

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:

26044-21-22

Child's Name:

B.F.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

July 8, 2022

INFORMATION AND PROCEDURAL HISTORY

The Student¹ is currently [an early adolescent] and recently completed the [redacted] grade in the District. The Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² as a child with an Intellectual Disability, Autism, and Speech or Language Impairment.

The Parent³ filed a due process complaint that asserted the District denied Student a free appropriate public education (FAPE) during the COVID closure, improperly excluded the Student from school, and that the recent recommendation to change the Student's placement violated least restrictive environment mandates. In response, the District maintains that its actions and programming are appropriate, and that no relief is due.

For the following reasons, the Parent's claims are partially granted and denied.

ISSUES

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

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

³ Although both Parents are involved in the Student's education, one Parent filed the Complaint and attended the due process hearing.

1. Did the School District fail to provide the Student with a Free Appropriate Public Education during the COVID-19 mandatory school closure period (March 2020 through the conclusion of the 2019-2020 school year), and if so, is the Student entitled to an award of compensatory education?
2. Did the School District fail to provide the Student with a free appropriate public education during the 2021-2022 school year, and if so, is the Student entitled to an award of compensatory education?
3. Did the School District improperly exclude the Student from the District from February 8, 2022, through February 14, 2022, and if so, is the Student entitled to compensatory education?
4. Is the Student's current program and placement at the District middle school the least restrictive environment, and should the Student remain in [the] current placement?
5. Should the Student be placed in the alternative educational program and placement the School District has proposed and is the alternative educational program the least restrictive environment?

FINDINGS OF FACTS⁴

Early Education

⁴ The Parents and the LEA stipulated to the admission of exhibits P-1 through P-7 and S-1 through S-15. (N.T. (496))

1. The Student is eligible for special education and related services as a child with an Intellectual Disability, Autism, and Speech or Language Impairment. (S-1)
2. Since [an early age], the Student has received services in the home and community from therapeutic staff support (TSS) (N.T. 28).
3. The Student attended [early elementary] in a life skills classroom in the District and transitioned to a different District elementary school for [the remaining elementary grades]. (N.T. 31)
4. In the Student's [redacted] grade year, the District contracted with Pennsylvania Training and Technical Assistance Network Autism Initiative ABA Supports program (PaTTAN-AI). The AI is comprised of different projects, including an ABA support program that provides preservice training to teachers through a training model, a behavior skills training model and onsite consultation to offer feedback to school staff and training based on classroom needs. (P-5; N.T. 89-93)
5. The AI is not part of a child's IEP team and does not consult or provide direct services to students but focuses on training and consultation to support positive behavioral changes and improved student outcomes. (N.T. 93)
6. Each participating school district identifies an internal coach trained by the AI. The internal coach receives ongoing training from the AI and works collaboratively with support consultants to foster the independent implementation of applied behavior analytic programming in their school district. (P-5; N.T. 96-97)

7. During the 2018-2019 school year, the District received PaTTAN-AI services. (P-5; N.T. 93-97)
8. In April 2019, the District reevaluated the Student and conducted a functional behavioral assessment (FBA). The FBA interview determined behaviors of concern, medical factors, antecedent events, skill deficits, and consequence factors. For inclusion in the FBA, the District conducted a direct observation, collected data and described its methods. The FBA summary listed antecedent (prevention) and consequence strategies, events, and factors (behavior occurs when Student is seeking attention from adults and peers or when exhausted and attempting to stay awake). The FBA hypothesized that when seeking attention, the Student [engages in disruptive behavior]. (S-7)
9. The evaluation recommended that Student continue to attend the full-time autistic support classroom and receive speech and occupational therapy services. Based on the FBA, the team developed a positive behavioral support plan (PBSP). (S-7)

2019-2020 School Year [redacted]

