

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:

24571-20-21

Child's Name:

C.G.

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer:

Cheryl Cutrona, J.D.

Date of Decision:

September 10, 2021

INTRODUCTION

G.C. (hereafter "Student"),¹ [a middle school] student who resides in the Norristown Area School District (hereafter "District"), qualifies for special education and related services under the disability category of Autism. On February 5, 2021, the Parent filed a due process complaint against the District contending that the Student has been denied a free and appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA")², Section 504 of the Rehabilitation Act of 1973 ("Section 504")³, and Chapters 14 and 15 of the Pennsylvania Public School Code.

The case proceeded to a closed, due process hearing held over seven sessions from May 12, 2021 through July 29, 2021. The sessions were convened virtually due to the COVID-19 pandemic. [Redacted] interpretation services were provided to the Parent throughout the due process hearings.

ISSUES

1. Did the District fail to provide FAPE under IDEA and/or Section 504 by not offering the Student an appropriate placement for the 2020-2021 school year?
2. Are the District's Reevaluation Reports (RR) dated January 4, 2016 and January 3, 2019; and the November 25, 2020 Independent Educational Evaluation (IEE) appropriate? If not, is the Parent entitled

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 the details on the cover page, will be redacted prior to the decision's posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

- to reimbursement for the cost of the April 2021 IEE obtained by the Parents and the experts' time testifying at the due process hearing?
3. Should the District reevaluate the Student's Occupational Therapy (OT), assistive technology and central auditory processing needs?
 4. Should the District grant the Parent's request to transfer the Student from a District middle school that has a program serving students with Autism to the middle school closest to the Student's house that does not have a program for students with Autism because it is the Least Restrictive Environment (LRE)?
 5. Is the Student entitled to full days of compensatory education from August 13, 2017 through March 12, 2020, and from February 2021 through the date that the District offers the Student an appropriate program and placement?

PROCEDURAL HISTORY AND FINDINGS OF FACT

All evidence including the exhibits admitted to the record, transcripts of the testimony, and the parties' extensive written closing statements was considered. Only the findings of fact are cited herein as needed to address the issues resolved herein. All exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. The Student, who qualifies for special education and related services under the disability category of Autism, has attended schools in the District since Kindergarten. The Parent has raised concerns about the Student's speech and language, reading comprehension, and writing difficulties since that time (N.T. at 1428; 1463).⁴

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.-), School Exhibits (S-) followed by the exhibit number, Parent Exhibits (P-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number.

2. The Student's native/home language is [redacted]. The Student speaks English in school.
3. The May 17, 2013 Reevaluation Report (RR) was completed as the Student was transitioned from Pre-school to Kindergarten. The RR confirmed a medical diagnosis of Autism and noted that the Student had difficulties speaking in [redacted] and English (S-1 at 1). The March 2013 Evaluation, conducted by a District bilingual speech and language therapist, concluded that the Student qualified for special education with a primary diagnosis of Autism and the secondary diagnosis of Speech or Language Impairment due to a severe, receptive and expressive language impairment and an articulation/phonological processing disorder (S-1 at 8). Occupational Therapy (S-1 at 10) was also recommended.
4. On August 31, 2015, the District received a children's hospital request to conduct a psychoeducational evaluation (P-15 at 1). At the time, the Student was in the [redacted] grade and placed in a full-time Autistic Support Classroom, and was included with typical aged peers for lunch, outdoor recess, special areas, field trips, and school wide events.
5. The **January 4, 2016 RR** noted that the Student speaks English and [redacted], and primarily communicates in English (S-2 at 2). The Student's speech and language skills were re-evaluated on November 11, 2015 by the same bilingual speech and language therapist who conducted the 2013 RR. The tests administered included: Receptive one-word Picture vocabulary test-[redacted]-Bilingual Edition (ROWPVT-56E) Expressive One-Word Picture Vocabulary Test-[redacted] Bilingual Edition (EOWPVT-SBE) Test for Auditory Comprehension of Language - 3 (TALL-3) (S-2 at 6). At that time the evaluator recommended that the Student continue to receive itinerant

