large to be moved, and those were generally located in the special education classroom. (N.T. 1649-51, 1714-15.)
58. When Student returned to in-person instruction, the special education teacher worked with Student with the AAC device, which was an iPad with LAMP software installed; however, the ordered key guard did not fit the device. The regular education teacher and PCA also used the AAC device with Student. (N.T. 973-75, 978, 1111-12, 1940-41.)
59. The special education teacher during the 2020-21 school year modeled using Student's AAC device as part of the ALS, as did related service providers. (N.T. 981-83, 1725.)
60. A feeding plan was developed for Student in October 2020 in order to ensure that nutrition and hydration needs were met upon return to school in person. There were safety elements to the feeding plan, which also considered sensory, behavioral, and motor needs. The feeding specialist's goals for the plan were to devise a feeding routine, wean Student from technology while feeding, and gain independence. As specific elements, the plan described a sensory activity before feeding, appropriate positioning, an environment without distractions, a vegetarian diet of food provided by the Parents, and procedures for bite size, feeding by an adult and Student's self, supervision, and prompting. A number of strategies for promoting the feeding experience was also included. (N.T. 853-57, 861-63, 865-66; 1621; S-37.)
61. Student's IEP was revised again following a November 2020 meeting. At that time, two new occupational therapy goals were added addressing attention/regulation and use of a feeding utensil, and the existing goals

in that area were slightly revised. Group occupational therapy was removed because that service was not effective. The feeding plan was also incorporated into the IEP. (N.T. 1634; S-37; S-38; S-41; S-42.)

62. The Parents did approve the NOREP for the November 2020 IEP, but also requested another meeting to discuss a strict sensory diet and use of the AAC device. (P-84; S-48.)
63. Progress monitoring reporting in November 2020 essentially reflected maintenance of baselines due to Student's recent return to half-day in-person instruction and limited exposure to instruction and services through remote programming. (S-45; S-46; S-47.)
64. Student resumed full days of in-person instruction in late December 2020, three days each week, with half days on the remaining two. Student's special education programming remained consistent from before. (N.T. 975; S-129 at 8.)
65. Because of the pandemic, students were not able to have lunch in the cafeteria during the 2020-21 school year. Student and peers ate lunch in the regular education classroom. (N.T. 1148.)
66. An IEP meeting convened in December 2020. The team discussed the strict sensory diet and its impact on instructional time; current progress and functioning across domains were also reported. Parental concerns at that time were those noted on the most recent NOREP, as well as Student's use of non-verbal communication, ALS, a prompt hierarchy for vocabulary using the device, wait time for responses, and facilitating use of vocabulary throughout the day at school and at home. The program modifications/SDI section of the IEP was revised to provide for a strict sensory plan during direct instruction in language arts and mathematics; ALS; a prompt hierarchy for fading prompts; use of targeted icons across settings; and target words for use throughout the day. The

Parents approved the NOREP for this IEP. (N.T. 1617-20; S-51; S-52; S-56.)

67. An FBA was conducted in December 2020. The identified target behaviors were laughing, eloping, crying, screaming, hitting, standing on desk or tabletop, verbal refusal, throwing and grabbing objects, dropping to the floor, head down on desk, and leaning on staff. (S-54; S-61.)
68. Following identification of the behaviors of concern, including staff and Parent interviews, multiple observations were conducted by the BCBA for the FBA over a period of approximately 30 days. The presentation of a demand was an antecedent for a majority of the behaviors observed during data collection. (N.T. 1751, 1755; S-61.)
69. The hypothesized functions of the problem behaviors were determined to be positive reinforcement/attention and negative reinforcement/escape. A Positive Behavior Support Plan (PBSP) was recommended with a number of suggestions for its content. (S-61.)
70. A number of schedule changes were made as Student gradually increased the time in person at school. (P-60; 60; P-61; S-13.)

Spring 2021

71. Additional IEP meetings convened in January and February 2021. The team agreed that Student would begin to participate more in regular education and resume full time in person instruction. They also discussed the PBSP, functional communication training, a total communication approach, modifying the sensory diet, toileting, feeding, and safety. The IEP was updated to reflect the FBA and current performance. A new goal for functional communication training was added, and the social skills goal was modified to reflect independent functional play because Student was not exhibiting that skill. Other

slight revisions were made including removal of the strict sensory diet in favor of providing for more naturalistic opportunities; and the PBSP was finalized with the functional communication goal. (N.T. 1653-57; S-73; S-74; S-75.)

72. Student returned to full days in person, five days each week, in early February 2021. (N.T. 1101-02; S-129 at 8.)
73. The Parents returned the February 2021 NOREP agreeing only in part, and requested another meeting. Specifically, the Parents disagreed with the functional communication training; the PBSP; direct language arts and mathematics instruction outside of the regular education classroom; the revision of the social skills (play) goal; and a recommendation for Extended School Year (ESY) services. (S-76; S-77; S-78.)
74. Progress monitoring reports in February 2021 reflected incremental progress on occupational therapy, physical therapy, early mathematics, and speech/language goals. Student did not exhibit progress on the early literacy (letter identification) and social skills goals. (S-80; S-81; S-82.)
75. A Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) was administered over the spring of 2021. Results indicated that Student earned 37.5 points of a possible 170, reflecting that Student was at a Level 1 on that instrument. (S-129 at 16-22.)
76. Student was provided direct reading and mathematics instruction with the special education teacher over the 2020-21 school year. Student's reading program included a Wilson Reading® based curriculum and another phonemic-awareness program. The instruction was provided remotely one-on-one until Student returned to school. (N.T. 960-61, 963-66, 970-71, 1045.)