10. During the 2019-2020 school year, the Student was enrolled in [redacted] a District elementary school. (S-3)
11. Through the April 2019 IEP, the Student received full-time autistic support that included instruction in communication, prompting,

motor movement, labeling, and socially mediated negative reinforcement. The IEP contained a PBSP, program modifications and SDI, 180 minutes of monthly Speech therapy, 120 minutes of monthly occupational therapy (OT), and a personal care assistant (PCA). (S-3)

12. During the [2019-2020 school year], the District implemented the PBSP. The Student demonstrated behaviors that included hitting, kicking, yelling, and swearing. Although the AI supported three District classrooms, including the Student's with in-person, monthly consultation, PaTTAN did not provide individualized, one-to-one student services. The AI consultants observed teachers, worked with staff, reviewed programming, made suggestions, and answered the teachers' questions. The services were provided to all the students in the classroom. (S-12; N.T. 69-70, 116-117, 267-257, 266-278, 398)
13. On March 13, 2020, the District closed after the Commonwealth of Pennsylvania mandated school closures because of the COVID-19 pandemic. During the closure, the District offered its students virtual instruction. (N.T.72-73, 452-453)
14. On March 30, 2020, the IEP team met to develop programming. The March 2020 IEP offered goals, a PBSP, and related services that included Speech, OT and a Personal Care Assistant (PCA). (S-6)
15. On April 10, 2020, the District issued a NOREP with a COVID-19 IEP plan with proposed amendments to the Student's programming for implementation in a virtual setting. The supports included virtual instruction, parent training, activities of daily living suggestions,

individual speech and OT remote services, and progress monitoring. On May 21, 2020, the District proposed extended school year (ESY) services for the Student during the summer of 2020. (S-4, S-5; N.T. 454-456)

16. During the COVID closure, the Student participated inconsistently in virtual instruction. Depending on attentiveness, the Student received three to fifteen minutes of virtual instruction at a time. The instruction included the special education teacher reading to the Student, showing a video clip, asking questions and skills reinforcement. The District posted videos to SeeSaw for enrichment and for the Parent to assist with activities and instruction. (S-6; N.T. 39-40, 259-261, 269; 456- 457)
17. During the COVID closure, the District did not provide Speech or OT services to the Student. The Parent received direction from the District on how to provide Speech and OT services to the Student as a component of activities of daily living instruction. The Parent does not have the education or training to provide Speech or OT services. (N.T. 38, 457-458)
18. During the summer of 2020, the Student received ESY for five to fifteen minutes daily. (N.T. 270-271, 458)

2020-2021 School Year [redacted]

19. In Fall 2020, the Student returned to in-person instruction enrolled [redacted] at a District elementary school. The Student continued instruction with the same special education teacher from the

previous year with placement in full-time autistic support and received speech, OT and support from a PCA. (S-6; N.T. 453)

20. After the first marking period, the District assessed the Student for purposes of covid compensatory services (CCS). The Student did not demonstrate regression related to IEP goals and maintained some skills; however, progress slowed because new concepts could not be introduced. Behaviorally, it took time for the Student to get back on track. Because the District could not determine whether the Student regressed during the COVID closure, no CCS were offered. (N.T. 114-115, 261-262, 272, 458-460)

21. During the 2020-2021 school year, PaTTAN AI-supported three District elementary schools, including the Student's classroom. Although COVID restrictions reduced its onsite involvement, teachers in the District videoed behaviors for AI observation and feedback. PaTTAN trained the teachers and classroom aides, with four consults through zoom and one in person. (N.T. 94, 97, 116, 118, 397-400)

22. During the first marking period, the Student engaged in behavioral incidents that included elopement, aggression, and screaming that resulted in [disruption to the classroom]. (S-8)

23. On March 25, 2021, the District completed a reevaluation (RR) of the Student. The RR determined the Student had needs related to

effective interventions delivered with consistency, safety awareness and skills, the ability to attend to the instructor and materials, appropriately getting attention from classroom staff and peers, and responding to directions cooperatively. (S-7)

