

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

**Pennsylvania Special Education Due Process Hearing Officer
Final Decision and Order**

CLOSED HEARING

ODR No. 29896-23-24

Child's Name:

L.P.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

01/06/2025

INTRODUCTION AND PROCEDURAL HISTORY

The student, L.P. (Student),¹ is a preteen, late elementary school-aged student residing within the boundaries of the Boyertown Area School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973³ as a Student with Other Health Impairment and a Speech/Language Impairment. Student currently attends a District elementary school.

During the summer of 2024, the Parents filed a Due Process Complaint under the referenced statutes contending that the District's proposed program for the current 2024-25 school year was not appropriate for Student or in the least restrictive environment. The District denied the Parents' contentions and all relief demanded. After a number of delays, the matter proceeded to hearing over multiple sessions,⁴ revealing circumstances that are, in a word, heartbreaking.

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818, and 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 codified in 34 C.F.R. §§ 104.1 – 104.61, and the applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15). The Parents also assert related claims under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 – 12213.

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, Joint Exhibits (J-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. References are to Parents in the plural where it appears that one was acting on behalf of both. Citations to duplicative testimony and exhibits are not necessarily exhaustive.

Following review of the record and for all of the reasons set forth below, the claims of the Parents cannot be sustained and must be denied, although the attached order will contain specific directives to the District.

ISSUES

1. Whether the District's proposed program and placement for Student was appropriate and in the least restrictive environment;
2. Whether the District's most recent evaluation of Student was in compliance with the law;
3. If the District's proposed program and placement were not appropriate for Student, should the Parents' requested remedies be ordered; and
4. If the District's most recent evaluation of Student did not comply with all legal requirements, should the Parents be awarded an Independent Educational Evaluation at public expense?⁵

FINDINGS OF FACT

1. Student is an [late] elementary school-aged child who resides with the Parents and family within the District boundaries. Student is eligible for special education under the Other Health Impairment and Speech/Language Impairment categories. (J-14.)
2. Student is a happy and social child who loves to play with other children. Student does have some developmental delays, and was diagnosed

⁵ This issue was not set forth in the Parents' Due Process Complaint beyond the broad "such other relief" clause; nonetheless, the District raised the claim in light of an informal request for that remedy, which was treated as its own Complaint without a need for a formal filing and case number for purposes of efficiency. No objection was lodged to that procedure by either party. (N.T. 40; J-46; J-47.)

[redacted]. Student also has Autism and Attention-Deficit Hyperactivity Disorder (ADHD), and Student's Autism is considered to be severe. (N.T. 67-69, 75-76, 239, 249, 269-72, 287.)⁶

3. Student has been treating with a developmental pediatrician in a clinic for individuals with Student's [redacted] condition. She has experience with treating individuals with that condition as well as others. (N.T. 267-68.)
4. The Parents have been actively involved in Student's educational program, attending meetings and communicating frequently. (N.T. 91, 177-78, and *passim*; J-45.)
5. Student has attended the same school building since kindergarten. Consistency is very important for Student, including environments and other people. Student does imitate peers. (N.T. 86-87, 96-97.)
6. Student's [redacted] condition has led to regression in verbal and nonverbal ability that, in school, may be reflected in lower cognitive skills compared to same-age peers. Lower scores do not necessarily mean a decline in skills because, as children grow, they are compared to peers of the same chronological age, so those scores may reflect a plateau in skills. (N.T. 275-76.)
7. Student's treatments for the [redacted] condition occur weekly and involve an infusion that typically takes over four hours to undergo and complete. (N.T. 69-70.)
8. Student's Parents have noticed that Student's skills have regressed over time, particularly since January 2023. Skills affected have been in the areas of language and communication, mathematics, and handwriting skills, all of which have diminished. Impulsivity and physical aggression

⁶ Student's general presentation is intentionally described vaguely rather than in detail for confidentiality reasons, not to ignore or minimize Student's abilities and weaknesses. See, e.g., N.T. 76-78.

have also increased about the same time, and Student's ability to perform activities of daily living have decreased. However, because there is no accurate means to assess the progression, the extent of the impact of the disorder on these changes is unknown. (N.T. 71-74, 140-41, 143-44; J-45 at 53.)

9. District professionals have similarly noticed regression in Student, particularly with problem behaviors. (N.T. 181-83, 372-73, 399, 416-18. 458-61.)
10. [redacted]. (N.T. 70.)
11. Student has recently begun privately-obtained Applied Behavioral Analysis (ABA) services both at home and at school. Services have included consultation with Student's school staff. (N.T. 80-81, 103, 537-40, 544-45.)