77. When Student returned to school in person, Student participated in regular education for morning meeting, whole group reading, some mathematics instruction, science, and social studies as well as special classes. Student's special education teacher was frequently in that classroom. (N.T. 1033-34, 1060-61, 1087.)
78. Student's regular and special education teacher collaborated to adapt and modify lessons for Student in the regular classroom, focusing on core vocabulary and Student's specific needs as they related to the lessons and activities. (N.T. 1023-27, 1061-62, 1106-10, 1131.)
79. Student had social skills instruction during the 2020-21 school year in a small group. (N.T. 979-81.)
80. Student experienced a number of toileting accidents on a weekly basis after returning to in-person instruction during the 2020-21 school year. Student did not exhibit independence with that function in the school environment, which the Parents reported they observed at home. The District tried various strategies to address that function. (N.T. 1018-19, 1603-05.)
81. The restroom that Student used was not large enough for an adult to be physically present inside with Student. The IEP team including the Parents agreed that an adult could be just outside with the door partially open, rather than the option of using a different restroom some distance away on another floor of the building. (N.T. 1083-85, 1691-92.)
82. Student had opportunities to interact with typical peers during the 2020-21 school year but required prompting and did not do so independently. (N.T. 1116-20, 1146-47.)
83. Student was not independent with the AAC device during the 2020-21 school year. (N.T. 1120.)
84. Schedule changes were again made in the spring of 2021. (S-71; S-95.)

85. By the end of the 2020-21 school year, progress monitoring reports reflected that Student made progress compared to February 2021 on the early reading (letter identification) goal but not quite attaining mastery; incremental progress on the early mathematics, occupational therapy, and most speech/language goals, and on one physical therapy goal. Student did not make progress on the social skills (cooperative play) goal or one physical therapy goal. (P-51.)
86. Student was frequently absent over the 2020-21 school year, usually for illness or medical reasons. (N.T. 1527-28; S-104.)

District AAC Evaluation Spring 2021

87. In April 2021, the District sought and the Parents provided consent to conduct another AAC evaluation, and for communication between the District and outside related service providers. (S-105; S-106.)
88. Student did not have a key guard for the District's AAC Assessment, but that factor did not impact the results or recommendations for Student. Other accessories for the personal AAC device were not necessary for that evaluation. (N.T. (25622) at 66-68, 75, 78, 83.)
89. The IU AAC evaluator observed Student in the regular and special education classrooms. Student's average length of utterances was slightly higher during those observations using verbal speech than using the device. (N.T. (25622) at 53-54; S-119 at 1-2.)
90. The IU AAC evaluator administered two specific instruments for the AAC Assessment, and also completed an AAC Profile using information obtained from the Parents, teacher, and Student's speech/language pathologist. (N.T. (25622) at 51-53, 117-18; S-119.)
91. The Test of Aided-Communication Symbol Performance (a low tech, paper instrument that is evidence-based) was administered for the District's AAC Assessment to evaluate skills related to the use of

symbols, primarily for design of a device. During that assessment, Student exhibited inattention and non-compliance, and generally did not use a single finger in isolation to select a picture symbol. Student had difficulty with categorization with that measure. (N.T. (25622) at 63-66, 84; S-119 at 2-4, 12-13.)

92. The AAC Genie, an informal assessment, was also administered for the District's AAC Assessment in order to evaluate four skill areas: visual identification, visual discrimination, vocabulary knowledge, and picture description. (N.T. (25622) at 65-66, 83-84; S-119 at 4-6, 12-13.)
93. The results of the AAC Profile in the District's AAC Assessment reflected that Student's communicative competency with the device was at a skill set level 2, that of an early AAC communicator with emerging skills across all four areas of learning (operational, linguistic, social, and strategic). The Parents' input suggested that Student was demonstrating some emerging skills at level 3. (N.T. (25622) at 57-58; S-119 at 6-12.)
94. The IU AAC evaluator ascertained Student's present levels related to AAC, and made a number of recommendations for Student, including use of a key guard with the AAC device configuration, a focus on development of vocabulary and word association, modeling of language, and acceptance of Student's chosen modality of communication when intelligible and support of the AAC device when verbalization was unintelligible. (N.T. (25622) at 76; S-119.)

