

Pennsylvania Special Education Hearing Officer

Final Decision and Order

Closed Hearing

ODR File Number:

24232-20-21AS

Child's Name:

A [REDACTED] M [REDACTED]

Date of Birth:

[REDACTED]

Parent:

[REDACTED]

Counsel for Parent:

Michael Joseph, Esq.

Berney & Sang

8 Penn Center, 1628 John F. Kennedy Blvd., Suite 1000

Philadelphia, PA 19103

Local Education Agency:

Perkiomen Valley School District

3 Iron Bridge Drive

Collegeville, PA 19426

Counsel for LEA:

Timothy E. Gilsbach, Esq.

Fox Rothschild LLP

10 Sentry Parkway, Suite 200

Blue Bell, PA 19422

Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

September 16, 2021

Information and Procedural History

Student ¹is currently twelve years of age and, since the 2020-2021 school year has attended a District funded approved private school (APS). Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² The Parent filed a due process complaint alleging during the 2018-2019 school year while attending school in the District; the Student was denied a free appropriate public education (FAPE), in violation of the IDEA, Section 504 of the Rehabilitation Act of 1973 (Section 504), and the Americans with Disabilities Act (ADA), as well as the federal and state regulations implementing those statutes. ³ The Parent seeks reimbursement for three independent educational evaluations (IEE) as well as compensatory education.⁴ In response, the District maintained that

¹ In the interest of confidentiality, 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 The Parent's IDEA claims arise under 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, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14).

³ The applicable federal and state regulations implementing Section 504 are found at 22 Pa. Code Chapter 15, and 34 C.F.R. Section 104.101 et seq. In addition to the claims under IDEA and Section 504, the Parent presents a claim under Title II of the Americans with Disabilities Act ("ADA"). This special education due process hearing has no jurisdiction over such claims. Accordingly, claims under ADA are dismissed for lack of jurisdiction.

⁴ In the Complaint, the Parent also sought the production of various educational records and reserved the right to seek damages, attorneys' fees, and costs.

educational programming, as offered and implemented, was appropriate for Student and that no remedy is due.⁵

For reasons that follow, the claims of the Parent are granted in part and denied in part.

Issues

- 1) Did the District fail to provide Student FAPE through its December 12, 2018, March 13, 2019, April 16, 2019, and May 31, 2019, IEPs?
- 2) Did the District fail to offer Student an appropriate educational placement during the 2018-2019 school year?
- 3) Is Student entitled to compensatory education or a special needs trust?
- 4) Is Student entitled to an IEE at public expense?

Findings of Facts

1. Student is currently twelve years of age and completed the sixth grade during the 2020-2021 school year at an APS funded by the District.⁶
(P-39)

⁵The case proceeded to a multi-session hearing convening virtually due to the COVID-19 pandemic and resulting school closures. Because of schedule conflicts, availability of witnesses, including the necessity for additional sessions, the decision due date was extended for a good cause, upon written motion of the parties.

⁶ The parties stipulated to the admission of the following exhibits: P-1 through P-10, P-13 through P-17, P-19 through P-21, P-23 through P-28, P-30, P-33, P-34, P-35 through P-40, P-45 through P-64, P-66, P-77, P-78, P-80, P-88, P-91, P-93. S-8, S-13, S-15, S-20, S-39, S-43, S-44, S-50, S-57, S-58, S-63, S-66, S-69, S-70, S-72, S-78, S-93, S--95 through S-98.

2. The Student was adopted by the Parent. Before adoption, the Student endured severe physical, emotional, and sexual abuse. Student is diagnosed with post-traumatic stress disorder (PTSD) and attention deficit hyperactivity disorder (ADHD) (N.T. 47-48)
3. As a preschooler, the Student received services through a partial hospitalization program for six hours a day, five days a week. The Student's treatment plan addressed impulsive behaviors throughout the day, including inappropriate touching, personal space concerns, and nightmares about trauma and flashbacks. (P-80, p. 10)
4. In April 2014, at the age of five, the Student received an AXIS I diagnosis of ADHD, primarily hyperactive and impulsive type, Adjustment Disorder with mixed disturbance of conduct and emotions, and AXIS IV of severe history of neglect and abuse (physical, emotional, and possibly sexual) separation from parents and multiple foster placements, and AXIS V with a GAF of 45-50. (P-80, p. 10)

Kindergarten – Third Grade

5. The Student attended kindergarten through third grade in school district different than the current school district of residence. (P-80)

2014-2015 School Year-Kindergarten

6. In December 2014, as a kindergartener, the Student received a psychoeducational evaluation because of academic and behavioral concerns. The evaluation summarized information from an FBA. The

FBA identified behaviors of concern included noncompliance, physical aggression, elopement, and disruption of instructional time. The perceived function was to avoid a task or demand and to gain teacher attention. (P-80, p.10)

7. The December 2014 evaluation concluded that Student was eligible for special education under the primary disability of emotional disturbance and the secondary category of specific learning disability. The team determined that the Student demonstrated clinically significant discrepancies between ability and achievement in early reading skills, numerical operations, oral expression, Spelling, oral language composite, and total achievement. (P-80)
8. The December 2014 evaluation noted Student's history of trauma within the primary support group and foster care placement. Recommendations for the team included IEP goals that address executive functioning, internal locus of control, and mood regulation. A smaller classroom setting with greater supports with small group instruction for work on behaviors was suggested. (P-80)

2015-2016 School Year -First Grade

9. During the 2015-2016 school year, the Student received special education services with supplemental emotional support. (P-24)
10. In March 2016, the Student received a treatment plan and review of expanded mental health services. The plan indicated Student had a diagnosis of post-traumatic stress disorder (PTSD). Psychosocial stressors included severe-sexual, physical, and emotional abuse at the

hands of the biological parents; removal from parents' care/CYS involvement; adoption; parent incarceration with a history of substance abuse; social and cognitive delays. (P-78)

2016-2017 School Year -Second Grade

11. During the 2016-2017 school year, the Student received supplemental emotional support and instruction at the second-grade level for math, reading, and writing. The Student received counseling services for 30 minutes a week. (P-91, p. 17)
12. On December 15, 2016, the Student received a school district reevaluation. Parent input included a request for placement in a therapeutic environment to address a history of trauma. Teacher input included Student's needs of externalizing problems, hyperactivity, aggression, conduct, attention, and learning problems. (P-24, P-88)
13. The December 2016 reevaluation concluded that Student continued to qualify for special education services under the primary category of emotional disturbance and a secondary disability category of other health impairment (ADHD, PTSD). The Student was also determined eligible for speech and language services for articulation. (P-24, P-88, S-15)
14. The reevaluation recommended a structured small environment to address compliance, emotional regulation, interpersonal skills, motivation toward academic tasks, a behavior plan, small group instruction for reading, writing, and math, and group counseling. (P-88, p. 14)