IEP speech/language services 240 minutes per month and to continue to expand grammatical and verbal formulation skills (S-2 at 8). All of the academic testing was conducted in English. The tests included the Woodcock Johnson III achievement assessments, the Developmental Reading Assessment (DRA), the Key Math-3 Diagnostic Assessment, and the Verbal Behavior Milestone Assessment and Placement Program (VB-MAPP) which included 12 subtests. The RR also included input from the Parent, a review of the Student's IEP progress monitoring, current classroom-based assessments, teacher observations and recommendations. The RR recommended that the Student continue to be placed in the Autism Support Classroom to receive academic, communication, and social skill instruction and with adaptations and modifications made to the regular education curriculum (S-2 at 9). The RR concluded that the Student continued to meet the primary diagnosis for Autism and the secondary diagnosis of Speech or Language Impairment, and needed specially designed instruction in all educational areas (S-2 at 13). As a result of the RR, two new speech and language goals were added to the Student's IEP because the Student had met the IEP's prior speech goals and the speech and language therapist wanted to bring the Student's skills to the next level and practice emerging skills (N.T. at 558).

6. The Student demonstrated meaningful progress throughout [redacted] grade (S-4 at 8, 9, 10-11) and was placed in Extended School Year (ESY) (S-4 at 25).
7. During the **[redacted] grade (2017-2018)**, the Student continued to receive Speech and Language therapy until on January 17, 2018 the IEP team convened and the District recommended that the Student be dismissed from itinerant speech and language services (S-10 at 1). Subsequently, related services in the IEP were revised to remove

group speech and language therapy once per week for 30 minutes. (S-10 at 22). The Student remained in the Supplemental Autistic Support Classroom for writing, communication, and social skills. The Student was placed in regular education for reading, mathematics, specials, lunch, recess, field trips and school-wide events (S-10 at 6; 23). In the regular education classroom the Student had access to a paraprofessional who was assigned to the students with autism to provide assistance in Mathematics and Reading as mentioned in the IEP (S-10 at 8; N.T. 1112; 1124-1126).

8. During the **[redacted] grade (2018-2019)**, the Student continued to be placed in an Autistic Support Classroom for part of the day and in the regular education classroom for Reading.
9. The District's **January 3, 2019 RR** was conducted by a qualified District evaluator who is trained to administer the instruments used. The achievement testing was conducted using the Woodcock Johnson III and Key Math-3 Diagnostic Assessment (N.T. at 241; S-19). The WISC-IV was also administered because it was the most valid and reliable assessment instrument that was used by the District at the time (N.T. at 279). The Student's Spring 2018 Pennsylvania Alternate System of Assessment (PASA) scores were reviewed as a basis for achievement. The results indicate that the Student was advanced in reading level C, proficient in math level C, and novice science tier 2 (S-19 at 2). The evaluator considered and incorporated classroom observations and information from the Student's related services providers and special education teacher (N.T. 286 at 5-11), VB-MAPP and FSIQ results.
10. As a result of the January 2019 RR, the Student was returned to the Autistic Support Classroom for math because the Student was not on grade level and the learning support classroom was not appropriate

because the group was too large to meet the Student's needs (N.T. at 327-328). For the same reasons, the Student also received grade level science and social studies instruction in the Autistic Support Classroom; programming and curriculum was sometimes modified to provide more time to focus on specific areas of need (N.T. at 414). During the Spring of the Student's [redacted] grade year, there were eight students, one teacher, and two paraprofessionals in the Autistic Support Classroom (S-20 at 16).

11. In September 2019, at the beginning of the Student's **[redacted] grade school year (2019-2020)**, the IEP team convened to discuss the shift to a less restrictive program (N.T. at 1699-1701; S-94). The IEP team proposed having the Student in the regular education classroom for all academic areas (English Language Arts, Mathematics, Science, and Social Studies) except for academic support in math, writing and communication instruction, and social skills which would occur in the Autistic Support Classroom. The IEP team also recommended administering a full comprehensive evaluation, after which a new IEP would be written (S-20 at 6; S-94; S-95; N.T. at 1699-1705). Following the meeting, the District issued a NOREP reflecting the shift to itinerant support based on the Student's academic success and social needs. The proposed program would have placed the Student in regular education except for when the Student was in the Autistic Support room for intervention, enrichment and social skills instruction. The Parent did not approve the placement. The signed NOREP was not returned until after the ten-day period, so the District had moved forward under the premise of implied consent, however, upon receipt of the NOREP, the District returned the Student to receiving all academic courses in the Autistic Support Classroom except for 40 minutes daily of English Language Arts, which the

Student received in the Regular Education classroom (S-20 at 6; N.T. at 1706-1707).