2021-22 School Year

95. The Parents elected to retain Student [redacted] for the 2021-22 school year. (S-124.)¹¹

Fall 2021

96. The District updated its feeding evaluation and in August 2021 following a discussion with the Parents. The feeding plan anticipated that Student would eat lunch in the classroom at the start of the 2021-22 school year with a possible transition to the cafeteria. (S-127.)
97. An IEP meeting convened in August 2021. Parent concerns at that time were toileting; sensory regulation; a lack of a communication plan; use of the AAC device; transitions throughout the school building; direct language arts and mathematics instruction in the regular education setting and more time there in general; their request for a reading evaluation; fine motor (writing) skills; and safety. (N.T. 31-32, 51; P-142; S-128; S-129 at 34-35; S-131.)
98. Needs identified in the August 2021 IEP were for early academic skills (language arts and mathematics); social skills/peer interactions; transitions; and occupational, physical, and speech/language weaknesses. (S-129.)
99. Annual goals in the August 2021 IEP addressed the areas of early language arts (letter identification, sight word recognition); early mathematics (one-to-one correspondence); occupational therapy (fine motor skills, visual motor integration, strength and coordination, self care, fine motor coordination and planning); physical therapy (balance, gross motor skills, eye-hand coordination); speech/language therapy

¹¹ Act of Jun. 30, 2021, P.L. 353, No. 66, 24 P.S. § 13-1383, permitted this election for parents of school-age children with disabilities due to the COVID-19 pandemic, and was signed by Governor Wolf on June 30, 2021.

(receptive language, expressive/pragmatic language (2-4 word phrases, verbal interactions); social skills (independent functional play); and behavior (following directions and transitioning, functional communication training). Additional goals addressed motor imitation and listener responding. (S-129.)

100. Program modifications/SDI in the August 2021 IEP mirrored those from August 2020 supplemented by additional related service provider and behavior supports across school environments. The related services were maintained as before. Student's program remained learning support at a supplemental level with participation in regular education except for direct language arts and mathematics instruction, social skills, and related services. (S-129.)
101. The PBSP was revised in August 2021 to add a goal for following directions and transitioning in school. (S-130.)
102. The Parents did not approve the NOREP accompanying the August 2021 IEP. (S-133.)
103. Student used the AAC device from home at school during the 2021-22 school year except when it was undergoing repairs, at which time the District device with LAMP was used. (N.T. 2024-25.)
104. Another IEP meeting convened in September 2021. The IEP was revised slightly, with the functional communication training goal utilizing a total communication approach. A new item of SDI provided for Student to use the AAC device from home with a District device as a backup. The Parents did not approve the September 2021 NOREP. (S-135; S-136.)
105. A new feeding plan was developed in October 2021. This plan added fading of technology when eating at school and specified the number of calories Student typically consumed per day, and a few revisions to the plan content were made. (S-137.)

106. Student began the 2020-21 school year participating in regular education for morning meeting, whole class reading, social studies, science, recess, and specials. Student's individual reading and mathematics instruction was with the special education. (N.T. 61-62, 65-68, 113, 1202-03, 1211, 1239, 1261-62.)
107. At the start of the 2021-22 school year, Student was not independent with toileting skills at school and required monitoring by an adult. Student began to experience more toileting accidents in approximately November 2021 and missed instructional time as a result. (N.T. 38-40, 68-69, 93, 1226-27.)
108. Progress monitoring reports in November 2021 reflected that Student made incremental progress on occupational therapy, physical therapy, speech/language, early mathematics, and one early reading (sight word) goal. Student did not make progress on the functional communication training (manding), motor imitation, and listener responding goals, or the social skills (functional play) goal. Student remained below baseline on one early reading (letter identification) goal. (P-52.)

Private AAC Evaluation Fall 2021

109. The Parents obtained a private AAC evaluation in the fall of 2021 by an individual well known in the field of AAC and properly credentialed and experienced in the field of speech/language pathology. (N.T. (25622) at 202; S-145.)
110. The private evaluators conducted assessments of Student, including the AAC Profile. Results from another instrument could not be scored. The AAC Profile results also reflected that Student was at skill set level 2, with some language skills at skill set level 3 developing. (S-145.)
111. Student's accuracy with various AAC devices was assessed both with and without the key guard for the private AAC evaluation. Student

demonstrated approximately 70% accuracy with the guard and 36% without; less prompting was also required with the key guard. (S-145 at 6-7.)

112. The private AAC evaluation provided data on Student's use of different devices both with and without a key guard. Student benefitted from use of the key guard, and the use of different devices with a touch screen was not difficult for Student, who is accustomed to using a tablet and is willing to do so. (N.T. (25622) at 247.)
113. The private evaluators made several recommendations for Student, including opportunities for using the personal device, revision of the IEP to review current functioning and goals/objectives, and consistent use of the device in developing literacy. Student produced longer utterances using the device than verbally for this evaluation. (N.T. (25622) at 233; S-145 at 12.)
114. The Parents' private AAC evaluation is comparable to that of the IU evaluator, but the private evaluation is more detailed, including exploring AAC devices and the possibility of a different device recommendation in the future. The AAC Profiles in each were very similar, however, and both evaluations supported a multi-modal communication approach. (N.T. (25622) at 221-22; S-119; S-145.)

2021 Reevaluation

115. The District sought permission to reevaluate Student in the fall of 2021, and the Parents provided consent. (S-142.)
116. The District issued its Reevaluation Report (RR) in December 2021.¹² Parent input at that time into the RR included updated medical information, and the family's perceptions of strengths (including reading,

¹² An updated RR issued in January 2022 to include medical necessity information from Student's treating physicians. (S-152.)

visual and motor memory, receptive language, interest in music, improved vocabulary) and needs/concerns (nutrition, toileting and other self-care, sensory regulation, speech deficits, one-on-one support, distractibility, social skills, pre-academic skills, and communication). (S-146 at 2-7.)