2017-2018 School Year – Third Grade

15. During the 2017-2018 school year, Student attended the third grade and received supplemental emotional support for Math, Reading, Writing, and social skills, group, and weekly itinerant speech and language support. (P-24)
16. On January 4, 2018, the district conducted an annual IEP review. The January 2018 IEP noted Student exhibited behaviors that impeded learning. (P-91)
17. The January 2018 IEP offered goals designed to address Reading, Math, following directions, and Speech. Program modifications and specially designed instruction (SDI) included multi-modality instruction (modeling, explicit instruction, repetition, visual cues), preferential seating, wait time, small group instruction, and a positive behavioral support plan (PBSP). Related services in the January 2018 IEP included counseling services and speech. The team determined Student ineligible for ESY. (P-91)
18. Through the January 2018 IEP, the Student received supplemental emotional support services in a small setting for social skills, Reading, Writing, and Math. The Student was included within the general education class for homeroom, Science, Social Studies, Health, Physical education, Music, library, Art, lunch, recess, and field trips. The Student spent 3.42 hours, or 49% of the school day, in the regular classroom. (P-91, pp. 20, 35, 38-39; N.T. 173-174, 189)
19. The January 2018 PBSP incorporated in the IEP identified antecedents to the behaviors of concern as a request to perform a non-preferred

activity, a challenging task, being tired, or a situation earlier in the day or before school. Behaviors of concern included work refusal, noncompliance, off-task, not following teacher directions, calling out during instruction. Consequences outlined in the PBSP included walking laps, a behavioral reward system, recess tasks, re-direction prompts. The perceived function was to gain what was wanted and to avoid non-preferred tasks. (P-92)

20. The PBSP prevention strategies included a small group setting, access to a relaxation room, social skills group, verbal praise, advance notice of schedule change. Replacement behaviors included compliance with teacher direction on task behavior. Reinforcement, when student performed a replacement behavior, included immediate feedback, verbal praise, prompting, and earned privileges. Consequences when the Student engaged in concerning behaviors included prompting, a reward system, removal of privileges, re-direction, removal from regular education to the emotional support classroom to calm, and recess laps. (P-92, p. 3)

20. Related services to be provided through the PBSP included ten thirty-minute counseling sessions during a marking period. (P-92, p. 7)

2018-2019 School Year- Fourth Grade

21. The Student began the 2018-2019 school year as a fourth-grader enrolled in the school district attended since kindergarten. (P-8)

22. On October 28, 2018, the Parent enrolled the Student in the fourth grade in the District. During registration, the Parent provided the District with the 2016 reevaluation report and the January 2018 IEP in place at the inception of the school year at the previous district. The

Parent requested placement of Student in a therapeutic, small classroom educational setting. (P-8, P-9, P-88, P-91; N.T. 62, 203)

23. Based on the records from the previous school district and Parent input, the District proposed providing Student with supplemental emotional support for the next 30-45 school days until an updated IEP could be developed after data collection. On October 29, 2018, through a NOREP, the Parent approved the District's recommendation. (P-10, S-8)

24. On November 5, 2018, the Student started the fourth grade in the District. (P-15)

25. After enrollment, the Student received special education services, at the supplemental level, through the District's emotional support program. The Student participated in the District's general education for homeroom, Math, English Language Arts (ELA), Enrichment/Intervention, Science, Social Studies, recess, lunch, PE, Art, Music, Library, Technology, and Spanish. Special education staff provided push-in support for instructional and behavioral support. The Student received thirty minutes of group counseling, individual counseling, social skills instruction, and speech/language services per cycle. (P-15, pp. 15, 17, 18, S-15)

26. Student's IEP progress from November – December 2018, reported by the District indicated the Student made progress toward some of the IEP goals. (S-13, S-15, p.11)

27. On December 12, 2018, the IEP team met to develop programming for the remainder of Student's 2018-2019 school year. (S-12)

December 2018 IEP

28. The December 12, 2018, IEP noted Student had communication needs and exhibited behaviors that impeded learning or that of others. (P-15, S-15, pp. 7-8)

29. The December 2018 IEP contained present levels of academic achievement and functional performance, progress on IEP goals, a counseling services update, speech progress, parental concerns, annual goals, specially designed instruction (SDI), related services, a positive behavioral support plan (PBSP), supports for school personnel, and an ESY determination.⁷ (P-15, S-15)

30. Based on data collected, the District offered goals to address reading comprehension, reading fluency, math computation, math concepts, compliance, problem solving, communication and speech articulation. All goals contained baseline data and methods for determining Student's progress toward meeting each goal. (S-15, pp. 15, 24-30)

31. The District BCBA utilized previous school district records and teacher observational data to create the December PBSP. (P-17, P-45; N.T. 459, 500, 502)

32. Between November 5, 2018, and December 12, 2018, the Student engaged in negative behavioral incidents eight out of sixteen days.

⁷ The team deferred an ESY determination until February 2019. (S-15, p. 32)

Those incidents included difficulty in working with peers, off-task behaviors, not following directions, incomplete homework, a bus incident, and disrespectful behavior. (P-51)

33. During behavioral observations, the District noted that Student required minimal reminders for coping/self-advocacy and personal space behaviors. Student required multiple reminders for following directions/compliance, problem-solving/personal interactions. Collected data determined that Student did not demonstrate positive/respectful communication skills. (S-15, p. 15; N.T. 506)

34. Based on the functional performance summary from Student's previous school and the District's collected behavioral data, the team developed goals to address compliance, problem-solving and communication. The compliance goal expected Student to receive a behavioral score of 3 (no more than 3 reminders) on 4 out of 5 scores over 8 weeks. The problem-solving goal expected the Student to exercise self-control and resolve conflict with a score of 3 (no more than 3 reminders) on 4 to 5 daily scores over 8 weeks. The communication goal expected the Student to speak with respect using a calm tone, scoring a 3 (no more than 3 reminders) on 4 out of 5 daily scores. (S-15, pp. 27-29)

35. Program modifications and SDI offered in the December 2018 IEP included electronic communication with the Parent, social skills instruction, small group, Reading and Math instruction, direct instruction for speech or language needs, and a PBSP. Related services included group and individual counseling, speech, and language therapy. (P-15, S-15, pp. 31-33; N.T. 206-207, 209)

36. The PBSP identified behaviors of concern as work refusal, noncompliance, off-task, not following teacher directions, being argumentative, and entering personal space. Antecedents to the behaviors of concern included a request to perform a non-preferred activity, a challenging task, being tired, a situation earlier in the day or before school. Consequences maintaining the behavior of concern included adult attention and task delay. The perceived function of the behavior was to gain what was wanted and to avoid non-preferred tasks. (P-17; N.T. 459)

37. The positive behavior support plan (PBSP) incorporated the IEP compliance, problem-solving, and communication goals. Offered program modifications included prevention strategies (preferential eating, wait time, behavior plan, flexible environment), replacement behaviors, consequences/reinforcement, consequences/behavioral concerns, and a crisis plan. (P-17)

38. Consequences for engaging in behaviors of concern included redirection and prompting, removal of privileges, access to the emotional support classroom, work completion during recess. (P-17; N.T. 499)

39. The crisis plan was to be utilized if Student became non-receptive to frustration management strategies that included verbal de-escalation, empathetic listening, and offering choices. If physical actions occurred by the Student, staff could block access to items thrown or used in an unsafe way. As a last resort if physical aggression was directed toward

others, staff could escort the Student to a safe room until calm.⁸ If the crisis plan was implemented, the District was to phone the Parent. (P-17)