2021-22 School Year

12. An annual Individualized education program (IEP) team meeting convened for Student in December 2021. (J-1.)
13. A number of strengths identified in the December 2021 IEP included being friendly and enthusiastic, having basic academic skills and an inquisitive nature, and enjoying time with peers. Needs included early reading and mathematics skills; following directions; improving focus/attention; self-advocacy skills; and occupational physical, and speech/language skills. (J-1.)
14. A Positive Behavior Support Plan (PBSP) in the December 2021 IEP reported on a spring 2021 Functional Behavioral Assessment (FBA). (J-1 at 45-47.)
15. Annual goals in the December 2021 IEP addressed sight word fluency; counting; writing alphabet letters; task initiation and completion; self-

advocacy; and gross motor, fine motor, and speech/language skills. A number of program modifications/items of specially designed instruction were set forth along with related services including a full-time paraprofessional. Student's program was one of learning, speech/language, and hearing support at a supplemental level; Student would not participate in general education during reading, writing, and mathematics instruction, or social skills instruction. (J-1.)

16. Student's IEP was revised in March 2022 to provided for extended school year (ESY) services and the goals to be addressed. (J-1; J-2.)

2022-23 School Year

17. Student's IEP was revised again in early September 2022 following a recent neuropsychological assessment. Based on recommendations in that report, support of the related services increased. A highly structured, small learning support environment was reportedly suggested to be maintained, and the team agreed to increase the reading and writing instruction. (J-1; J-2.)
18. A new IEP was developed for Student in November 2022. (J-4.)
19. Parent input into the November 2022 IEP included modified grades not reflecting whether Student was behind peers; and needs for possible adjustments to the therapy areas, communication, and social skills; adaptive behavior skills, and behavioral intervention (task completion). (J-3; J-4 at 18.)
20. A number of strengths identified in the November 2022 IEP include being friendly and enthusiastic, having basic academic skills, and enjoying time with peers. Needs included early reading and mathematics skills; following directions; improving focus/attention; remaining on task; self-advocacy skills; and occupational physical, and speech/language skills. (J-4.)

21. Annual goals in the November 2022 IEP addressed sight word fluency; writing alphabet letters; spelling; mathematics computation (subtraction); attending to non-preferred activities; hearing support; and gross motor, fine motor, and speech/language skills. A number of program modifications/items of specially designed instruction were set forth along with related services to include a full-time paraprofessional. Student's program was one of learning, speech/language, and hearing support at a supplemental level. Student would not participate in general education during reading, writing, and mathematics instruction, or during social skills instruction and related services. (J-4.)
22. The Parents approved the Notice of Recommended Educational Placement (NOREP) accompanying the November 2022 IEP. (J-5.)
23. Student was determined to be eligible for ESY services for 2023, and the Parents approved the NOREP. (J-7; J-8.)

Developmental Pediatrician Evaluation August 2023

24. Student's developmental pediatrician provided a report on an evaluation of Student in August 2023 (Developmental Pediatrician Evaluation (DPE)). At that time, Student was engaging in more physical aggression, verbal outbursts of inappropriate language, and increased elopement. Diminishment of skills was reported by the Parents with respect to speech and fine motor abilities. Trials of medication for diagnosed ADHD were reportedly unsuccessful. Other diagnoses included [redacted] and oppositional behavior. (J-10 at 1-5.)
25. Based on a neuropsychologist's testing, cognitive assessment reported in the 2023 DPE reflected decreased scores on the same instrument compared to 2020 and 2022; a separate measure confirmed a number of areas of cognitive weakness. Assessment of academic achievement by the neuropsychologist similarly was more weak compared to 2022. Other

assessed areas were reported as relatively the same or without comparison (adaptive skills, emotional/behavioral functioning). (J-10 at 7-9.)

26. Educational recommendations in the DPE included a one-on-one aide trained by a Board Certified Behavior Analyst (BCBA) and a visual schedule. An assessment for Autism Spectrum Disorder was also planned. (J-10.)

Neuropsychological Evaluation August 2023

27. A neuropsychological assessment of Student was completed in August 2023 by a pediatric neuropsychologist. The neuropsychological Evaluation Report (NER) also reflected an increase in behaviors beginning in January 2023; and provided the results of her assessments of Student that had been summarized by the developmental pediatrician. (J-12.)
28. The NER provided educational recommendations for a highly individualized, flexible approach with integration of therapeutic and behavioral support. Occupational, physical, speech/language, hearing support therapy were necessary, focused on functional, meaningful goals. For placement, the neuropsychologist suggested consideration of “a more supported substantially-separate classroom for all academic learning” (J-12 at 6) with ABA strategies, and inclusion with peers for special classes. Interaction with social and verbal peers would also be important for modeling language. This placement consideration suggestion differed from that by the same neuropsychologist in the spring of 2022 for “a highly structured learning support setting” (J-45 at 21) with inclusion activities. (J-12; J-45 at 18-25.)