117. The 2021 RR incorporated results of previous evaluations including the private AAC evaluation. (S-146.)
118. Extensive input from teachers and other service providers was included in the 2021 RR. The school psychologist also conducted a classroom observation. (S-146.)
119. On measures of cognitive ability (including the Comprehensive Test of Nonverbal Intelligence, Second Edition and nonverbal portions of the Stanford-Binet Intelligence Scales, Fifth Edition), Student earned a nonverbal IQ standard score of 44, below the first percentile. Student exhibited difficulty with administration of those instruments. (S-146 at 34-36.)
120. Assessment of achievement for the 2021 RR (Kaufman Test of Educational Achievement, Third Edition), Student attained scores below the first percentile on subtests administered. (S-146 at 36.)
121. Assessment of speech/language skills for the 2021 RR was extensive, and included observations and multiple instruments to evaluate Student's receptive, expressive, and pragmatic language, as well as speech production. Areas of strength (including following one-step directions, some spontaneous speech for needs and protests) and deficits (including improved speech production, DTTC, the AAC, and development of functional communication) were indicated in all of these areas and continuation of services was recommended. (S-146 at 40-51.)

122. Student's oral motor and feeding skills were also assessed for the 2021 RR. Recommendation was made for continuation of a feeding plan with consultative services. (S-146 at 60-62.)
123. Assessment of physical therapy-related skills for the 2021 RR noted low tone, and continued needs to improve balance, large motor skills, and ball skills. (S-126 at 51-53.)
124. In the area of occupational therapy for the 2021 RR, evaluation included observations, questionnaires, and standardized assessments. Results reflected ongoing needs with respect to fine motor skills, visual motor integration and handwriting skills, sensory processing and self-regulation, upper extremity strength, and self-care skills. (S-146 at 53-58.)
125. Behavioral functioning was assessed through rating scales for the 2021 RR (Behavioral Assessment System for Children – Third Edition). The Parents' ratings were overall less concerning than those of the teacher. The Parents endorsed at-risk concerns with atypicality, leadership, functional communication, and activities of daily living. The teacher endorsed clinically significant concerns with attention problems, learning problems, school problems, atypicality, withdrawal, leadership, and functional communication; with additional at-risk concerns with hyperactivity, social skills, and study skills. (S-146 at 36-38.)
126. On assessment of adaptive behavior, also through rating scales, the teacher's results overall were lower than that of the Parents. However, both raters reflected low adaptive functioning across domains (communication, daily living skills, and socialization) and the composite. (S-146 at 38-40.)
127. A brief update to the VB-MAPP for the 2021 RR indicated that Student was beginning to demonstrate a few emerging skills of those assessed

that were not exhibited in spring 2021, but Student remained a level one learner. (S-146 at 58-59.)

128. The 2021 RR identified Student as eligible for special education on the bases of Intellectual Disability and Speech/Language Impairment. Needs were noted with respect to pre-academic and functional academic skills, social skills, adaptive skills, and attention; and occupational, physical, and speech/language skills. Recommendations to the IEP team were extensive. (S-146 at 32-33, 63-66, 69.)
129. A meeting convened to review the 2021 RR. (S-150.)

Spring 2022

130. A new IEP was developed in January 2022. That IEP summarized and incorporated the updated information from the 2021 RR with additional updates on functioning and performance. (N.T. 53-54; S-153.)
131. The January 2022 IEP reflected a number of areas of educational and functional strengths and needs. The latter were: one-on-one correspondence; pre-reading skills, attention and self-regulation in the classroom, adaptive behavior support, play skills; occupational therapy (fine motor skills, core and upper extremity strength, visual-motor integration, functional handwriting, self-care, and sensory processing and self-regulation skills); physical therapy (balance, large motor and ball skills); and speech/language therapy (motor speech production, receptive and expressive language, pragmatic language, use of AAC device, and feeding skills). (S-153 at 72-73.)
132. A number of the annual goals in the August 2021 IEP were maintained in the January 2022 IEP. The January 2022 IEP addressed the areas of early language arts (book handling, word awareness/recognition, phonological awareness); early mathematics (one-to-one correspondence); occupational therapy (fine motor skills, visual motor

integration, strength and coordination, self-care, fine motor coordination); physical therapy (balance, gross motor skills, eye-hand coordination); speech/language therapy (motor speech production, receptive language, expressive/pragmatic language (verb phrases, greeting others); social skills (independent functional play); motor imitation and listener responding; and behavior (following directions and transitioning, functional communication training using a total communication approach). (S-153.)

133. Program modifications in the January 2022 elaborated on and included details for physical, occupational, and speech/language therapy, adding interoception support as part of sensory regulation. In addition to the previous elements in the August 2021 IEP, additional strategies for support in the regular education environment and development of early academic skills were also incorporated. Student's PBSP continued for this IEP with the addition of a total communication approach for the functional communication training goal; the play skills goal was removed; and the program modifications/SDI section incorporated more information from other parts of the PBSP. (S-153 at 104-124; S-154.)
134. The related services in the most recent IEP remained in the January 2022 IEP. Student's program remained one of learning support at a supplemental level, with Student not participating in regular education for direct academic instruction, social skills, and related services. (S-153 at 124-25, 130.)
135. The Parents did not approve the NOREP for the January 2022 IEP, and provided a supplement to the 2021 RR. The supplement added various resources and provided their perspective on some of the content of the RR including their experts' input, while also asking questions about portions of the document. (P-171; S-155; S-156.)