24. The resulting March 2021 IEP indicated the Student exhibited behaviors that impeded learning and contained a PBSP assessment summary, measurable annual goals that addressed (manding, tacting, following directions, intraverbal abilities, social behavior, motor imitation repeating words), program modifications and specially designed instruction, related services, support for school personnel, and ESY services. (S-7, S-8)

25. The PBSP incorporated in the March 2021 IEP identified antecedents to Student's behaviors of concern (refusal to comply with instructions, hitting, kicking, pulling hair, pushing, swiping materials, dropping to the floor and/or elopement, inappropriate vocalizations; behaviors of concern (hitting, kicking, pulling hair, dropping to the floor, swiping materials. inappropriate and language; screaming responses and/or whining); consequences maintaining the behavior; and the perceived function of the behavior of concern. (S-8, p. 12-13)

26. The SDI in the March 2021 IEP included frequent and varied reinforcement in the form of tangibles and edibles, modeling, verbal prompts, skill practice, singular task presentation, simplified language, adapted materials, movement breaks, a PBSP with a differential reinforcement for positive behaviors, QBS safety procedures, and bathroom training. Related services included Speech and OT services, a PCA and transportation. (S-8, p. 35-37)

27. The March 2021 IEP offered full-time autistic and speech and language support in the Student's neighborhood school. On March 25, 2021, through a NOREP, the District offered ESY for the summer of 2021. (S-8, p. 4, S-9; N.T. 461)

28. In April 2021, an intensive behavioral health services (IBHS) agency updated its individual treatment plan (ITP) for the Student. The plan identified the Student's transition to the District middle school as a concern. The ITP listed behaviors that included aggression, non-compliance and tantrums. The Parent reported overall regression in behaviors since July 2020. The ITP proposed a treatment goals, methods/interventions and a discharge plan. The Parent did not provide the ITP to the District until December 2021. (S-11)

29. During the [2020-2021 school year], the Student engaged in aggressive behaviors, including kicking and hitting, resulting in bruises. (S-12; N.T. 397)

30. During the summer of 2021, the Student received ESY for two weeks until the Parent enrolled the Student in a camp. (N.T. 461)

2021-2022 School Year [redacted]

31. During the 2021-2022 school year, the Student transitioned to [redacted] a District middle school with placement in full-time autistic support. (N.T. 314)

32. PaTTAN AI services are provided only upon the request of a District. After not receiving an application for AI services for the 2021-2022 school year, PaTTAN contacted the District. In response, the District proposed its own consultation model, which PaTTAN could not support because it was not evidence-based. (N.T. 104-108)
33. In September 2021, the IEP team met and updated Student's IEP to reflect middle school enrollment and behaviors of concern. At the meeting, the Parent learned that PaTTAN would not be providing its services to the District and the Student.⁵ (P-2, S-8; N.T. 162)
34. The needs identified in the IEP included accuracy and consistency, attending to instruction and materials, motor imitations, labeling skills for items and actions, decreased problem behaviors, and articulation. (S-8)
35. The Student's IEP included measurable annual goals responsive to needs, a PBSP, SDI and related services that included OT, Speech, transportation and the support of a school-day PCA. After reviewing data collected over the year, the District did not update the FBA from 2019 but determined the function of Student's behavior remained unchanged. (S-8; N.T. 35-43, 286-287, 327, 331-332, 389-391, 469)
36. Although assigned to the Student in September 2021, the assigned PCA was unable to support Student because of an

⁵ At the end of the Student's [2020-2021 school] year, the Parent was advised that PaTTAN services would be in place for [the 2021-2022 school year]. (N.T. 44-45)

incompatible personality, and adequate training had not occurred that would ensure safety. Frequently, the autistic support teacher assisted the Student instead of the PCA. (S-8: N.T. 312-318, 330, 487)