12. In October 2019, in response to the Parent's request for additional testing to assess the Student's reading levels, the District conducted a Qualitative Reading Inventory (QRI) and the results were incorporated into the IEP (S-24 at 11).
13. Then at the December 2019 IEP annual meeting, a less restrictive placement in regular education with itinerant services was offered again, three new goals were added, and several SDI revisions were made (S-24-27, N.T. at 1708-1710). On January 10, 2020, the Student's special education teacher/case manager and a translator spoke with the Parent who stated that she was having trouble finding a time to schedule a meeting and asked for further explanation of what revisions were made. The revisions of the two added SDIs were read and explained to Parent. On January 16, 2020, Parent called again and stated that she did not want the meeting and, instead, was fine with the revisions. She requested that the revisions and NOREP be translated into [her primary language] and sent to her (S-28 at 14-15). The District sent the January 2, 2020 IEP Amendment and the NOREP translated into [her primary language] (S-29 and S-31). Unfortunately, there is nothing on the record indicating when the Parent received the translated versions of the IEP and NOREP. On February 2, 2020, the Parent rejected the NOREP (S-30 at 2).
14. In March 2020, when schools closed due to the COVID-19 pandemic, the teachers provided lesson packets for the Student. When connectivity issues at home were resolved, the District issued the Student a Chromebook and the Student attended synchronous and asynchronous classes regularly (N.T. at 1283).

15. The Student's **[redacted] grade school year (2020-2021)** remained completely virtual from the start of the school year through April 2021 when the District transitioned to hybrid instruction. The Student did not regularly attend virtual Homeroom and Social Skills instruction, however, the Student regularly attended asynchronous classes. When on-site classes resumed, even after being away for almost a year, the Student followed the schedule and school/classroom routines and expectations, and independently navigated the building, specifically to locations the Student had been to before. Although the Student sometimes became distracted while walking the hallways which resulted in wandering around rather than going to the assigned location (S-57 at 25).
16. That Fall, at the Parent's request, the District funded a bilingual speech and language evaluation, which was conducted by an experienced, bilingual speech language pathologist (BSLP) (S-93). The evaluation was conducted on November 18, 2020 via remote assessment due to COVID-19 restrictions. Google Meet and Q-Global remote assessments were used to administer the assessment (S-39 at 1). The purpose of the evaluation was to determine the need for direct speech and language services (N.T. at 149-150). The evaluation consisted of a records review, interviews with the Student and the learning support teacher, and formal and informal language assessments. The BSLP communicated with the Parent in [her primary language], to ensure her full participation and understanding of the process. (N.T. at 157). The Goldman-Fristoe Test of Articulation-Third Edition (GFTA-3) and the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) were administered (S-39 at 3-4). In the resultant **November 25, 2020 Report**, the BSLP noted that the Student typically answered questions in English, regardless of the

language she used to ask them. When responding in [another language], the Student demonstrated “code switching,” intermixing [redacted] and English, which she regarded as normal for bilingual speakers. The Student indicated that it was “easier” to respond in English (S-39 at 1). Due to increased and significant exposure to English, the Student demonstrated the loss of some [redacted] language. The BSLP postulated that this could explain the Parent’s concerns regarding the Student’s comprehension at home. The BSLP concluded that the Student did not demonstrate a speech delay or disorder, speech and language skills were within normal limits, and speech and language services were not recommended at that time (S-39 at 5).

17. The Parents obtained an IEE by an experienced School Psychologist to clarify the nature of the Student’s academic strengths and needs, determine if the Student meets the criteria for the educational classification of Autism, and to recommend the most appropriate academic placement and educational programming. The testing dates were September 22 and 23, 2020 (prior to the speech and language IEE funded by the District). The assessment included a records review; an interview with the mother (the father was not interviewed) conducted by email using Google Translate and the BASC-3 Structured Developmental History Form (N.T. at 1356); teacher inputs; classroom observations; Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition (VMI-6); Comprehensive Test of Nonverbal Intelligence, Second Edition (CTONI-2); Woodcock-Johnson IV Tests of Cognitive Abilities (WJ-IV-COG); Woodcock-Johnson IV Tests of Achievement - Form B (WJ-IV-ACH:B); Woodcock-Johnson IV Tests of Oral Language (WJ-IV-OL); Wide Range Assessment of Memory and Learning, Second Edition (WRAML-2) -