40. Under the crisis plan, if the Student engaged in physically aggressive behaviors to self or others, the door to the safe room could be shut with the Student inside. The safe room was 12 x12, windowless, and furnished with a bean bag chair. (P-17, P-46; N.T. 487, 489, 508-509)

41. During the 2018-2019 school year, the counselor assigned to the Student was trained in trauma-informed cognitive behavioral therapy (TFCBT) but not consulted during the development of the District's crisis plan. The counselor advised that shutting this Student alone in a room could be retraumatizing based on abuse history and was not a trauma-informed approach. (P-46; N.T. 749, 759, 762)

42. Parent concerns noted in the December IEP included the impact of Student's cognitive level on speech, behavioral concerns (elopement, aggression, conflictual interactions with peers, and stealing/hoarding) exhibited at the previous school, the special education placement, and the need for reevaluation. (P-15, p. 17; N.T. 97)

43. Student's needs in the December IEP included academic (reading comprehension, reading fluency, math computation on basic facts, math concepts and applications), behavior (following directions, remaining on task, problem-solving, maintenance of personal space), and speech (articulation). (P-15, S-15)

⁸ Throughout the hearing, this room was referred to as the safe room, calming room. Reference was also made to a relaxation room. (P-21, P-49)

44. The December 2018 IEP offered supports for school personnel. The team deferred an ESY determination until February 2019 (P-15, p. 34-35)
45. The IEP team recommended that Student's placement change from a supplemental to an itinerant level of emotional support with Student in the regular classroom for 92 % of the day. (S-15, pp. 36, 39; N.T. 175-176, 189)
46. On December 12, 2018, the Parent signed a release for the District to obtain Student's mental health records. The records detailed a history of disturbing neglect and physical, emotional, and sexual abuse perpetrated by the biological parents. (P-2, P-14, P-78)
47. On December 19, 2018, the District issued a permission to reevaluate the Student. The District proposed administering intelligence and achievement assessments, behavior rating scales, a review of records and past evaluations, and a functional behavioral assessment. (P-19, S-20; N.T. 140)
48. From December 28, 2018, through January 2, 2019, at the request of the Parent, an independent speech and language pathologist evaluated the Student. The evaluation concluded that Student's impairments included a language processing disorder, a specific language impairment, an executive function disorder, a language-based learning disability, a speech sound disorder, and a social communication disorder. (P-6, P-7; N.T. 95)

49. The recommendations from the speech and language evaluation included school-based individual speech therapy, consultation time, a CCAP battery, the Fastforward program, a SETT meeting, an FM system, a demystification process, classroom strategies, pre-teaching, small classroom, preferential seating, and a study buddy. (S-14, pp. 27-31)

January – March 2019

50. In January, the Student received a new special education teacher. The teacher attended professional development regarding trauma and learned de-escalation techniques and understood that children exposed to trauma needed to receive supports and services to address their needs. (N.T. 264-265)

51. On January 17, 2019, the Parent, through a NOREP, approved the December 2018 IEP and consented to the reevaluation of Student. (P-16, P-19, S-18, S-20)

51. Between January 31, 2019, and March 13, 2019, the Student engaged in numerous behavioral incidents, including hitting, punching, slapping, kicking, pushing, and threatening school staff with violence, throwing books and furniture, elopement, and expressing suicidal ideation. In response, the District implemented the PBSP crisis plan and escorted the Student to the "safe room."⁹ (P-49)

52. Throughout January, although Student experienced some days with periods of compliance with expected behaviors, many days were

⁹ The District's PBSP, Crisis Plan, indicates that if needed, the Student, would be "escorted to a safe area until calm." (P-21, p. 7) The District's incident notes, refer to Student's removal under the crisis plan to a "safe room". (P-49) The terms safe room and calming room were used throughout the hearing.

punctuated with off-task behaviors, disrespect, and work refusal. (P-51, p.26)

53. Throughout February, the Student experienced some days of compliance with behavioral expectations; however, on February 8th, 21st, and 25th, pushing, kicking, and threats to staff occurred. (P-53, P-54)

54. On February 26, 2019, the Student ran down the hallway and kicked and hit staff. Student was moved to the safe room where writing on the walls occurred. Student left the room, called teachers' names, threw a chair, hitting staff, and hit a teacher across the face, cursing. For at least an additional 15 minutes, the Student threatened, hit, slapped, kicked, and scratched staff. (P-49, pp. 9-10)

55. On February 28, 2019, at 8:58 a.m., the Student refused prescribed medication, attempted to elope, and was transported to the safe room, where staff was kicked and hit. The Student left the safe room and continued to harm District staff. Student was warned, and District staff shut the safe room door. The Student kicked the walls, and District staff removed the Student's shoes. Student hit District staff again and was told that opening of the door to the safe room had to be earned. The District asked Student to remove a sweatshirt tied around the neck, when Student refused, staff removed it and a headband. The Student kicked and slapped staff. The Student expressed a suicidal ideation, and the District called the counselor. By 10:15 a.m., the Student was calm and completed a math worksheet. Between 11:50-12:55, the Student refused to follow directions and was taken to the safe room to eat lunch

because the office was full. Staff advised the Student that completion of a test was needed to earn return to the classroom. At 2:50 p.m., Student returned to the regular education classroom after completing the assigned work. (P-49, pp. 23-26, S-39; N.T. 211, 493)

56. On March 5th, 6th, 8th, and 13th, Student's elopement, hitting, and kicking of staff resulted in transport and confinement in the safe room. The March 6, 2019, incident occurred during an observation by the District BCBA for development of an FBA. As a result of the incident, Student was confined in the safe room from 9:00-1:20 p.m. (P-49, P-53; N.T.486-487, 492)

57. The emotional support paraeducator tasked with providing academic and behavioral support to the Student knew of the significant trauma experienced as a young child. The paraeducator received training in trauma-informed teaching approaches and could not recall the detail, but that it consisted of learning to be sensitive to a student. (N.T. 358-359, 363)

March 2019 IEP Revision

58. On March 13, 2019, in response to Student's behavioral incidents and need for restraints, an IEP meeting was convened to revise the December 2018 IEP and PBSP. The team amended the parental concerns, present levels of functional performance, SDI, the PBSP, educational placement, and ESY sections of the IEP. (P-20, p. 3, P-21, S-39; N.T. 211)

59. The Parent provided input that Student needed a therapeutic setting at an APS, that a private speech evaluation was underway, and concerns

with the interaction between the Student and the assigned paraprofessional providing support. The team requested access to the completed speech evaluation and agreed to provide an alternate paraprofessional to the Student. (P-20, pp. 18-19)

60. The team added SDI that included a daily point sheet to earn incentives, use of the emotional support room for breaks, adult support, a daily check-in, and pull-out small group, 1:1 instruction in math. (P-20, pp. 34-35)

61. Antecedent (prevention) strategies in the PBSP were revised to offer Student a morning check-in and afternoon check-out in the emotional support room, a review of behavioral expectations at the start of the day, the opportunity to earn daily incentives and counseling sessions. The crisis plan remained unchanged. (P-21, S-39, p. 57)