37. At the end of September 2021, the Parent filed a Complaint with the Pennsylvania Department of Education (PDE) that raised three issues related to outside behavior consultation, PBSP implementation and failure to implement the Student's IEP. (S-14)
38. On November 18, 2021, the Student's treating psychiatrist recommended that the Student receive applied behavior analysis (ABA) at school, supported by PaTTAN, to address behaviors that previously responded well to this intervention. (P-6)
39. On November 22, 2021, after investigating the Parent's claims, the BSE concluded that the District required no corrective action. After the Parent requested a Complaint Investigation Report (CIR), PDE concluded the conclusions from the original report would stand. (S-14, p. 20)
40. On December 8, 2021, the IEP team met to address concerns about Student's escalating behaviors. The Parents attended the meeting with the Student's blended case manager, the supervisor for special education, an instructional advisor, an educational advocate, the school psychologist, the special education teacher and an outside mental health provider. (P-1, S-10)

41. After the team met, the District issued a NOREP that recommended the Student receive full-time autistic support, with speech and language support at a private, non-residential academic school (Private School). The Parents rejected the proposed placement. (S-10; N.T. 206)
42. The Private School placement recommended by the District works solely with students with autism and intellectual disabilities, utilizes principles of ABA and verbal behavior programming, and offers smaller classes than the District with a higher teacher-to-student ratio. The onsite crisis behavioral team is within ten feet of a classroom and can provide immediate support and redirection to a student in need. (N.T. 210, 300-301, 306-307)
43. Unlike the District, the Private School has secured doors that do not open unless accessed by a swipe card to assure safety and prevent elopement. At the Private School, a playground is under construction for access by the students. (N.T. 475)
44. The Private School works with students on transition and daily living activities. (N.T. 472-476, 494)
45. On February 4, 2022, the Student engaged in a behavioral incident that resulted in physical injuries to two team members assisting. On February 8, 2022, while attempting to drop off the Student at school, the District advised the Parent that Student was excluded from school until February 15, 2022. Although the District intended to provide thirty minutes of daily morning instruction during the exclusion, the Parent was unable to access the virtual platform.

The Student did not receive Speech or OT services during the exclusion from school. ⁶(N.T. 66-68, 300)

46. During the 2021-2022 school year, the District utilized the services of a BCBA from the IU to provide support to the Student. The BCBA conducted classroom observations reviewed the positive behavior support plan and offered suggestions to the team. (N.T. 75, 467-468)
47. During the 2021-2022 school year, the Student received direct instruction from the autistic support teacher and speech and OT services. Because of Student's behaviors, the District was unable to teach new skills and instead focused on concepts already mastered. Despite the Student's aggressive behaviors, some progress occurred. (N.T. 297)
48. Because the PCA assigned to the Student in September was untrained, the autistic support teacher provided support along with another students PCA. When the Student had crisis behaviors, instructional advisors, the Director of exceptional children and the building principal assisted. (N.T. 283, 311-313)
49. During the 2021-2022 school year, the District implemented the Student's PBSP and staff that worked with the Student in the

⁶ On February 14, 2022, the Parent submitted a Motion to Reinstate the Student and for Enforcement of Stay-Put rights. That same day, the Hearing Officer granted the Parent's request. (HO-2)

classroom were trained in applied behavior analysis (ABA) principles. (N.T. 122-123, 366-367)

50. During the 2021-2022 school year, the Student engaged in numerous behavioral incidents that resulted in injuries to the Student, school staff and other children. The Student [engaged in severe disruptive behaviors.] On some occasions, the Student engaged in passive non-compliance and would sit, stare and refuse to answer. Sometimes, the Student purposefully gave the wrong answer [and engaged in verbally disruptive behavior.] Some of the behaviors occurred daily and appeared calculated and planned. (S-12, pp. 1-218; N.T. 29-294, 201-203, 392-394)
51. As a safety measure, during the first marking period, the Student was evacuated from the classroom 24 out of 44 days, during the second marking period, the Student was removed 27 out of 33 days, during the third marking period for 18 out of 21, and by mid-April of 2022, for 6 out of 16 days. (N.T. 292)
52. Although the Student was interested in peers and was familiar with some from elementary school, on several occasions, the team cleared the Student's classroom to ensure all students' safety. Some of the Student's peers were afraid, refused to enter the classroom, and were wary because of exhibited aggressive behaviors. (N.T. 295-297)