selected subtests; Test of Word Reading Efficiency, Second Edition - Form A (TOWRE-Z:A); Ortiz Picture Vocabulary Acquisition Test (Ortiz PVAT); Receptive One-Word Picture Vocabulary Test, Fourth Edition (ROWPVT-4); Expressive One-Word Picture Vocabulary Test, Fourth Edition (EOWPVT-4); Test of Visual Perceptual Skills, Fourth Edition (TVPS-4); Test of Auditory Processing Skills, Fourth Edition (TAPS-4) - selected subtests; Comprehensive Test of Phonological Processing, Second Edition (CTOPP-2); NEPSY-II: A Developmental Neuropsychological Assessment (NEPSY-II) -selected subtests; Behavior Assessment System for Children, Third Edition (BASC-3); Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-2); Conners Third Edition (Conners 3); Social Skills Improvement System (SSIS); and Autism Spectrum Rating Scales (ASRS). In the IEE Report dated December 14, 2020, the School Psychologist recommended an OT Evaluation that includes an assessment of sensory processing, an updated Speech and Language evaluation to further evaluate the Student's pragmatic language and overall language skills due to the variable findings noted within [Student's] assessments, Social Skills instruction, a Functional Behavior Assessment (FBA), a Central Auditory Processing Battery, and counseling as a related service. The report also listed extensive program modifications and SDI (S-45 at 44-49) to be taken into consideration by the IEP team.

18. In January 2021, the IEP team convened to discuss the School Psychologist's December 14, 2020 IEE Report, the District amended the Student's IEP based on the recommendations therein and held IEP meetings on February 2, February 16, and March 12, 2021 to discuss them with the IEP team. In addition to a long list of Accommodations and Interventions, counseling, Speech and Language related services

and several goals were also incorporated. On March 19, 2021, the Parent signed the NOREP rejecting the amended IEP (S-58).

After the District incorporated many of the School Psychologist's recommendations into the Student's IEP, he testified at the due process hearing that adding 34 SDI and modifications to the IEP rendered it difficult for any special education teacher to "ethically, efficiently and appropriately" implement it (N.T. at 1343).

19. On April 21, 2021, the Student was evaluated by a private Certified Speech-Language Pathologist (SLP) obtained by the Parents. The purpose of the evaluation was to diagnose the Student's receptive, expressive, language processing and pragmatic language skills and to determine what, if any, deficits may be impeding the Student's learning. The evaluation consisted of formalized testing, language samples, a records review, a classroom observation and interviews with the Student, the Parents and the District case manager (P-45 at 1). The formalized tests that were administered included: TAPS-4: A Language Processing Skills Assessment; the Clinical Evaluation of Language Fundamentals-Fifth Edition, (CELF-5) and its Reading Comprehension and Structured Writing Supplemental tests and Observational Rating Scale; the Comprehensive Assessment of Spoken Language - Second Edition, (CASL-II) and its Subtests of the Supralinguistic Index and the Pragmatic Language subtest (P-45 at 8). The SLP contracted by the Parents administered the CELF-5, as did the BSLP contracted by the District some five months earlier during the Fall 2020 evaluation (S-39 at 3-4). While the District argued that it was too soon to repeat a test, the SLP stated that there was sufficient time between tests and pointed out that if a practice effect had occurred, the Student would have scored higher rather than lower on the test (P-45 at 18; N.T. at 785-787). As a result of her clinical

evaluation, which was conducted in person using COVID-19 protocols, the SLP found that the Student presented with language processing deficits including: Language Processing Disorder; Spoken Language Disorder; Cognitive Communication Disorder; Social Communication Disorder; and Language Based Learning Disability. The SLP concluded that these deficits directly impact the Student's receptive, expressive, pragmatic and literacy skills and that the Student meets the eligibility requirements for Speech or Language Impairment under IDEA (P-45 at 37-38). Like the School Psychologist, the SLP recommended a laundry list of goals, further evaluations, and SDIs (P-45 at 41-46). This SLP's conclusions contradict the results of the BSLP who evaluated the Student five months earlier. Specifically, the SLP recommended direct speech and language therapy while the BSLP did not.