2023-24 School Year

29. At the start of the 2023-24 school year, the District sought permission to conduct a reevaluation, and the Parents consented. (J-11.)

30. In early October 2023, the developmental pediatrician provided a report of the separate evaluation for Autism Spectrum Disorder. Student met criteria, and she recommended that the District identify this eligibility category as primary. (J-13.)

District Reevaluation October 2023

31. The District issued a Reevaluation Report (RR) in late October 2023. The RR provided a summary of background information from a record review; set forth educational history; and reported on Student's programming through the start of the 2023-24 school year. (J-14.)
32. The October 2023 RR incorporated recommendations of the NER, and summarized her assessment results. A teacher adaptive rating scale that had not been sought by the neuropsychologist complemented the reported results, with the teacher noting significant to milder needs across all domains; functional academics, school living, and self-direction were the most extreme. (J-14 at 4-8.)
33. Parent input for the October 2023 RR described increased behaviors at home since January 2023. They shared concerns with Student's attention span, rule defiance, temper outbursts, behavior changes including aggression, mood swings, tendency to interrupt, lack of safety awareness, and declining skills with hygiene (particularly toileting) and handwriting. (J-14 at 8.)
34. Special education teacher input into the October 2023 RR reflected Student's well-below expected skills in the areas of reading (below kindergarten level); writing skills; and mathematics skills. Progress monitoring from the spring of 2023 was also incorporated, with inconsistent progress on academic goals and regression on behavioral goals. The general education teacher reported on difficulty with academic tasks and reliance on the paraprofessional. Related service provider input

was also included, reflecting regression of skills as well as increased difficulty with attention and focus in speech/language therapy; generally inconsistent or stagnant performance was reported for all of the other areas. (J-14 at 8-22.)

35. Strengths were provided in the October 2023 RR, including being social, having increased attention in a preferred group activity, and interest in books. Needs included foundational reading, writing, and mathematics skills; following directions; improving focus/attention; remaining on task; demonstrating safe behavior; self-advocacy skills; activities of daily living; hearing (self-advocacy); and occupational (sensory-seeking), physical (gross motor), and speech/language (expressive, receptive, social language) skills. (J-14 at 24-25.)
36. The October 2023 RR determined that Student was eligible for special education on the bases of Other Health Impairment and Speech/Language Impairment. Recommendations were for consideration of a different educational placement, and monitoring of and revision to the IEP as needed. (J-14 at 23-28.)
37. The Parents were provided the District's October 2023 ER prior to an upcoming IEP meeting. (N.T. 149-50.)

Fall 2023 IEPs

38. The District convened an IEP meeting in October 2023. By that time, Student's teachers had noticed increased behaviors and a very short attention span of approximately one minute. (N.T. 87-88, 147, 418-20, 674-76.)
39. An annual IEP meeting convened in November 2023 that included a review of the RR. (N.T. 88-89, 418, 431, 682-83; J-15; J-18.)
40. The November 2023 IEP summarized the recent neuropsychological assessment. Assessment of cognitive ability was reportedly variable but

in the very low range. Academic achievement results yielded very low-range scores in basic literacy skills and in the extremely low range for mathematics. Other functioning assessed reflected a number of concerns with emotional/behavioral and adaptive skills. (J-16 at 7-8.)

41. Teacher input into the November 2023 IEP reflected positive social skills with peers; by contrast, Student's early literacy skills were weak with reading level at pre-kindergarten, and Student relied on the paraprofessional to participate in science/social studies. Task completion, turn-taking, and focus/attention were also noted as deficient. Student's progress on all IEP goals (academic and behavioral) was inconsistent and did not reflect progress toward any; the same was true of related service goals. (J-16 at 7-21.)
42. Parent input into the November 2023 IEP mirrored that from the October 2023 RR. (J-16 at 28.)
43. A number of strengths identified in the November 2023 IEP include being friendly and enthusiastic, enjoying time with peers, having increased attention in the preferred group activity, and interest in books. Needs identified followed those in the RR: foundational reading, writing, and mathematics skills; following directions; improving focus/attention; remaining on task; demonstrating safe behavior; self-advocacy skills; activities of daily living; and occupational physical, and speech/language skills. (J-16 at 29-30.)
44. Annual goals in the November 2023 IEP addressed sight word fluency; writing alphabet letters; spelling; mathematics computation (subtraction); attending to non-preferred activities; appropriate language throughout the day; compliant behavior and safe actions; hearing support; and gross motor, fine motor, and speech/language skills. A number of program modifications/items of specially designed instruction