136. The District retained an inclusion expert¹³ who provided training to District staff on essentialization beginning in the summer of 2021. A number of District staff were also further trained in the fall of 2021 in working specifically with Student using approaches such as Dynamic Learning Maps. (N.T. 1299-1301, 1363-64; S-194.)
137. Another feeding evaluation was conducted by the IU feeding therapist in November 2021. (N.T. 884-86.)
138. During the 2021-22 school year, District professionals used a Total Communication Approach with Student, understanding that they should accept all manner of communication from Student. For Student's verbal communication, word approximations were accepted. (N.T. 17, 75, 1272-73, 1859-60, 1832-33.)
139. During the 2021-22 school year, District professionals provided ALS for Student by modeling the motor planning sequence necessary for an appropriate and specific phrase on the AAC device, in addition to providing verbal modeling. Student would also have the opportunity to use the same sequence with the device. This procedure was also used for Student learning letter sounds and participating in regular education. (N.T. 18-20, 29-30, 49-50, 63-65, 1205-06, 1237-38, 1861-62.)
140. During the 2021-22 school year, Student required prompting to use the AAC device at school and did not generally so do independently. Student did at times use the device with peers with significant prompting, and would use hand gestures with peers, but did not play with peers even with prompting. Student did continue to exhibit an interest in peers. (N.T. 44-45, 1203-04, 1207-11, 1218-19, 1266-67.)

¹³ This expert has colleagues who also participated in training and collaboration. For ease of discussion, the District's inclusion expert may refer to the individual who testified at the hearing or her colleagues. (N.T. 1299, 1301-02.)

141. Student participated in small group activities in the regular education classroom during the 2021-22 school year but required prompting to remain in the area and on task. (N.T. 1218-19, 1249-50.)
142. During the 2021-22 school year, Student's teacher provided procedures that were based on Applied Behavior Analysis (ABA) principles and specifically Verbal Behavior (VB). Student's teacher was well experienced with VB and is a Board Certified Behavior Analyst (BCBA). (N.T. 20-26, 45-46.)
143. During the 2021-22 school year, District professionals worked together to identify essential skills in the content for regular education classes and to modify materials and expectations for Student. In that process, the team reviews regular education lessons in advance. Student was also provided pre-teaching the content. (N.T. 48-49, 76-77, 79-80, 1213-16.)
144. During the 2021-22 school year, Student had scheduled sensory breaks as well as natural opportunities to obtain sensory input. (N.T. 50-51.)
145. Student was frequently absent over the 2021-22 school year, usually for illness or medical reasons. (N.T. 1527-28; S-188.)
146. During the 2021-22 school year, Student had lunch in the special education classroom with one or two peers and an adult. Toward the end of the school year, Student began going to the cafeteria, arriving earlier than peers and seated near but not at their tables to minimize distractions. (N.T. 60-61, 917-23.)
147. The Parents obtained an independent evaluation of Student in the spring of 2022 by a university professor with a doctoral degree in special education and several years of prior experience in public schools. She issued a report following two school observations. She was critical of experience in the regular education setting as not meaningful or

consistent with current inclusionary practices, making recommendations that the District refer to Dynamic Learning Maps and essentialize Student's learning to focus on major concepts. She also offered that Student's time in regular education should be increased to some unspecified degree. (P-119; P-205.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

The burden of proof generally is viewed as comprising two elements: the burden of production and the burden of persuasion. The latter, the burden of persuasion, lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who filed the Complaint in this administrative forum. However, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, who assume the role of fact-finder in a case, are also charged with the responsibility of making credibility determinations of the witnesses who testify in the proceedings. 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 based on his or her recollection and perspective; she did not discern any witness to intentionally deceive. The weight accorded the evidence was not equally placed, however. There was significant evidence provided by professionals who may be considered to be experts in their fields; their opinions and the

bases therefor were based on each individual's education, training, experience, and perspective; and, the various opinions were not wholly consistent even among professionals for one party or the other. This is understandable given Student's very complex presentation, and does not mean that various recommendations, even those that were somewhat contradictory in nature, were unreasonably made or followed. This decision recognizes that the unique constellation of Student's strengths and needs understandably led to some interventions and approaches that ultimately were not as successful as anticipated. The testimony of the Parents' private speech/language pathologists and occupational therapist was entitled to significant weight as discussed below. And, the Parents' own perceptions are clearly based on the type of intimate experience unique to families, and their knowledge of Student's strengths and needs provided useful insight into their perspective and the basis for their concerns. Nonetheless, this decision addresses Student's programming based on presentation and functioning at school which are somewhat different than at home.

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.

It should be noted here that this hearing officer granted the Parents' request for additional observations by their expert witnesses based in part on consideration of cases such as *Oberti v. Board of Education*, 995 F.2d 1204, 1219 (3d Cir. 1993)(recognizing that, "[i]n practical terms, the school has an advantage when a dispute arises under the [IDEA]: the school has better access to the relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents.")