62. The team determined that Student was eligible for ESY and recommended that for the remainder of the school year, Student's placement change from an itinerant to a supplemental level of special education support 68% of the day spent in the regular classroom. (P-20)

63. Between December of 2018 and March of 2019, Student made progress toward some IEP goals. (P-13)

March 2019 Reevaluation Report

64. On March 18, 2019, the District issued its reevaluation report, conducted by a certified school psychologist. The reevaluation included

a review of prior records, Parent input, classroom and testing observations, aptitude and achievement testing, a summary of current classroom-based assessments, a classroom observation from the FBA, information about the Student both from a teacher and Parent through the Behavior Assessment System for Children – Third Edition (BASC-3), the Connors Rating Scale-Third Edition (Conners), the Behavior Rating Inventory of executive Function (BRIEF 2), the Scale for Assessing Emotional Disturbance-Second Edition (SAED-2), and a review of updated speech and language levels. (P-24, S-44)

65. Parent input for inclusion in the reevaluation included concerns that Student's behaviors interfered with learning, a therapeutic, educational setting was needed, and that Student needed skills to complete assigned schoolwork. ¹⁰(P-24)

66. On the WISC-V, the Student received a full-scale IQ score of 77, in the 6th percentile. On the WIAT-III, the Student obtained a low average total reading composite score in the 18th percentile, math composite score of very low in the 4th percentile, and written expression composite score of low average in the 10th percentile. (P-24)

67. On the BASC-3, a teacher rated Student's hyperactivity, aggression, conduct problems, attention problems, learning problems, atypicality, withdrawal, adaptability, study skills, and functional communication as

¹⁰ The District provided a parent information form to the Parent on February 22, 2019. The form was returned to the District on March 21, 2019.

clinically significant. Depression, somatization, social skills, and leadership were rated as at risk. (P-24, p. 13)

68. On the Conners scale, a teacher rated Student's inattention, hyperactivity/impulsivity, learning problems, executive functioning, defiance/aggression, peer relations, the DSM 5 ADHD inattentive scale, the DSM 5 hyperactive-impulsive scale, conduct disorder, and oppositional defiant disorder as very elevated. (P-24, p. 14)

69. On the BRIEF 2, a teacher rated Student's inhibit, self-monitor, shift, emotional control, initiate, working memory, plan/organize, task monitor, and organization of materials as clinically elevated. (P-24, p. 15)

70. On the SAED-2, Student's teacher rated all five of the scales as either indicative of an emotional disturbance or highly indicative of an emotional disturbance. (P-24, p. 16)

71. The District did not conduct a reevaluation of Student's speech-language needs. (P-24, p. 16)

72. For inclusion in the reevaluation, a District BCBA conducted a functional behavioral assessment (FBA) to determine Student behaviors to address at school. The FBA consisted of an interview, direct observations, and a summary. (P-23, P-24, S-43, S-44; N.T. 456-457, 485)

73. The FBA interview targeted one behavior, emotional outbursts: loud voice, saying "no," approaching in a threatening manner, spitting, kicking, throwing items at staff, accusatory verbal statements, and elopement. Physiological factors noted diagnoses of PTSD and ADHD. (P-23)

74. Antecedent events in which the behavior always occurred included Math as a non-preferred activity, late arrival to school, not having homework ready. The FBA determined that triggers for target behaviors were inconsistent. The FBA noted that target behaviors occurred when Student was presented with academic demands, when told "no," when reading aloud and if in proximity of adults when prompted or redirected. (P-23)

75. Social communication, self-regulation, and study skills were noted as deficits to the behavior of concern. (P-23)

76. The direct observation conducted by the BCBA determined that Student engaged in the target behaviors almost daily to avoid academic demands. The range of target behaviors was observed to be wide, from passive sitting and ignoring directives to unsafe escalation that last for more than an hour and a half per incident. The observation summary determined that Student's problem behaviors severely impacted the ability to participate in daily routines, complete academic tasks, and develop social relationships with others. (P-23, P-53; N.T. 445, 452-454)

77. The FBA summarized the prevention and consequence strategies, the observation, antecedent and consequence factors, and a hypothesis.

Prevention strategies included seating close to instruction, chunking, clearly stated expectations. Predictable routines, access to earned privileges. Consequence strategies included prompting to task, selective ignoring, Crisis Prevention Institute (CPI) crisis management, counseling, lack of privileges. (P-23)

78. The FBA hypothesized that when presented with academic tasks or routine demands, when told “no” to something wanted or when interacting with staff who provided redirection during a previous behavioral incident, Student’s behaviors of concern were done to delay/avoid the task or directive at hand and gain adult attention. (P-23, P-24, p. 16)

79. Antecedent (prevention) strategies included seating Student close to the source of instruction, chunking of tasks, clear expectations. Consequence strategies included prompting to task, selective ignoring, verbal redirection. (P-23, p.8)

80. The March 2019 reevaluation concluded that Student had academic needs in reading comprehension, reading fluency, math computation, math concepts and applications, and written expression. The District reevaluation determined Student had behavioral needs of following directions, remaining on task, problem solving, and maintaining personal space. Speech needs were determined to be in articulation. (P-24, p. 17)

81. Based on the results of the reevaluation, the team determined that the Student continued to qualify for special education service as a student

with an emotional disturbance and as other health impaired (OHI). The behavior scales indicated concerns regarding Student's attention, hyperactivity, and executive functioning skills. (P-24, p. 18)

82. According to the March 19, 2019, IEP progress report, Student made progress toward the reading comprehension, fluency, speech, and math computation goals. Student made no progress toward the behavior (decision making) and math concepts goals. (P-13, pp. 3-9)

April 2019 IEP

83. On April 16, 2019, a team meeting occurred to develop an IEP following the issuance of the reevaluation report. (P-27)

84. The April 2019 IEP contained goals designed to address ELA writing, reading comprehension, reading fluency, math computation, math concepts, and applications. Behavioral goals were offered designed to address compliance, problem solving, communication, and executive functioning. Based on the privately conducted speech-language evaluation received in March 2019, speech goals were added to address conversational speech, receptive and expressive language, and articulation. (P-27, pp. 19-20, 28-39)

85. The April 2019 IEP offered modifications and SDI that included a weekly behavior rubric emailed to the Parent, social skills instruction, positive reinforcement, private re-direction, chunking of assignments, a teacher scribe or technology access, extended processing time, a school day paraprofessional, pull out, and small group/1:1 math instruction, an

occupational therapy evaluation, a PBSP, use of supplemental emotional support room for breaks, and trauma-sensitive CPI strategies for prevention and de-escalation techniques. (P-27, pp. 40-44; N.T. pp. 230, 270, 419-420)

86. Related services in the April IEP included group and individual counseling services and speech therapy. The April IEP offered supports for school personnel that included consultation between the regular education and special education teacher with the speech clinician and behavior specialists. (P-27, p. 45)

87. The April 2019 IEP offered supplemental, emotional support special education, for the remainder of the school year with 66% of the school day inside the regular classroom¹¹. (P-27, p. 59)