were set forth along with related services including the full-time paraprofessional. Student's program was one of learning and speech/language support⁷ at a supplemental level; Student would not participate in general education during reading, writing, and mathematics instruction or related service therapy and instruction, as well as during social skills instruction. (J-16.)

45. Student's PBSP in the November 2023 IEP provided for numerous antecedent strategies; replacement behaviors; and consequences for both problematic and replacement behaviors. (J-16 at 65-72.)
46. At the end of the November 2023 meeting, the District representatives recommended a different form of special education support, namely life skills rather than learning support. That meeting was the first time such a change was discussed, but the team reviewed placement options and supplementary aids and services at that time. A transition plan would be implemented after the Parents toured the proposed setting. (N.T. 90-91, 94-95, 151, 431-32, 435-36, 443-44, 684-89; J-16 at 21.)
47. The proposed life skills program is in a different District elementary school and would provide more intensive services focused on functional academics and skills, with better access to facilities for activities of daily living such as toileting. Teachers there have more experience with difficult behaviors and are supported by a classroom registered behavior technician (RBT). There are also community-based activities imbedded within the program. Student would have more access to small group instruction with peers having comparable skills, rather than being essentially educated alone for most learning support activities. There is a also nurse in that classroom. (N.T. 212-13, 392-93, 649-51, 720-26, 753-54, 760-61, 774-77, 779-81.)

⁷ Hearing support was not checked but was provided in the IEP.

48. The Parents soon afterward discussed the District's proposal with Student's treating physician, who disagreed with the recommendation to move Student from the neighborhood school. The Parents arranged for the District representatives to have a conference call with that physician about the changes, and they signed releases for information from both of Student's developmental physicians. (N.T. 94, 98-99, 155-56, 227-28, 237-38, 696-98; J-16 at 23; J-21; J-22.)
49. The Parents did tour the proposed placement, and had serious concerns about Student making the transition to the new setting. Reasons included the skills of the peers they observed, and the fact that both Student and the peers would need to get to know each other. They did not disagree with the proposed general education other than the setting. (N.T. 96-97, 104, 107, 112-13, 159-60.)
50. The developmental pediatrician wrote a letter in late January 2024 recommending the addition of Autism as an eligibility category; she also wrote that she "strongly advocate[d]" that Student remain in the "home school" to permit Student to learn with peers exhibiting appropriate behavioral, communication, and social skills (J-17 at 2). She provided a listing of resources for supporting inclusion, and recommended that Student be educated with peers from whom appropriate behavior, communication, and social skills could be learned. (N.T. 278-80, 285, 296; J-17.)

Spring 2024 IEPs

51. Additional IEP meetings convened in both January and February 2024. A BCBA proposed revisions to Student's PBSP to be followed by implementation over a trial period. ESY services were memorialized in the IEP as well. The Parents approved the NOREPs for these changes. (N.T.

99-100, 156-57, 225-28, 240, 246, 418, 450, 701-02; J-16; J-18; J-20; J-24; J-25; J-26.)

52. The February 2024 IEP contained a transition plan for Student's move to the other elementary school setting, with a gradual progression from a visit to eventual attendance solely in that placement. (J-16 at 21-22; J-23.)
53. Progress monitoring in March 2024 continued to show Student's stagnant, inconsistent, or declining performance on IEP goals across areas, particularly with problematic behaviors. The sole exception was a spelling short-term objective where Student did exhibit gain. (J-28.)
54. The IEP team met again in April 2024 after the trial period. The District reported to the Parents that the revisions to the PBSP were not successful, and reiterated the recommendation for the proposed program and placement. The IEP remained largely unchanged with the exception of the location of services and an additional twenty minute period of learning support for reading; hearing, learning, and speech/language support remained at a supplemental level. (N.T. 100-01, 185-86, 418, 452-54, 706-10, 719-22; J-29; J-30.)
55. Progress toward goals reported as of April 2024 reflected minor progress on one goal (sight words); no progress on some goals (mathematics computation, speech/language, self-advocacy); and regression in performance on others (writing, spelling). In addition, some progress particularly with behavior was highly inconsistent, and behaviors impacted goal progress attempts and reporting. (J-29 at 28-33.)
56. The Parents did not approved the NOREP proposing the life skills support. (J-31.)
57. Student was in the general education setting for morning meeting, science, social studies, recess, and lunch during the 2023-24 school year.