20. The Student's most recent IEP, as revised in April 2021, offered itinerant autistic support services and participation in regular education for all academic areas (English Language Arts, Mathematics, Science, and Social Studies), academic support in the areas of English Language Arts (40 minutes/daily), and instruction in social skills and self-regulation to address pragmatic language, perspective taking, body language, rigidity, and frustration in the Special Education classroom (S-62 at 8). The IEP also includes 34 Program Modifications and SDIs (S-62 at 27-28), individual counseling (once weekly for 30 minutes) and group speech and language therapy (twice monthly for 30 minutes) (S-62 at 29).
21. In Spring 2021, the Student's family relocated to a residence within the District that feeds into a different home school. The Parent requested that the Student be transferred to the home school and attend all regular education classes with the assistance of a 1:1 aide and learning support. The District denied the request because the new

home school does not have an Autistic Support Classroom (N.T. 1555). On April 22, 2021, the IEP team convened to discuss the potential school transfer (S-62, S-63). The District proposed keeping the Student in the current placement because the Autistic Support programming at the middle school the Student currently attends includes a curriculum-based social skills program (SkillStreaming) and the Student has the support from an Autistic Support paraprofessional that helps with on task behaviors and generalizing in the moment social skills when the Student is in the regular classroom. The home middle school does not have an Autistic Support program (S-62 at 6; N.T. at 1554-1556; 1642; 1759).

Parent's Claim

The Parent claimed that the District has provided the Student with minimal and inappropriate evaluations, offered inappropriate IEPs, and failed to provide the Student with necessary speech and language services, all of which have hampered the Student's ability to make meaningful educational progress.

The Parent contended that in addition to the Student's known diagnosis of Autism, the IEEs indicated that the Student has a significant receptive and expressive Speech or Language Impairment, Executive Functioning, auditory processing, association, conceptualization, socioemotional needs, reading comprehension, listening comprehension, oral expression and a language-based learning disability for which the District has inappropriately programmed.

The Parent argued that in violation of Section 504 the District routinely gave the Parent documents in English rather than [her primary language], despite knowing that her primary language is [redacted] and she has difficulty reading English.

The Parent alleged that the District's denial of the Parent's request to transfer the Student to the neighborhood middle school violated FAPE's Least Restrictive Environment (LRE) mandate because the District places all Students in the District who are diagnosed with Autism, regardless of their individual needs, in the one District middle school that has an Autistic Support Classroom (S-20; N.T. 1555, 1642).

District's Claim

The District contended that the Student, who qualifies for special education and related services under the disability category of Autism, has made meaningful, significant progress over the Student's years in the District in the LRE. The Student, who was initially placed in full-time autistic support to address academic, language and behavioral deficits, demonstrated significant improvement through the District's programming. As the evidence in this matter proved, the Student had a successful 2020-2021 school year in general education, despite the challenges of virtual instruction during the pandemic. The Student, after returning to the classroom, continued to make meaningful progress. The District argued that the evidence overwhelmingly established that the District provided, and continues to provide, the Student a FAPE based on the information and knowledge available, and that the Parents failed to meet its burden of persuasion in all regards. The District implemented the Student's IEPs with fidelity throughout the period in question, held numerous meetings to revise the IEPs, as needed, to assure that the IEPs remained current and aligned with the Student's present needs, and ensured that the Parents had ample opportunity to participate and be heard at all times, providing [redacted] interpreters and IEPs and NOREPs translated into [redacted]. The District contended that its most recent RR and the independent educational

evaluations all demonstrated that the District's programming appropriately addressed the Student's areas of need.

Furthermore, the District maintained that it considered and appropriately denied the Parent's request to transfer the Student to a neighborhood school because the Student continues to need a curriculum-based social skills program (SkillStreaming) and support from an Autistic Support paraprofessional. The District argued that the Student's placement of Itinerant Autistic Support is the LRE for the Student, at this time.

DISCUSSION AND CONCLUSIONS OF LAW

Burden of Proof

In general, the burden of proof essentially consists of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

The burden of persuasion must be established by a preponderance of the evidence. *Jaffess v. Council Rock School District*, 2006 EL 3097939 (E.D. Pa. October 26, 2006). A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in *Schaffer* called "equipoise." When the evidence is in "equipoise," the party seeking relief and challenging the program and placement must prove their case by a preponderance of the evidence in order to prevail. See *Schaffer* above; see also *Ridley S.D. v.*

M.R., 680 F.3d 260 (3d Cir. 2012); *L.E. v. Ramsey Board of Education*, 435 F.3d 384 (3d Cir. 2006).

On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See *Schaffer*, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who filed the complaint initiating the due process hearing.

Credibility Determinations

It is the responsibility of the hearing officer, as factfinder, to determine the credibility and reliability of the witnesses' testimony. 22 Pa. Code §14.162 (requiring findings of fact); 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*, 88 A.3d 256, 266 (Pa. Commw. 2014) (it is within the province of the hearing officer to make credibility determinations and weigh the evidence to make the required findings).