88. The April 2019 IEP offered ESY during the summer of 2019. (P-27, pp. 46-55)

89. Parent concerns included the Student's hearing, the use of standard-based report cards and progress documentation, behavior changes, math anxiety, and the educational placement. (P-27, p. 21)

90. On April 16, 2019, the District developed a PBSP for implementation with data from the March 2019 FBA. In addition to identifying antecedents, behaviors of concern, and consequences, goals designed to address compliance, interaction with others, and communication

¹¹ The April IEP proposed that Student would spend 75% of the day in the regular classroom for the 2019-2020 school year. (P-27, p. 61)

were offered. SDI included social skills instruction, private redirection, and trauma-sensitive person-centered, non-violent crisis interventions focused on prevention and de-escalation techniques. The PBSP included a crisis plan. As a last resort, Student would be escorted to a safe area until calm. Completion of missed work because of Student's behaviors would not be discussed during the crisis situation. (P-28)

91. Student had no serious behavioral incidents during April 2019. On May 1, the Parent agreed to the District's offered program and placement. (P-30, P-49)

92. In May 2019, Student had several behavioral incidents resulting in restraint, transport to the safe room with nurse and counselor involvement. (P-49, P-51)

93. On May 7, 2019, the Student a threw a ruler at school staff and indicated she wanted to kill a staff member. The Student threw multiple objects, hit staff, and, although placed in a standing restraint, kicked a staff member in the face. The Student grabbed a staff member's hair and continued hitting and tried to elope. The Student was transported by four staff to another room, a nurse assessed, and a counselor arrived and spoke with Student. (P-49)

94. On May 20, 2019, the Student climbed on desks and chairs, started throwing objects across the room, slapped and spit on staff. Student expressed suicidal ideations and threatened to kill, blow out the brains, and shoot staff in the head. staff. Student picked up a computer mouse, wrapped the cord around the hand, and swung it at adults, attempting

to hit them with it. Student was restrained and transported. Student received one-day of in-school suspension for the behaviors. (P-49, P-50)

May 2019 IEP Revision

95. On May 31, 2019, the team held an IEP meeting to address Student's programming and the District's restraint/transport of Student to an emotional support classroom. (P-36)

96. Parent concerns presented to the IEP team included the transport/restraint and observed bruising, Student's embarrassment about having a paraprofessional one-on-one in the general education setting, and placement of Student in a more therapeutic setting, an APS. (P-36)

97. At the May IEP meeting, the District agreed to explore a therapeutic placement at an approved private school (APS) for the 2019-2020 school year to address Student's emotional and behavioral needs (P-36, P-37; N.T. 194-197)

98. On June 6, 2019, the Student received two half days of in-school suspension and two- and one-half days of out-of-school suspension. The Student received in-school suspension for violation of the District's Acceptable Use Policy for technology. The Student received an out-of-school suspension for the verbal and physical abuse of staff. (P-50)

99. On June 11, 2019, the District issued an IEP progress report. According to the reporting, from April 2019 through June 2019, the Student made progress toward some IEP goals. (P-13, pp. 11-16, S-78)
100. On July 1, 2019, the APS notified the District that the Student was accepted for ESY and fall enrollment. (P-66)

Private Evaluations

101. In the late summer, early fall of 2018, before Student's transfer to the District, a private BCBA consulted with the Parent. In February 2019, the evaluator conducted a records review. In March 2019, curriculum-based educational levels testing of Student occurred to assist with decisions regarding educational placement and programming. The final report was provided to the Parent on July 15, 2019. (P-4, P-5, S-95, S-96; N.T. 104, 873-875)
102. As part of the evaluation, in May 2019, the BCBA conducted an observation of the Student at the District in a classroom with one teacher and roughly twenty-five students. A paraeducator was present and provided prompts and demands to the Student. During the observation, the Student was placed in the hallway during recess to finish missed classwork. (N.T. 822-825)
103. The evaluator concluded that the District did not provide a trauma-informed approach as no indication that staff were trained, and trauma-informed practices were identified in the implemented IEPs and PBSP. The private evaluator did not review the District's March 2019 reevaluation report. (N.T. 792-794, 883-884)

104. From April 19, 2019, through May 12, 2019, a private neuropsychologist conducted a detailed and comprehensive evaluation of Student on behalf of the Parent. The Student was referred to assess psychological, educational, and socio-behavioral needs. The final report dated July 5, 2019, provided numerous recommendations, including that a history of abuse necessitated a consistent trauma-informed approach across settings. (P-2, P-3, S-93; N.T. 615-648)

105. On August 11, 2020, the Parent provided the privately obtained neuropsychological evaluation and private curriculum-based assessment of Student to the District. (S-97; N.T. 220)

2019-2020 School Year

106. On September 13, 2019, the Parent, through a NOREP, approved the recommendation for placement of the Student in an APS. (P-40, S-98; N.T.200)

107. Since the 2019-2020 school year, the Student has attended an APS at District expense. (P-40, P-66; N.T.201)

DISCUSSION AND CONCLUSIONS OF LAW

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must

make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.” *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) (“[Courts] must accept the state agency’s credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.”). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014). I find no issue with any witnesses’ credibility as all witnesses testified honestly and to the best of his or her ability. To the extent any witnesses’ testimony conflicts with another’s, those witnesses either recall events differently or have different opinions. To the extent that my findings of fact depend on accepting one witness’s testimony over another’s, I have accorded more weight to the witness based on the witnesses’ testimony and the other evidence presented. This hearing officer found all the witnesses who testified to be credible, testifying to the best of his or her recollection from his or her perspective. The testimony overall was essentially consistent on factual matters. This hearing officer now finds the District’s witnesses and the Parents’ testimony credible and essentially consistent with respect to the actions taken or not taken by the team

Burden of Proof

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At

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

The IDEA requires the provision of 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. The U.S. Supreme Court addressed these statutory requirements in *Board of Education v. Rowley*, 458 U.S. 176 (1982), 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 complying with the procedural obligations in the Act.

The Commonwealth of Pennsylvania and other states, through local educational agencies (LEAs), comply with the obligation to provide FAPE to eligible students through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009) (citations omitted). In 2017, the U.S. Supreme Court has determined that an IEP “is constructed only after careful

consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). “A focus on the particular child is at the core of the IDEA.” *Id.*, ___ U.S. at ___, 137 S. Ct. 11 at 999, 197 L.Ed.2d at 349-50 (2017) (citing *Rowley* at 206-09) (other citations omitted).

Individualization is a prime consideration for purposes of the IDEA. The duty to ensure a student’s right to FAPE lies with the LEA, not parents. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996) (explaining that, “a child's entitlement to special education should not depend upon the vigilance of the parents[.]”). Still, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands services are reasonable and appropriate considering a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Endrew F.*, *supra*; *Ridley*, *supra*; see also *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made,” and not viewed in hindsight. *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).