The learning support teacher consulted with the general education teachers and provided resources for supporting Student. (N.T. 415-16.)

58. Student was in the learning support classroom for reading, writing, and mathematics instruction during the 2023-24 school year. (N.T. 415, 420-24.)
59. During the 2023-24 school year, Student exhibited pleasure being around peers but did not engage socially with them. (N.T. 466-48.)
60. Student had difficulty completing tasks, had a short attention span, and engaged in physical aggression during the 2023-24 school year. Behaviors increased in general at school over that school year. Student did exhibit pleasure being around peers but did not engage socially with them. (N.T. 416-17, 423, 437-40, 457-58, 466-68, 477.)
61. By the spring of 2024, Student would perform a task for up to a minute then have a break for five minutes. Sometimes Student would continue the task for a brief period, and the teachers did not interrupt Student. (N.T. 427, 494.)
62. Student's overall performance was highly inconsistent over the 2023-24 school year. (N.T. 468-69.)
63. Student attended ESY at the proposed non-neighborhood elementary school in 2024. Student was present with mostly new peers and responded to them very similarly to how Student was responding to peers at the current elementary school in the spring of 2024. (N.T. 520, 717-19.)

2024-25 School Year

64. Student's school day in the fall of 2024 began with arrival at school followed by breakfast accompanied by a special education teacher, then homeroom with the full time paraprofessional, who by then was an RBT.

Student then transitioned to a writing class, a special class, reading class, then lunch. After lunch, Student continued with phonics instruction, mathematics, recess, social studies, and related services. The school day ended with a period of time for any additional support or a break. (N.T. 243-44, 354-56.)

65. Two special education teachers for the 2024-25 school year provided direct writing and mathematics instruction to Student. Both were in small groups, and mathematics also included larger group instruction with stations for instruction and practice as well as a separate time for individual direct instruction. Student was generally not near the same level as peers in the larger group instruction and often worked individually with the aide. All students worked individually after direct instruction. (N.T. 328, 332-34, 338-39, 349-51, 356-58, 361-62, 374.)
66. A special education teacher for the 2024-25 school year provided support for individual students based on need in social studies, collaborating with the general education teacher. The special education teacher implemented Student's IEP along with the general education teacher, and modified the coursework to focus on essential information covered for Student. Rather than working with peers in general education, Student worked nearby them. There were times that Student became disruptive to the class and needed to be removed to a special education classroom, arrived late, or did not attend at all. Science class would be the same after that class began. (N.T. 328-31, 337-39, 344-45, 362-67, 585, 589-90, 598, 600-01, 604-06, 610-11, 613-14, 620-21, 635-36, 638-40, 646.)
67. Student's performance over the 2024-25 school year was widely inconsistent. Student engaged in inappropriate verbal language and physical aggression, and was often noncompliant. (N.T. 339, 360-61, 368-69, 382-84, 386, 388-890.)

68. Student participated in read-aloud in a small group in the general education class during the 2024-25 school year. (N.T. 340-41.)
69. Student's PBSP over the 2024-25 school year provided for Student to work for one minute then take a five-minute break. However, if Student was successful in the task, sometimes it would continue another one to two minutes as in the prior school year until Student exhibited frustration and needed the break. (N.T. 341-42.)
70. Student worked alongside peers in the fall of 2024 but generally not together with a peer, although Student did generally smile after peer attention. There were some brief interactions by peers especially at recess but Student did not actively engage in any conversation. (N.T. 347-48, 368-69, 375-81, 596-97, 621-22, 626, 643-44.)
71. As of the time of the due process hearing, Student was working one-on-one for the majority of the school day because of the significant behaviors that were disruptive to peers. The District professionals found that to be very isolating for Student. (N.T. 193-94, 197-99, 202, 250-51.)
72. District professionals believe that providing a more functional life skills program for Student rather than learning support would be more appropriate and serve as the least restrictive environment. (N.T. 392-95, 403-04, 446-47, 464-65, 488, 511-12, 649-51., 687-89, 69, 722-25, 769-70)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

In general, the burden of proof is viewed as comprising two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S.

49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who filed the Complaint leading to this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58.