This Hearing Officer found each of the witnesses to be candid, generally credible and convincing, testifying to the best of their ability and recollection concerning facts necessary to resolve the issues presented.

FAPE under IDEA

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. Decades ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements,

holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to assist a child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

FAPE under Section 504

A recipient of federal funds that operates a public elementary or secondary education program "shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities." 34 C.F.R. § 104.37(a)(1).⁹

Section 504 and Chapter 15 require that districts "provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 34 CFR 104.33(a); 22 PA Code §15.1

The provisions of IDEA/Chapter 14 and related case law, in regard to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (See generally *P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

FAPE and the IEP

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v.*

Doe, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency ("LEA") representative and the child's parents. An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." Id. § 1414(d)(1)(A)(i).

A FAPE, as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." Id. § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. Id. §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D).

To be eligible for special education services under IDEA, the student must (1) meet the requirements of one or more of the disability categories identified in the regulation and (2) require specially designed instruction to benefit from that instruction.

There is no question in this case that the Student is eligible for special education services because the Student meets the eligibility requirements for a student with Autism and, as such, requires specially designed instruction to benefit from that instruction. The Student's IEPs appropriately conform with the FAPE requirements outlined above and reflect the Student's unique educational needs as determined by evaluations and classroom performance and decided upon by the IEP Team.

Evaluations

An IEP follows and is based on an evaluation. The IDEA establishes requirements for evaluations that substantively the same for initial evaluations and reevaluations. 20 U.S.C. § 1414.

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).

IDEA and its implementing regulations sets out procedural requirements designed to ensure that all of the child’s individual educational needs are examined: (1) the District must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information; (2) 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 (3) 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).

And, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the

educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); see also 20 U.S.C. § 1414(b)(3).

If a parent disagrees with a school district evaluation, the parent may request an independent educational evaluation at public expense. IDEA § 615(d)(2)(A); 34 C.F.R. § 300.502(b)(1); *PP by Michael P and Rita P v. Westchester Area School District*, 585 F.3d 727, 53 IDELR 109 (3d Cir. 2009).

The Parent alleged that the District’s 2016 and 2019 reevaluations and the 2020 IEE were insufficient and, as such, are a *per se* denial of FAPE. The Parent based this claim, in part, on the District’s alleged failure to conduct any OT evaluations to assess the Student’s sensory processing, assistive technology or central auditory processing needs.

The 2016 RR was sufficiently comprehensive to identify all of the Student’s academic and related services needs. The IEP team properly took the results of the RR into consideration in crafting new IEP goals, program modifications and SDIs.

The 2019 RR included a full understanding of the Student’s needs based on the current testing, teacher observation and input and review, consideration, and incorporation of prior evaluation reports (including testing) and educational records (N.T. at 301). The IEP team determined that there was no need for additional testing because the Student was making progress on IEP goals and was doing well in [redacted] grade (N.T. at 409).

In addition to the regular school-based testing students must take, this Student was subjected to a series of three “independent” evaluations conducted over six months, that included 17 formal tests, plus subtests and informal testing (e.g., SLAM cards). And what did all those tests and 101 pages of evaluation reports tell us? All of the evaluators came to the table with impeccable credentials. And, as expected when different experts, are

hired by the parents and the district, the ones commissioned by the district tend to agree with the district's perspective and the ones obtained by the parents reflect the Parent's perspective. This case was no exception. The District's expert concluded that the Student does not need direct speech and language therapy at this time, while the Parent's expert concluded that the Student does need direct speech and language services. Overall, the expert test results and the District school-based testing, albeit with some test scatter, come to fairly similar results: the Student is achieving in the Average to Low Average range. None of the experts concluded that the test results indicated that there is a discrepancy between the Student's ability and achievement, and the District consistently considered other data to obtain a comprehensive assessment of the Student. The experts just reached different conclusions despite the relative similarity of the myriad test results.

The Parent's claimed that the District inappropriately decided not to conduct an Occupational Therapy (OT) evaluation to assess the Student's sensory processing, assistive technology or central auditory processing needs. On the Autism Spectrum Rating Scales (ASRS) administered by the School Psychologist, the Parent ranked the Student as "average" in the area of sensory sensitivity and noted that the Student "reacts appropriately to sensory stimulation." The teachers ranked the Student in the "elevated" and "very elevated" range; both noted that the Student "overreacts to sensory stimulation" (S-45 at 43). The School Psychologist recommended that the IEP team "consider" an OT evaluation to determine if additional services are needed (S-45 at 45). From their responses, it appears that the teachers are aware of the Student's sensory needs. There is nothing in the record indicating that sensory needs have been an issue that interferes with the Student's ability to access and benefit from the educational programming. Furthermore, there were no specific recommendations made by any of the

three most recent evaluators that address sensory needs. Therefore, the Hearing Officer cannot conclude that the District inappropriately failed to conduct an OT evaluation.