Evaluation Requirements

The IDEA establishes requirements for evaluations. Substantively, those are the same for initial evaluations and reevaluations. 20 U.S.C. §

1414. Substantively, an IEP must follow and be based on an evaluation. The IDEA sets forth two purposes of a special education evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1)(C)(i). Certain procedural requirements are set forth in the IDEA and its implementing regulations that are designed to ensure that all of a child’s individual needs are examined in this type of evaluation:

Conduct of evaluation. In conducting the evaluation, the local educational agency shall— (A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining— (i) whether the child is a child with a disability; and (ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities; (B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and (C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 20 U.S.C. § 1414(b)(2); see also 34 C.F.R. §§ 300.303(a), 304(b). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); see *also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to

identify all of the child's special education and related service 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 include a review of existing data including that provided by the parents in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a).

When a parent disagrees with an LEA's educational evaluation, he or she may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency..." 34 C.F.R. § 300.502(b)(1).

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 *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 deciding 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. That question includes review of whether the LEA "has made reasonable efforts to accommodate the child in a regular classroom;" a comparison of educational benefit in the regular class with those in a special education setting; and consideration of potential negative implications on peers in the regular classroom. *Id.* at 1217-18. Then, 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.* at 1215.

In assessing the first prong, the mere fact that a child might attain better academic progress in a segregated setting than in an inclusive setting is not the determining factor, because one must evaluate the unique benefits of the typical environment for the individual child, such as social skills and peer interactions. *Girty v. School District of Valley Grove*, 163 F.Supp.2d 527, 536 (W.D. Pa. 2001), *aff'd mem.*, 60 Fed. Appx. 889 (3d Cir. 2002) (quoting *Oberti* at 1217). 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 this analysis is a recognition that LRE 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)). 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. It is, however, important to also recognize that the failure to adhere to LRE principles does not automatically mean 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.

Procedural FAPE

Another core principle of the IDEA is that of procedural FAPE, which includes parent participation in educational decisions. *Schaffer, supra*, 546 U.S. at 53. Procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). The IEP is developed by a team, and a child’s educational placement must be determined by the IEP team based upon

the child's IEP, as well as other relevant factors. 20 U.S.C. §§ 1414(d)(1)(B), 1414(e); 34 C.F.R. § 300.116; *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994); see also *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258-59 (4th Cir. 1988). The law does not permit the LEA to have predetermined a program and placement, without evidencing an open mind to consideration of alternatives. See, e.g., *Deal v. Hamilton County Board of Education*, 392 F.3d 840, 858 (6th Cir. 2004).

Section 504

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). Thus, in this case, the Section 504 claims that challenge the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

Parent's Claims

This Student, adopted by the Parent, was the survivor of documented horrific abuse experienced as a toddler. In early November 2018, the Parent transferred the Student from a school district attended since kindergarten and enrolled in the District. This matter concerns only the 2018-2019 school year and the assertion that the District failed to expeditiously offer appropriate educational programming or a therapeutic placement responsive to this Student's embedded trauma and resultant behavioral needs.

In the Complaint, the Parent asserts that during the 2018-2019 school year, the lack of trauma-informed programming in the District developed IEPs of December 12, 2018, March 13, 2019, April 16, 2019, and May 31, 2019, denied this Student FAPE. The Parent further contends that the District's March 2019 reevaluation was inadequate. The Parent seeks compensatory education and reimbursement for three privately obtained evaluations of the Student.

The first period for this review encompasses the Student's first day of school in November 2018 until the IEP meeting held roughly one month later, in December 2018. Concerning this period, the Parent claims that after the transfer, the District denied Student a FAPE because it failed to implement Student's IEP from the previous school district and trauma history, behavioral incidents, and the Parent's request necessitated placement in a therapeutic, educational setting. Based on the totality of the record, the Parent has not sustained the burden of proof that the District denied Student a FAPE during this period.

When a child transfers from one school district to another, the IDEA regulations provide:

(e) IEPs for children who transfer public agencies in the same State. If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either—

- (1) Adopts the child's IEP from the previous public agency; or
- (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§ 300.320 through 300.324.

34 C.F.R. § 300.323(e).

In advance of Student's first day at the District elementary school, as a new student, the Parent provided the special education director with a December 15, 2016, reevaluation report and the January 2018 IEP in place, at the former school, at the start of the 2018-2019 school year.

The January IEP indicated the Student exhibited behaviors that impeded learning and included a positive behavioral support plan (PBSP). The January 2018 IEP provided the Student with supplemental emotional support in a small setting for social skills, Reading, Writing, and Math. Through the January 2018 IEP, the Student spent 49% of the school day in the regular classroom.

The PBSP identified Student's behaviors of concern as work refusal, noncompliance with directions, and calling out during instruction. Prevention strategies included a small group setting, access to a relaxation room, social skills group, verbal praise, and advance notice of schedule change. Consequences when the Student engaged in concerning behaviors included re-direction and removal from the regular education to the emotional support classroom to calm.

The 2016 RR contained Parent input with a request for placement of the Student in a therapeutic environment to address a history of trauma. Teacher input indicated that the Student had needs related to hyperactivity, aggression, and conduct problems. Based on the information provided upon enrollment, the IEP team agreed to collect behavioral data, meet a month later, and develop an IEP for the remainder of the 2018-2019 school year.

The District's actions upon enrollment of this new Student were reasonable and did not violate the FAPE mandate of the IDEA. After enrollment, the Student received special education services through the District's emotional support program. The Student participated in the District's general education for homeroom, Math, English Language Arts (ELA), Enrichment/Intervention, Science, Social Studies, recess, lunch, PE, Art, Music, Library, Technology, and Spanish. Special education staff provided push-in support for instructional and behavioral support. Student also received thirty minutes of group counseling services one time per cycle, thirty minutes of individual counseling, one time per cycle, thirty minutes of social skills instruction one time per cycle, and thirty minutes of speech/language services, one time per cycle. Overall, the Student's IEP from the previous school was implemented, SDI and related services remained in place. Still, more importantly, in concert with the information received, the District recognized the need for additional behavioral data to offer future informed educational programming consistent with the principles governing least restrictive environment considerations.

Based on the information available at the time of enrollment, the District would have done this new Student a disservice and violated the IDEA by merely referring and placing in an APS or other restrictive setting without attempting to ascertain this Student's complete needs. The District did not deny Student a FAPE from the time of enrollment until the IEP meeting in December 2018.

In December 2018, the IEP team convened to discuss the collected behavioral data and offer an updated special education program to the Student. During IEP development, the Parent expressed concerns regarding the impact of Student's cognitive level on speech and elopement,

aggression, and conflictual peer interactions experienced in the previous school. The Parent again asked that the District consider a more restrictive educational setting and requested a reevaluation.

Based on conducted assessments and review of previous information, the team identified Student as having academic needs in reading comprehension, reading fluency, math computation on basic facts, math concepts and application. Determined behavioral needs included following directions, remaining on task, problem-solving, maintaining personal space, and speech (articulation). Although the December IEP contained measurable academic goals, an adequate method for monitoring progress, specially designed instruction, and related services, the revised PBSP and the reduction of special education support merit a more in-depth discussion.

In addition to added behavioral goals designed to address compliance, problem-solving, and communication, the updated PBSP in the December 2018 IEP relied on the years old, previously conducted FBA from the transferring school district.¹² This slightly revised PBSP added a new behavior of concern, violation of personal space, and a much-discussed "crisis plan". Under this plan, staff could restrain the Student, and transport to a "calming" or "safe" room could occur. The door to the room could be shut, and Student would be unable to leave depending on the intensity of the behaviors. The crisis plan provided examples of how and when it would be implemented and specified it was a last resort measure if other strategies failed and Student's physical aggression was directed toward others.