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

The testimony of the District representatives was quite persuasive with respect to Student’s educational needs in light of behavioral and other functioning at school. The former director of special education for the District, who was very familiar with and knowledgeable about Student, provided cogent and convincing reasons that Student, like all students, benefits from exposure to peers of varying levels, both higher and lower functioning (N.T. 773-77), which is certainly consistent with the law. Her description of the proposed program was knowledgeable and detailed, made without exaggeration or improper motivation, and was highly credited.

The heartfelt testimony of the Parent who testified was clearly genuine and understandably emotional, and was fully credited as to their position, experiences, and dedicated advocacy as loving parents of a child with a [redacted] and circumstances that would be unimaginable to most people. The testimony of their developmental pediatrician, while clearly credible as to her opinion, was not outcome-determinative despite her firm conviction that any different location for Student's programming would not be "best" (N.T. 303), and she based her recommendation for the same peer group on her "common sense" (N.T. 317), rather than on any medical or experience-generated rationale.

The other expert for the Parents, who undoubtedly was similarly convinced of her opinion and was well-qualified and experienced regarding the delivery of educational services for students with significant and complex needs in general education classrooms, was rather generic in terms of inclusion overall instead of focused on Student's individual strengths and needs (*see, e.g.*, N.T. 827-31, 883-84, 886-87 (insisting that all students with special education needs must be in general education settings for at least 80% of the time)). Moreover, her testimony was rather evasive rather than responsive on cross-examination, with a rather defensive rather than convincing demeanor. For these reasons, her testimony was not accorded persuasive value in deciding any of the issues presented.

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

General IDEA Principles: Substantive FAPE

The IDEA requires each of the states to provide a “free appropriate public education” (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE is comprised of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. More than two decades ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with the procedural obligations in the Act.

Through local educational agencies (LEAs), states meet the obligation of providing FAPE to an eligible student through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court has confirmed, an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, 500 U.S. 386, 399 (2017).

Individualization is unmistakably the central consideration for purposes of the IDEA. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Additionally, a proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); see also *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031,

1040 (3d Cir. 1993) (same). “The IEP *must aim* to enable the child to make progress.” *Dunn v. Downingtown Area School District*, 904 F.3d 248, 255 (3d Cir. 2018) (emphasis in original).

Evaluation Requirements

Substantively, 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). The IDEA explicitly identifies the following qualifying disabilities: “intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance[], orthopedic impairments, autism, traumatic brain injury, other health impairments, [and] specific learning disabilities.” 20 U.S.C. § 1401(3); *see also* 34 C.F.R. § 300.8(a).

Certain procedural requirements are set forth in the IDEA and its implementing regulations that are designed to ensure that all of the child’s individual needs are appropriately examined.

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 services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3). Any evaluation or reevaluation must also involve a review of existing data including that provided by the parents in addition to available assessments and observations. 34 C.F.R. § 300.305(a).

General IDEA Principles: Least Restrictive Environment

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

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

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

Also fundamental 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 physical 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). The IDEA “does not create a right for a child to be educated” at his or her neighborhood school. *Lebron* at 801. 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. 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.

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family including parents have “a significant role in the IEP process.” *Schaffer, supra*, 546 U.S. at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b). Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 565 (3d Cir. 2010).

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

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

Full participation in the IEP process does not mean, however, that parents are the sole decision-makers on the team. *See, e.g., Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) (noting that IDEA “does not require school districts simply to accede to parents' demands without considering any suitable alternatives” and that failure to agree on placement does not constitute a procedural violation of the IDEA). As has previously been explained by the U.S. Department of Education,

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

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

The Parents' Claims

It is appropriate to emphasize at the outset that the Parents did and do not dispute anything in the content of the current IEP, its identified strengths and needs, the annual goals, program modifications/items of specially designed instruction and related services, and the amount of general education. Thus, the most logical starting point in the discussion is the primary claim that was the focus of the hearing: whether Student's program and placement should essentially remain the same or be changed as the District proposes. The Parents contend that this decision is governed by LRE principles, and they argue that the life skills support placement in the other elementary school is more restrictive than the learning support setting. Resolution of this issue is not straightforward in this unique case.

The *Oberti* and *Kingwood* cases addressed the issue of when students with disabilities may be removed from the regular education setting. That is not the actual question here, where the parties do not disagree on whether Student should spend a significant part of the school day outside of the

regular education environment. Both parties understand that special education instruction outside of the regular education environment is necessary for all academics. The parties' fundamental differences are instead over whether that time should be spent in learning support or life skills support. Neither of these placements is automatically more restrictive than the other; both qualify as "special classes" in the implementing federal regulations. 34 C.F.R. § 300.115(b)(1). Moreover, both the current and proposed programs provide for nearly comparable time in regular education, thus rendering them relatively the same in terms of restrictiveness. The central inquiry must be whether the placement is the least restrictive for the particular student, which is necessarily an individualized determination, and not merely a comparison of impressions of the different settings.