The School Psychologist and the SLP also recommended that the IEP team *consider* conducting a Student-centered, Environmentally useful and Tasks-focused Tool (SETT) systems process based upon the Student's cognitive and academic weaknesses to determine if assistive technology recommendations are required to support academic learning (S-45 at 46 and P-45 at 43).

The Student's IEPs have always included additional time for visual and auditory processing. The SLP conducted a partial auditory processing assessment (P-45 at 15) and also recommended a Comprehensive OT Evaluation, but in the recommendation she focuses on assessing the Student's *visual* perception, not auditory processing (P-45 at 42).

The SLP and the School Psychologist recommended numerous interventions and strategies for the IEP team to *consider*. The mere fact that evaluators make recommendations for further testing does not *per se* render the District's RR insufficient or mean that the IEP Team *must* implement them. The record shows that the IEP team convened *several times* during the Spring of 2021 for the purpose of considering all the recommendations that were made in the IEEs.

Based on the record, the Hearing Officer cannot order the District to conduct an OT evaluation to assess the Student's sensory processing, assistive technology or central auditory processing needs.

There is no evidence in the record to prove that either the 2016, the 2019 or the 2021 RR violated any of the IDEA's procedural or substantive requirements, or that the District's ultimate conclusion is incorrect. The evidence in this case proves that the RRs in question complied with the evaluation criteria detailed above. All of them were sufficiently

comprehensive based on the Student's educational progress, they included a variety of assessment tools and strategies, no single measure was used as the sole criterion to determine the educational program, and the instruments used were technically sound, valid, research-based tests. And, over the years, the Student has made steady progress academically. In fact, during the PASA state assessments in the Spring of 2019, the Student performed in the advanced range for Reading and Mathematics (S-28 at 13).

Furthermore, the IEPs based on the contested evaluations offered appropriate placements, program modifications, and SDI, and were followed by the District with fidelity. Therefore, the District did not fail to provide the Student with FAPE under either IDEA or Section 504.

Least Restrictive Environment

The IDEA mandates 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 federal Office of Special Education Programs has explained this principle as requiring “first consideration” of the regular education classroom with supplementary aids and services. *Letter to Cohen*, 25 IDELR 516 (OSEP August 6, 1996). 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. That question includes reviewing 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)).

It is also generally true that LEAs are provided with broad authority to determine the site for providing special education services, as long as the selected location is appropriate. *White v. Ascension Parish School Board*, 343 F.3d 373, 382-83 (5th Cir. 2003); *Lebron v. North Penn School District*, 769 F.Supp.2d 788, 801 (E.D. Pa. 2011). Still, 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.

The District is not required to provide every level of every type of service in all settings within its boundaries, and LEAs, generally, have broad discretion to determine location. However, the services themselves must be appropriate for the individual child and based on the student’s unique strengths and needs. Choosing a placement, in this case the Parent’s request that the child attend the neighborhood school, and then trying to fit a special education program into what that placement offers is not what the IDEA contemplates. While the LEA is required to ensure a continuum of various placements, it is not required to have every option available in every school.

In this case, there is one thing that the Parents, the District and all the evaluators agreed on: the Student meets the eligibility requirements in IDEA

for a student with Autism. For example, the School Psychologist, the Parent's own expert, in his December 14, 2020 Report indicated that the Parent and all four of the teachers rated the Student "above average" range in the Problem Behaviors/Autism Spectrum category (S-45 at 5), and their total scores on the Autism Spectrum Rating Scales (ASRS) were within two points of each other, all in the elevated range (S-44 at 42).

In the December 14, 2020 IEE, the School Psychologist concluded that the Student continues to meet the criteria for a diagnosis of an Autism Spectrum Disorder (ASD), which adversely impacts the Student's educational performance (S-45 at 44). The Parent's own expert recommended inclusion in the general education environment with supplementary aides and services, specially designed instruction, and accommodations, and "Itinerant Learning Support Services *and/or Autistic Support Services within a coteaching model*" (emphasis added) (S-45 at 45).