¹² Although not admitted into the hearing record, the last FBA, as referenced in other admitted exhibits was conducted in October 2014, shortly after the Student entered kindergarten,

Based on the District's collected data from the first month of school, the Student engaged in no documented severe behavioral episodes. However, the District determined that other academic goals were needed along with an update to the behavior plan. Despite the need for additional academic intervention and a contingency to deal with extreme behaviors, the team recommended that Student's educational placement change from a supplemental to an itinerant level of emotional support where Student's time in regular education increased now with 92% of the day spent in the regular classroom. The team deferred an ESY determination until February 2019. On the day of the IEP meeting, the Parent signed a release for the District to obtain Student's mental health records, which detailed much of the abuse suffered before adoption. Days later, the District requested permission from the Parent to conduct a reevaluation of the Student.

The Parent contends that the District's educational programming offered through the December 2018 IEP failed to provide Student with a FAPE because it lacked a necessary trauma-informed focus, the level of special education support was improperly reduced, and other identified needs were unaddressed. When the December IEP was developed, the Student had attended school in the District for one month. The records provided during enrollment referenced Student's history of trauma, including a PTSD diagnosis. Although the detailed mental health records were not in possession of the District at the time of the development of the December IEP, the records the District did review and information from the Parent about Student's behavioral needs and trauma history were enough to warrant a revision to the PBSP with a "crisis" strategy in the event the Student exhibited behaviors that warranted such an extreme level of intervention. The programming offered in the December 2018 IEP nor the

PBSP referenced or made any connection that the anticipated extreme behaviors of the Student could stem from historical trauma.

In addition to the weaknesses of the PBSP, the reduction in special education support was also questionable. While it is understandable that this District wanted to give this Student the opportunity to receive an education in a less restrictive environment, the behavioral and social history in tandem with expressed Parent concerns, all suggested that as a new student in this District, a drastic reduction in special education support might not be advisable. However, the mandates governing LRE, and the District collected data available when this decision was made required this District to make a “reasonable effort” to accommodate this child in a regular classroom, which it did.

Shortly after the new IEP was implemented, Student’s behaviors declined. From January through March 2019, the Student engaged in numerous behavioral incidents while the District simultaneously worked toward completing an FBA and reevaluation of the Student.¹³ Many of the disruptions were frightening and troubling. Several of the incidents triggered the implementation of the PBSP’s “crisis plan” that resulted in Student’s restraint, transport, and confinement to a “safe” or “calming” room. Although the District attempted to neutralize the Student’s escalation in the safe room, at times, Student became more agitated by the expectations and demands for compliance. In one incident, Student was told that release from the room had to be earned, and at least on one occasion, the door was shut with Student alone in the room. The counselor who provided direct services to this Student, trauma trained, was not consulted when the crisis plan was

¹³ On December 19, 2018, the District proposed a reevaluation and functional behavioral assessment of Student. The Parent consented to the reevaluation on January 17, 2019.

developed. She credibly testified that placing the Student in a room alone was not an acceptable trauma-informed approach and could be retraumatizing.

The hearing evidence in this matter focused very squarely on acceptable trauma-informed programming and strategies, which the Parent purports were crucial to address this child's educational needs.¹⁴ The Student's educational records, available from the former district, outlined a well-documented history of trauma, abuse, and complex mental health needs, requiring specialized treatment since preschool. It is understood that this District relied on an FBA conducted years earlier by a different district, in a different school environment, with a much younger child to update the PBSP in December. However, without a proper assessment of the functionality of the student's behavior, there cannot be a complete understanding of the behaviors. This does not mean that without an updated evaluation and FBA, Student's programming had to be devoid of trauma-centered strategies. Based on the evidence, few in regular contact with this child were knowledgeable and up to date about trauma-informed practices. The record is preponderant that the District took steps to secure a new evaluation, and it was well underway when the most severe behaviors occurred; however, this PBSP as implemented, particularly on days when the crisis plan was necessary, served to undermine this Student's trust of adults and the ability to feel safe and resulted in a denial of FAPE.

March 2019 IEP

¹⁴One of the hallmarks of trauma-informed programming is that it seeks to actively resist re-traumatization. <https://www.pattan.net/Multi-Tiered-System-of-Support/School-Psychology/Trauma-Informed-Practices>

Before the reevaluation was completed, in response to Student's behavioral incidents in February and March and the need for restraints, an IEP meeting was convened to revise Student's IEP and PBSP. Again, the Parent requested that consideration be given to Student's placement in an APS. In addition to more SDI, PBSP strategies were revised to offer Student a morning check-in an afternoon check-out in the emotional support room, a review of behavioral expectations at the start of the day, and the opportunity to earn daily incentives. The crisis plan was unchanged. Perhaps acknowledging the need for more support, the team also recommended that for the remainder of the school year, Student's placement change from an itinerant to a supplemental level of special education support, now with 68% of the day in the regular education classroom. The team also agreed to collect and review behavioral data and discuss the success of supplemental emotional support once the reevaluation and FBA were complete. The Parent contends that the District's March 2019 also denied Student FAPE. I agree. The Parent has met their burden of proof with respect to this contention. The March IEP was essentially unchanged from its December predecessor. With the exception of the change in offered educational support, the March 2019 IEP and PBSP, although providing some additional SDI, still lacked a necessary trauma-informed programming component.

March 2019 Reevaluation

Shortly after the March IEP revision meeting, the District completed its reevaluation of the Student, which now included an updated FBA. The Parent contends that the reevaluation was legally insufficient and that District reimbursement for three privately obtained evaluations is appropriate. Specifically, the Parent asserts that the reevaluation and FBA ignored the impact of the Student's trauma on behavior and ability to learn and that the District's refusal to conduct a speech and language evaluation contravened

the weight of the evidence. For reasons outlined below, the District is ordered to reimburse the Parent for the privately obtained speech-language evaluation; however, the Parent's contentions that the District's reevaluation and FBA denied Student a FAPE are unsupported by the evidence in this matter. Overall, the reevaluation was legally sufficient.

The reevaluation included a review of educational records from kindergarten onwards, Parent input, classroom and testing observations, aptitude, and achievement assessments as well as an updated FBA. The reevaluation information about the Student based on completed behavioral rating scales from teachers and the Parent. Although requested beforehand, the Parent input for inclusion in the reevaluation arrived after the initial report was issued. The Parent expressed concerns that Student's behaviors were more intense and interfered with learning.

With respect to an updated speech-language component for the reevaluation, the District opted to utilize the results from the Parent's privately obtained report to formulate updated programming in the April IEP, later offered. As such, although the Parent obtained the speech-language evaluation before the District completed its reevaluation, the District communicated it would rely on that private evaluate to formulate its development of speech programming for this Student. It would be unfair for the District to utilize this information to fulfill its FAPE responsibilities toward this Student when it opted not to conduct its own evaluation. The District must reimburse the Parent for the privately obtained speech-language evaluation. A special education hearing officer has equitable remedial authority to order reimbursement. See generally, *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) (requiring complete remedial orders). The circumstances of this matter equitably favor such an order.