The Parents' position focused on whether the District attempted to include Student as required by the IDEA. Neither the IDEA nor the federal regulations define the term "inclusion," and the U.S. Department of Education has confirmed that the term LRE is but a "strong preference" rather than a mandate. 71 Fed. Reg. 156 at 46,585. The Parents throughout the hearing cited to a number of acceptable inclusionary practices that could be considered for Student, such as "parallel instruction." That position, however, is inconsistent with standard understanding of the term in the field of special education as a co-teaching practice with two professionals teaching two different groups of students the same content, with increased participation by all students in a whole group activity,⁸ a

⁸ See, e.g., *Teachers' Desk Reference: Co-Teaching, Pennsylvania Technical Assistance and Training Network* (available at <https://www.pattan.net/Publications/Teachers-Desk-Reference-Co-Teaching>, last visited January 4, 2025); see also Katz, J. & Mirenda, P., *Including Students with Developmental Disabilities in General Education Classroom: Educational Benefits*, 17 *International Journal of Special Education* 2 (2002), at 20-21 (Noting that parallel instruction has "increased the perception of students with and without disabilities when all 'were a part of the class and did work like others do, leading to an enhanced sense of belonging.'" (Emphasis in original) (available at https://www.researchgate.net/publication/287680523_Including_students_with_developmental_disabilities_in_general_education_classrooms_Educational_benefits (last visited

concept with which this hearing officer is very familiar. Providing wholly different instruction with much different expectations to an individual student, necessarily as an isolated experience for this Student, is simply not the same.

The evidence is more than preponderant that Student is not benefitting from the learning support environment but, instead, is essentially a class of one exhibiting continuously escalating behaviors that are impeding the learning of the other students in addition to Student's own. This constantly changing environment is far from consistent, with Student's minute-by-minute presentation dictating the course of each day. Furthermore, Student's academic skills have regressed more than minimally, and functional skills that were previously exhibited have similarly decreased, especially in the home. The District's proposal to transition Student to an environment with the same level of general education but with the special education instruction in a setting that is more foundational and functional, with a higher level of behavioral support and increased opportunities for peer group instruction, is clearly appropriate at this time.

The Parents cite to a number of inapposite hearing officer decisions in this Commonwealth that differ markedly from the facts here. The District did not fail to meaningfully consider maintaining the current placement with supplementary aids and services; indeed, it has done so on an ongoing basis over the 2023-24 and 2024-25 school years. Even though the Parents did not specifically recollect a discussion of placement options, LRE, and

January 4, 2025). Notably, the Parents in their Complaint, and two of their witnesses at the hearing, cited to various research articles.

supplementary aids and services in November 2023, the District witnesses who did were credited over that lack of memory, particularly in light of the fact that there could not have been collaboration on and meaningful discussion of inclusionary practices for Student throughout that time period. A mere cursory review of Student's IEPs reveals such impossibility.

It is prudent to here briefly address the specific concerns of the Parents and developmental pediatrician that Student should remain in the current physical building. The basis for this position is their jointly held belief that it would be better for Student to be in a familiar environment with known peers. As noted, the District as the LEA has the broad discretion to determine the location of services as long as they are appropriate for the student; and public schools are not required to maximize a student's education or provide what might be considered to be best. In addition, as the District observes, it is required to program for all of Student's needs, not only a singular perception that familiar peers would be preferred.

Whether or not Student would be benefitted more by known peers than newer peers cannot be known, but the only evidence of record fails to support the Parents' argument after ESY in 2024. The developmental pediatrician who cited "common sense" as the basis for her conclusion, and the Parents' opinion that the same setting with familiar peers is most appropriate, may or may not be Student's experience going forward. The attached order provides a specific gradual transition to the new environment with continual monitoring of any changes in skills suggesting that the life skills setting in the other elementary school is not appropriate. The Parents, who will undoubtedly be very disappointed by this decision, are strongly encouraged to cooperative with the District in complying with and effectuating the terms of the order so that their concerns, if valid in practice, may be promptly addressed along with any other ongoing needs for adjustment.

Finally, the asserted FAPE denial under the IDEA is the same for Section 504 and the ADA, and the identical conclusions are reached and as briefly supplemented *infra* defeat the remainder of the FAPE contentions.