Since *Oberti*, federal district courts have upheld hearing officer determinations that accorded limited weight to the testimony of experts who had not conducted observations. See, e.g., *J.E. v. Boyertown Area School District*, 834 F. Supp. 2d 240, 251 (E.D. Pa. 2011); *L.G. v. Wissahickon School District*, 2011 U.S. Dist. LEXIS 476 at *15, 2011 WL 13572 (E.D. Pa. Jan. 4, 2011); accord *J.H. v. Henrico County School Board*, 395 F.3d 185 (4th Cir. 2005). This hearing officer does not, however, assume that any single observation of Student at school is necessarily representative of Student's typical school day or how District professionals implemented the IEP and interacted with Student over the time period in question. (See P-7, P-8, P-9, P-10, P-32, P-33, P-34, P-205.) However, these observations as well as those of the Parents did help to inform the hearing officer and District regarding the Parents' concerns and the reasons therefor.

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.” *Andrew 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.

General IDEA Principles: Least Restrictive Environment

The IDEA contains a crucial mandate that eligible students are to be educated in the “least restrictive environment” (LRE) that also satisfies meaningful educational benefit standards.

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such

that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.S. § 1412(a)(5)(A); *see also* *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993).

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

The U.S. Supreme Court's *Endrew* decision further recognized that educational benefit for a child with a disability is wholly dependent on the individual child, who should be challenged by his or her educational program. *Endrew, supra*, 137 S. Ct. at 999. Also crucial to the LRE analysis is a recognition that its principles "do not contemplate an all-or-nothing educational system" of regular education versus special education. *Oberti, supra*, 995 F.2d at 1218 (*quoting Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1050 (5th Cir. 1989)). Rather, 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. However, the failure to adhere to LRE principles does not automatically mean that that the student has been denied FAPE. *A.G. v.*

Wissahickon School District, 374 Fed. App'x 330 (3d Cir. 2010)(citations omitted). The issues of FAPE and LRE are related, but they are discrete concepts.

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).

General Section 504 and ADA Principles

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

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d

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

The Parents' Claims

The first issue is whether the District's programming for Student over the 2020-21 and 2021-22 school year was appropriate. Throughout the hearing, this claim focused on two discrete areas (see Parent Closing at 2): Student's speech/language development and particularly use of the AAC device; and sensory regulation. These shall be discussed separately, and in reverse order for ease of discussion. It should be noted, however, that these two facets of Student's disability are manifested across the school day and impact all aspects of Student's programming.

In general, the District's IEPs have been drafted based on known information about Student's strengths and needs, and implemented as approved by the Parents. Student has made incremental but gradual progress over time, which must be gauged within the context of Student's unique challenges including medical and educational needs as well as absences. That is not to say that the programming provided was ideal, particularly in light of the COVID-19 pandemic, but the standards set forth above do not contemplate perfection. Moreover, it cannot be suggested that the Parents were denied the opportunity to participate meaningfully in any

programming decisions for Student. With this overview in mind, the specific claims of the Parents shall be addressed.

Both the District and private occupational therapists have a solid understanding of Student's sensory regulation deficits (N.T. 775-80, 1580-86). Both also appeared to agree that one observing Student, even an experienced occupational therapist, cannot necessarily recognize whether Student is or is not regulated and engaged (N.T. 786-88, 1707-08). The Parents, who understand Student best, certainly cannot be with Student all day every day and point out when Student is dysregulated. However, this consideration ties in directly to the FBA conducted by the District BCBA. Her education, training, and experience depends upon observable behavior, which obviously impacted her assessment of Student's target behaviors and their relationship to Student's sensory regulation (N.T. 1768-70). From a behavior analysis perspective, one cannot fault her process or expertise. Nonetheless, that analysis of Student's behaviors was dependent upon whether an opportunity for sensory input was provided before a demand (*id.*), but without any full scrutiny of whether the sensory activity was successful in regulating Student. This determination is a critical consideration given Student's unique presentation with sensory dysregulation at times across environments and throughout the day that may not be observable.

The testimony of the Parents' private occupational therapist was particularly convincing and logical with respect to how Student's sensory regulation should be addressed in the school environment (Finding of Fact (FF) 9). The attached order will reflect those recommendations, and the District occupational therapist is clearly qualified to conduct the crucial monitoring that is necessary for Student's sensory regulation. Indeed, the recommended monitoring is little more than a formalization of the method the District occupational therapist was already using to track Student's response to sensory activities, but will be in an understandable form available to other

members of the IEP team. The recommendation of the District occupational therapist for an adapted curriculum addressing interoception (N.T. 1668-71), another important and realistic addition to Student's programming, shall also be incorporated.

The second of the two major facets to address is communication, including the use of the AAC device and related needs for ALS. The District has provided substantive and essential training for staff, who also meet regularly to consult on and discuss Student's various needs, including communication. The major recommendations of the private and District speech/language pathologists have been implemented throughout the time period in question, including DTTC with distributed practice, ALS, and a small class setting with intensive focus on language. The Parents did provide evidence of their concerns that use of the device at school is inadequately supported (N.T. 1392-1414, 1507-17). The record does suggest that additional training would benefit District staff to implement all of the steps of ALS, including Student having ongoing actual opportunities to practice modeled sequences on the AAC device. This is particularly important in light of the uncertainty at times of whether Student is attending to the demonstration or not, and while the opportunities have been present, Student's responses to the modeling are far from evident, which is vital to understanding the efficacy of the modeling.