For inclusion in the reevaluation, the District conducted an FBA to determine Student behaviors to address at school. Though not binding, the Pennsylvania Training and Technical Assistance Network (PaTTAN) describes the FBA process as including (1) an interview of persons who observe the student in a variety of settings to identify behaviors, antecedents, and consequences; (2) observations and data collection of objectively defined behavior; and (3) summarization and hypothesis development based on the first two stages.¹⁵ Furthermore, PaTTAN also explains, “[i]t is critical that a hypothesis statement be provided. A complete FBA clearly defines (a) the problem behavior, (b) the antecedent conditions that exist both when the behavior occurs and does not occur, (c) the consequences that maintain the behavior, (d) a clear definition of the behavior we want the student to exhibit in place of the problem behavior, and (e) a statement of the behavioral function.”

The District conducted FBA met the requisite elements and determined that Student’s problem behaviors severely impacted the ability to participate in daily routines, complete academic tasks, and develop social relationships with others. Medical factors included Student’s diagnoses of PTSD and ADHD and identified that the target behaviors of emotional outbursts occurred when presented with demands, was told “no,” or when something was taken away. The Student contributed that reading aloud in proximity to adults also created discomfort. Antecedent and consequence factors determined that Student’s behaviors escalated when redirected and towards staff in close physical proximity. The FBA hypothesized that Student’s behaviors of concern were done to delay/avoid the task or directive at hand and gain adult attention. Based on the totality of the evidence, the reevaluation report

¹⁵ <https://www.pattan.net/publications/functional-behavioral-assessment-process/>

with the incorporated FBA were appropriate and satisfied the FAPE mandate toward this Student.

Because the District's reevaluation was appropriate, the Parent is not entitled to reimbursement for the privately obtained curriculum-based assessments or the neuropsychological report. Furthermore, the Parent arranged for both evaluations well before the District had completed its March 2019 reevaluation. The privately obtained evaluations were not based on a disagreement with District's report. As such, no reimbursement of the privately obtained evaluations is appropriate. 34 C.F.R. § 300.502(b)

April IEP

On April 16, 2019, an IEP meeting occurred to develop programming following issuance of the reevaluation. The Parent has preponderantly established that the April 2019 IEP did not offer Student FAPE. Despite Student's known needs, the April 2019 IEP offered supplemental, emotional support special education for the remainder of the school year with 66% of the school day inside the regular classroom¹⁶, which would increase to 75% of the day for the 2019-2020 school year. Although the District's efforts to educate this Student primarily in a regular education environment were laudable, this Student needed a more intense setting to obtain meaningful educational benefit. Second, although the team proposed trauma-sensitive, child-centered, non-violent crisis interventions focused on prevention and de-escalation techniques, the PBSP still failed to reflect and acknowledge the trauma concerns so evident throughout this child's brief but complex educational journey. Additionally, the crisis interventions were not adequately described nor did the plan define the circumstances for

¹⁶ The April IEP proposed that Student would spend 75% of the day for the 2019-2020 school year. (P-27, p. 61)

implementation. Although a reevaluation and FBA occurred, the IEP and PBSP behaviors goals remained essentially unchanged from the December IEP iteration. They continued to lack a trauma-informed focus with an over-emphasis on reducing behaviors instead of self-regulation and skill development. Furthermore, the April IEP failed to adequately indicate how the trauma-informed interventions would be employed, whether specific training for school personnel interacting with the Student would occur or other educational interventions that were individualized to reflect this Student's unique needs. Accordingly, the District's April IEP was not calculated to afford this Student with meaningful educational progress and denied FAPE.

In May 2019, yet another IEP meeting was necessary to address Student's programming and another restraint and transport of Student. At that point, the District agreed to explore a therapeutic placement at an APS for the 2019-2020 school year. Student has attended an APS since that time.

CONCLUSION

For the reasons outlined above, the Parent has established by a preponderance of the evidence that the District denied the Student FAPE for the from December 2018 through the end of the 2018-2019 school year. Compensatory education is warranted.

Compensatory Education

In *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) the court endorsed a "complete" make whole compensatory education remedy favoring relief for the entire period of the violation *G.L.* 802 F.3d at 626.

Compensatory education “accrue[s] from the point, that the school district knows or should know of the injury to the child, and the child ‘is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.” Existing case law describes three competing methods to calculate the quantum of compensatory education hearing officers should award. One option is to adopt the *MC* “cookie cutter” approach. The second option is to employ the Reid “qualitative” approach. The third compensatory education option, after reviewing the record as a whole, is to make an equitable determination about the time and services necessary to provide appropriate relief. Each option, however, assumes the record is properly developed to support an equitable finding. Compensatory education, unlike the promise of a FAPE, is intended to compensate a disabled student, for past denials otherwise guaranteed by the IDEA. Compensatory education should place the child in the position they would have been in but for the violation. As an equitable remedy, compensatory education is intended to provide more than “some benefit” or, for that matter, “meaningful educational benefit and significant learning.” The factors included, in the compensatory education relief hinges on student-specific facts like how much more progress the student might have shown if he or she had received the required special education services, the student’s age, ability, past achievement, stage of learning, unmet needs, and the student’s current present level. Therefore, whether the hearing officer follows *Reid*, *MC*, or the equitable approach, appropriate relief must be supported by the record evidence as a whole. *Id.*

In this case, the District has denied the student FAPE from December 2018 onward by failing to offer appropriate programming through the IEP’s and attendant PBSP’s offered in December 2018, through April 2019. The nature of this denial-of-FAPE, however, is difficult in terms of a compensatory

education remedy. The lack of trauma-focused programming and the inadequate behavior plans does not necessarily align to a per-incident basis for remedy. Furthermore, the District was unable to commence the reevaluation until January 17, 2019, when the Parent gave consent. However, the District did later perform an FBA and develop a PBSP and provide other education offerings. On balance, the District's continual revisions to this Student's programming and efforts to maintain to the maximum extent in regular education were noteworthy. Additionally, this Student did make some academic gains, even while in the throes of obvious behavioral and emotional distress. Therefore, 400 hours of compensatory education is an equitable remedy for the denial of FAPE on this record.

ORDER

AND NOW, this 16th day of September 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

- 1) The student is awarded 400 hours of compensatory education.
 - a. As for the nature of the compensatory education award, the parent may decide how the hours should be spent so long as those hours take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the student's current or future IEPs or identified educational needs.
 - b. The compensatory education hours must be in addition to any then-current IEP and may not be used to supplant an IEP. These hours may be employed after school, on weekends and/or during the

summer months, at a time and place convenient for, and through providers who are convenient to, the student and the family. Nothing in this paragraph, however, should be read to limit the parties' ability to agree mutually and in writing to vary the amount of and/or the use of the compensatory education hours.

- 2) The District shall reimburse the Parent for the cost of the privately obtained Speech-Language evaluation.

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

Joy Waters Fleming, Esq.
Joy Waters Fleming, Esquire
Special Education Hearing Officer

9/16/21