The District's Claim

The other issue is the District's claim that its RR in October 2023 met IDEA criteria. There is little if any evidence in the record to support an inference that the Parents had concerns with that evaluation, or what those were. Other than the testimony of the Parent who testified that an IEE would be "beneficial" (N.T. 165-66), it is wholly unclear what their objections are, if any, to its content.

On the merits, examination of the October 2023 RR reveals that it did utilize multiple assessment tools, strategies, and instruments, rather than any single measure, to gather information about Student. The District conducted a record review with a summary of previous evaluations; incorporated parental input that provided their views on Student's academic, adaptive, and social/behavioral functioning; and obtained and reported on observations by and information from teachers and related service providers including progress on IEP goals. The RR identified areas of strength and need for Student and confirmed the previous eligibility categories under the IDEA, providing a document with comprehensive information to guide special education programming. Review of the document as a whole reflects that it served the very purpose of a special education evaluation, and did so thoroughly. There simply is no basis for awarding an IEE at public expense with an RR that fully complies with all IDEA requisite criteria.

The Parents' Separate Section 504 and ADA Claims

Finally, the Parents have asserted their claims under Section 504 and the ADA in addition to the IDEA. In their closing, they submit that they have established violation of both statutes because the District proposes to remove

Student from the neighborhood school. Without elaboration, they merely reference their position on the FAPE and LRE contentions and assert that the District failed to prove that removal from the current setting is necessary before it may be considered non-discriminatory. The *LePape* case did stress that “[t]he ADA ‘does not require a public entity to take any action that it can demonstrate would result [1] in a fundamental alteration in the nature of a service, program, or activity or [2] in undue financial and administrative burdens[,]’ though it must still ‘ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.’” *LePape, supra*, 103 F.4th 966, 974 n. 2 (citing to 28 C.F.R. § 35.164). As discussed above, the IDEA does not require public schools to create all programs in each and every school building but, rather, leaves the discretion on the physical setting to the LEA. Further, and as the Fourth Circuit cogently summarized consistent with other circuit courts,

Congress intended the states to balance the competing interests of economic necessity, on the one hand, and the special needs of a handicapped child, on the other, when making education placement decisions. 20 U.S.C. § 1412(3); *Doe v. Anrig*, 692 F.2d 800, 806 (1st Cir.1982) (in determining appropriate placement of an individual handicapped child, the child's needs must be weighed against the realities of limited public monies); *Pinkerton v. Moye*, 509 F. Supp. at 112 (“competing interests must be balanced to reach a reasonable accommodation”).

Barnett by Barnett v. Fairfax County School Board, 927 F.2d 146, 154 (4th Cir. 1991). The *Barnett* Court also rejected the argument under Section 504. *Id.* This hearing officer concludes that the Parents have accordingly not established any independent violation of either Section 504 or the ADA in the District’s adherence to these longstanding legal principles.

CONCLUSIONS OF LAW

1. The District's proposed program and placement for Student as of May 2024 were the least restrictive environment, and appropriate, for Student.
2. The District did not violate Section 504 or the ADA.
3. The District's reevaluation in October 2023 was appropriate and the Parents are not entitled to an IEE at public expense.
4. The District must be permitted to implement the May 2024 IEP in the proposed placement.

ORDER

AND NOW, this 6th day of January, 2025, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's proposed program and placement for Student as of May 2024 is in full compliance with the IDEA and did not deprive Student of the opportunity for FAPE.
2. Within seven calendar days of the date of this Order, the District shall begin to implement the transition plan in the most recent IEP.
3. Within seven calendar days of the date of this Order, the District shall also propose a schedule on ongoing consultation of the IEP team including the Parents, at least weekly, to review and discuss Student's functioning in the new environment and whether any revisions to the transition plan are necessary. This ongoing consultation need not be by scheduled meeting of the full IEP team as may be necessary to minimize scheduling delays, and should be supplemented by the ongoing communication between the parties.
4. Prior to Student's completion of the transition plan, the District shall convene an IEP meeting of all available members including the Parents to discuss any necessary revisions to the IEP that may be necessary, and a schedule for ongoing consultation as Student begins that program and placement on a full-time basis. This consultation shall be at least once every two weeks for a four week period, then at least once every four to six weeks until the team continues to meet as frequently as it did over the 2023-24 school year.

5. The District did not violate the provisions of Section 504 or the ADA during the time period in question.
6. The District is not ordered to take any further action.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 29896-23-24

Sent to counsel for both parties this date as required by 34 C.F.R. § 300.515 by electronic mail message as requested by counsel consistent with 22 Pa. Code § 14.162(n).