It merits mention here the District BCBA's concession that she did not have a complete understanding of ALS to understand how, or why, functional communication training would complement ALS and/or how it might be beneficial to Student (N.T. 1830-31). Thus, that particular testimony is not persuasive evidence for maintaining that provision in Student's IEP going forward. This hearing officer cannot conclude that the functional communication training is appropriate for Student as part of the existing and developing language-immersed programming at school.

Through another element of Student's speech/language programming, Student has been exposed to verbal behavior instruction and techniques at school and currently has several IEP goals for manding, motor imitation, and listener response. This approach was a reasonable one for the District to include, implementing elements of ABA that teach foundational language skills, based on information known at the time. Nonetheless, the testimony of the two private speech/language pathologists was quite persuasive that, while verbal behavior elements may be appropriate, Student requires much more intensive intervention in order to acquire meaningful and functional communication (N.T. 270-72, 488-89). Student's limited acquisition of VP-MAPP skills is further reason to eliminate those goals in favor of more generalized experiences. The IEP team shall be directed to remove the verbal behavior goals from Student's IEP and, consistent with recommendations (*id.*), may incorporate ongoing practice of those skills throughout the school day, including in the regular education setting.

There is one related but striking element that has been deficient in Student's programming as implemented, namely the facilitation of peer interactions and communication. The cooperative play social skills goal was removed because Student was not demonstrating functional play skills, but the record contains little evidence on what steps the team took to teach Student to engage with typical peers and actively facilitate those interactions. It is not enough to simply note that Student appeared to prefer independent activities to cooperative or even parallel play with peers. Student clearly is interested in and observes peers, who provide ideal models for (among other things) social behavior and engagement. But Student cannot be expected to acquire or pick up social skills merely by observation, in part because of Student's dependence on the AAC device (FF 7). Student requires direct engagement with peers prompted and facilitated by adults until those

interactions become more natural for Student and Student's peers, which shall be added to the IEP pursuant to the attached order.

A last critical and related communication need requiring more effective implementation is distributed practice of mastered and identified target words that does not permit incorrect pronunciation of those specified, so that Student can maintain mastery (N.T. 538-40, 549-52). Although the total communication approach has been recommended and is, in this hearing officer's view, appropriate for Student for most expressive language, there must be an exception made for current target words. It is also clear that appropriate monitoring of Student's target word use and practice across environments should be conducted through a tool such as a checklist maintained in the school and home settings (N.T. 490-91). The additional recommendation for training for the family so that the targets can be reinforced appropriately at home (N.T. 493) is also warranted. The attached order shall also provide for these.

The next, and related, issue relates to principles of LRE during the relevant time period. The Parents contend that Student has not been included with typical peers to the maximum extent appropriate, and that the District has failed to adequately consider Student's participation in regular education with supplementary aids and services. They rely in significant part on the opinion of their inclusion expert who, while well qualified, quite experienced in inclusionary practices, and certainly credible, provided rather general and broad recommendations that were not based on Student's unique needs (N.T. 695-99). Specifically, she opined that Student should not be removed from the regular education classroom for sensory activities, feeding, and toileting (*id.*), without consideration of the circumstances presented by the case for the location of sensory equipment and the restroom. Her opinion was also undermined by the cogent and more knowledgeable understanding of the IU feeding specialist who explained the focus on Student's individual

nutritional needs and requirement for minimization of distractions and social opportunities during feeding at school (N.T. 857-58, 865-66, 912, 917-23). In any event, Parent witnesses in general did recommend that Student be included for morning meeting, whole group reading to the class, and specials in the regular education environment (see, e.g., N.T. 377-78, 415-16, 693, 697, 715), as has been provided.

Moreover, it is also remarkable that the District's own inclusion professional described a number of observations and direct involvement with Student to essentialize regular education content for Student, a recommendation also endorsed by the Parents' inclusion professional and consistent with resources the latter recommended (FF 136 and 147; N.T. 1309-16, 1319-20). The District's professional who consulted on inclusionary practices worked directly with Student and the team, made recommendations based on her experience and understanding of Student, and described additional opportunities for Student to participate with typical peers in the regular education setting. That testimony was sound, rational, thoughtful, and more than convincing that she will remain a valuable resource for Student's IEP team in implementing the attached order. For example, she opined that Student can and should participate in the regular education environment for additional reading and mathematics instruction that has been provided outside of that setting and that Student's program should be aligned with the general education curriculum (N.T. 1330-33, 1358-59, 1370-71). These conclusions are persuasive and serve to support a conclusion that further consideration of whether Student can, with supplementary aids and services, be successfully educated within the regular education environment is necessary, as well as assessment of whether Student has been included with typical peers to the maximum extent possible. The Parents' inclusion expert's recommendations were aligned with these conclusions but did not materially add to them.