In this case, the District has made reasonable efforts to accommodate the Student in a regular classroom and has determined that the Student can be educated successfully within the regular classroom with the assistance of an Autistic Support paraprofessional; even though, at times, when the Parent disagreed with that placement, the District accommodated the Parent's request and moved the Student back to the Autistic Support Classroom.

The District appropriately determined that the Student continues to need the assistance of an Autistic Support paraprofessional to help with on task behaviors and generalizing "in the moment" social skills (S-62 at 6), and who is positioned to regularly consult with the special education teacher in the Autistic Support Classroom to ensure that the Student can meaningfully participate and achieve educational benefit to the fullest extent possible.

The Student's current placement has an Autistic Support classroom; the neighborhood school does not have one at this time. Therefore, the

District appropriately denied the Parent's request to transfer the Student to the neighborhood school at this time. The Student, therefore, will continue to attend the middle school where the Student is currently placed. The IEP notes that transportation is provided as a related service so there should be no additional burden on the Parent.

COMPENSATORY EDUCATION

Compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE under the terms of the IDEA. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *Big Beaver Falls Area School District v. Jackson*, 615 A.2d 910 (Pa. Commw. Ct. 1992). Compensatory education may be an appropriate form of relief where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996).

In this matter, the District provided the Student with timely and appropriate RRs and IEPs. The Student made meaningful, significant progress over the Student's years in the District. Over the Student's years in the District, the Student has gone from full-time autistic support to participating in the regular education classroom for most of the day with support from a paraprofessional. At all times, the record shows that the District was responsive to the Parent's concerns and provided [redacted] interpreters at meetings and during telephone conversations, and [redacted] translations of the Student's educational documents as soon as practicable.

This review of the evidence confirms the appropriateness of the District's programs for 2017-2018, 2018-2019, 2019-2020, and 2020-2021 school years. Therefore, the Hearing Officer finds that the Parents failed to

meet their burden of proving that the District's evaluations were inappropriate and there was no other denial of FAPE, therefore, the request for compensatory education is denied in its entirety.

CONCLUSION

1. Did the District fail to provide FAPE under IDEA and/or Section 504 by not offering the Student an appropriate placement for the 2020-2021 school year?

The record established that the District offered the Student an appropriate placement for the 2020-2021 school year so there was no denial of FAPE under either IDEA or Section 504.

2. Are the District's Reevaluation Reports (RR) dated January 4, 2016 and January 3, 2019; and the November 25, 2020 Independent Educational Evaluation (IEE) appropriate? If not, is the Parent entitled to reimbursement for the cost of the April 2021 IEE obtained by the Parents and the experts' time testifying at the due process hearing?
 - a) The District's January 4, 2016, January 3, 2019, and November 25, 2020 RRs were sufficient.
 - b) The Parent is not entitled to reimbursement for the cost of the April 2021 Evaluation because the District had funded a sufficient speech and language evaluation in November 2020, less than five months prior.
 - c) The Parent's request for the cost of the experts' testimony at the due process hearing is denied.
3. Should the District reevaluate the Student's OT, assistive technology and central auditory processing needs?

The Hearing Officer finds insufficient evidence to order the District to conduct an OT evaluation to assess the Student's

sensory processing, assistive technology or central auditory processing needs.

4. Should the District grant the Parent's request to transfer the Student from the District middle school that has a program serving students with Autism to the middle school closest to the Student's house that does not have an Autistic Support program because it is the Least Restrictive Environment (LRE)?

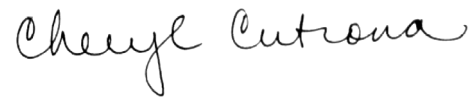
The District appropriately denied the Parent's request to transfer the Student to the neighborhood school at this time. The Student, therefore, will remain in the same middle school the Student has attended for the last several years.

6. Is the Student entitled to full days of compensatory education from August 13, 2017 through March 12, 2020, and from February 2021 through the date that the District offers the Student an appropriate program and placement?

The review of the evidence demonstrates the appropriateness of the District programs offered to the Student for the entirety of the 2017-2018, 2018-2019, 2019-2020, and 2020-2021 school years. The District's evaluations were appropriate and there was no other denial of FAPE under either IDEA or Section 504, therefore the Parent's request for compensatory education is denied in its entirety.

ORDER

The Parent's claims are denied.



Cheryl Cutrona, J.D.
Special Education Hearing Officer

Date of Decision

September 10, 2021

ODR 24571-20-21