These determinations do not mean that, as Student's relevant IEPs have been implemented, more intensive instruction outside of the regular classroom was not then appropriate. Even several of the Parents' private professionals recognized Student's need for intensive, individualized services in a smaller setting that minimizes distractions. (See, e.g., N.T. 376-77, 415-16; S-6). The District inclusion professional also realistically and reasonably recommended that, in light of Student's varied and unique deficits and the finite number of hours in a school day, some priorities must be placed on Student's educational programming (N.T. 1339-41). The IEP team must consider and determine what needs are most critical *at this time* with a recognition that Student will continue to grow and develop so that other weaknesses may take precedence as may be appropriate. Those facets of Student's special education program are not limited to any discrete area of need, but rather focus on Student as an individual with a vast array of strengths and weakness, like any child.

Remedies

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).

Although the IEP team will be directed to meet to revise Student's IEP to provide for more opportunities to be educated within the regular education setting, this hearing officer cannot conclude that Student has been denied FAPE as a result of any lack of inclusion as discussed *supra*. Compensatory education shall not be awarded based on LRE principles. However, the lack of consistent implementation of programming designed to teach Student to interact with peers and to facilitate peer engagement does warrant such a remedy.

There was little evidence presented from which one can calculate an award under either model accepted by the Third Circuit. Thus, it is equitably estimated that Student should have had one hour each week following Student's return to in-person instruction for some full days for appropriate interventions for Student to acquire and practice peer interaction skills. This remedy recognizes that Student already is provided private intensive clinical services outside of the school day that are beyond the scope of special education and related services in the school setting. Accordingly, the equitable award is intended to be manageable yet intended to target the specific peer interaction and engagement that Student missed.

The award of compensatory education is subject to the following conditions and limitations. Student's Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related services needs in the area of communication and peer engagement. 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.

Finally, a few of the Parents' additional concerns merit brief mention. The absence of a separate communication plan is, at best, a minor procedural flaw that was not substantive in nature. Student's IEPs have been, appropriately, embedded with communication and language programming throughout the documents that have become steadily lengthier. The criticism of the IEP goals themselves, some of which one of their experts described as appropriate (N.T. 492-93), appears to seek perfection rather than meet the applicable standards of appropriateness. While the Parents certainly cannot be faulted for asking for ideal programming by the District, this hearing officer cannot conclude that FAPE has been denied on this basis.

The attached order includes a provision permitting the parties to mutually agree to alter its terms, and this hearing officer emphasizes that such would be consistent with the IDEA focus on collaboration. The last agreed-upon IEP is nearly one year old at this juncture and the parties have almost certainly learned a great deal through this hearing about Student, the parties' respective perspectives, recommended approaches and

methodologies, and the like. A return to cooperative educational program planning can only benefit Student and the parties, and an agreement to invite an IEP facilitator may aid them in planning the next meeting.

CONCLUSIONS OF LAW

The District's program for Student over the relevant time period was appropriate in most respects but inappropriate in the area of peer interactions.

Student is entitled to compensatory education to remedy the denial of FAPE with respect to peer interactions.

The District did not violate LRE principles during the relevant time period but shall consider and implement additional opportunities for future participation in the regular education environment.

ORDER

AND NOW, this 15th day of July, 2022, for all of the reasons set forth above, it is hereby **ORDERED** as follows.

1. The District's special education program for Student over the 2020-21 and 2021 school years was appropriate in all respects other than peer communication and interactions.
2. Student is awarded one hour of compensatory education for each week that school was in session beginning with the

week of Student's return to in-person instruction for some full days during the 2020-21 school year, and for the entire 2021-22 school year. All of the conditions and limitations on that award set forth above are expressly made a part hereof as though set forth at length.

3. The District shall convene a meeting of the IEP team to include the Parents not later than August 10, 2022 to revise Student's IEP with the participation of the District's inclusion professional. The team shall consider whether Student can, with supplementary aids and services, be educated in the regular education setting to a greater degree than set forth in the September 2021 IEP, and an assessment of whether Student has been included with typical peers to the maximum extent possible. The team shall consult the Supplementary Aids and Services Toolkit available through PaTTAN in guiding this discussion. The team shall also view Student's program for alignment with the general education curriculum and revise accordingly.
4. Unless and until a finalized IEP is approved in writing, and/or pending any further administrative or court order, the following revisions to Student's IEP shall be made for implementation as of the first day of the 2022-23 school year.
 - a. The IEP goals for manding, motor imitation, and listener response shall be removed; and the skills addressed therein may be added to the SDI section for implementation across educational environments.

- b. The IEP provision for functional communication training shall be removed.
 - c. The IEP shall provide for ongoing active facilitation of peer interactions throughout Student's school day, with regular consultation and monitoring, as determined by the District speech/language pathologist.
 - d. The IEP shall continue to provide for a total communication approach but with an express exception for specified, mastered targeted words identified by Student's District speech/language pathologist and/or IU consultant for distributed practice. The target words shall be monitored by the District speech/language pathologist through creation of a checklist or other similar tool for use at school and home, with training provided to District staff and the Parents on appropriate distributed practice and monitoring. The District shall also provide additional training to all staff members working with Student for review and practice of the entire ALS process, as discussed in the foregoing discussion.
 - e. The IEP shall add a provision for interoception support with an adapted curriculum as determined by the District occupational therapist.
5. Nothing in this Order should be read to preclude the parties from mutually agreeing to alter any of its terms, in writing and signed by both parties and their respective counsel.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire.
HEARING OFFICER
ODR File No. 25874-21-22