53. The Parents have served as tireless advocates for the Student, attended every IEP meeting, sought out and secured community-based services along with clinical interventions and programming. (N.T. 20)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof may be viewed as consisting of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion, in this case, must rest with the Parent who filed for this administrative hearing. Yet, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence. Special education hearing officers, who assume the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *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 credible as to the facts. Overall, the witness testimony was consistent; any variations are better attributed to lapse in memory or recall or differing perspectives rather than an intention to mislead. The weight accorded the evidence, however, was not equal. Most notably, the testimony of the experienced educational consultant from the Pennsylvania Training and Technical Assistance Network (PaTTAN) and Autism Initiative Lead and Student's special education teachers was knowledgeable and exceptionally persuasive and has thus been given significant weight. Both teachers had responsibility for the direct instruction of the Student and spent hours of time providing education and managing behaviors. 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.

Substantive FAPE

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. 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. States, through local educational agencies (LEAs), meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is "reasonably

calculated” to enable the child to receive “meaningful educational benefits” in light of the student’s “intellectual potential.” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court has confirmed, an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). Individualization is, thus, the central consideration for purposes of the IDEA. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child’s parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands services are reasonable and appropriate in light of a child’s unique circumstances and not necessarily those that his or her “loving parents” might desire. *Endrew F.*, *supra*; *Ridley*, *supra*; *see also*, *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made.” *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).

Procedural FAPE

An additional core principle of the IDEA is procedural FAPE, which includes parental participation in educational decisions. *Schaffer*, *supra*, 546 U.S. at 53. For a procedural violation to be actionable as a denial of FAPE under the IDEA, a parent must show that the violation results in a loss of educational opportunity for the student, seriously deprive the parents of their participation rights, or causes a deprivation of educational benefit. *Ridley Sch Dist v. MR and JR ex rel. ER*, *supra*; IDEA § 615(f)(3)(E); 34 C.F.R. § 300.513(a). Where there are multiple procedural violations that

might otherwise be harmless in isolation, the cumulative effect of the multiple procedural violations may constitute an actionable denial of FAPE. See, *LO ex rel KT v NYC Dept of Educ*, 822 F.3d 95, 67 IDELR 225 (2d Cir 2016)

Least Restrictive Environment (LRE)

The IDEA requires LEAs to “ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.” 34 C.F.R. § 300.115(a). That continuum must include “instruction in regular classes, special schools, home instruction, and instruction in hospitals and institutions.” 34 C.F.R. § 300.115(b)(1); see also 34 C.F.R. § 300.99(a)(1)(i). LEAs must place students with disabilities in the least restrictive environment where each student can receive a FAPE. See 34 C.F.R. § 300.114. Generally, restrictiveness is measured by the extent to which a student with a disability is educated with children who do not have disabilities. See *id.* In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993), the Third Circuit court articulated three factors to consider when judging the appropriateness of a restrictive placement offer.

First, the court must determine whether a student can receive a FAPE by adding supplementary aids and services to less restrictive placements. “Supplementary aids and services [are] aids, services, and other supports that are provided in general education classes, other education-related settings, and in extracurricular and non-academic settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §300.114 through §300.116.” (34 CFR 300.42) The purpose of providing supplementary aids and services is to

support students with disabilities as active participants with nondisabled peers, as well as to enable their access to the general curriculum. To that end, supplementary aids and services include modification to the general curriculum and [a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modification in the general curriculum]. (34 CFR 300.116 (e))

If placement outside of the regular classroom is determined to be necessary, the second factor requires a comparison of the educational benefits of the segregated placement with the benefits the student could obtain from placement in a regular classroom.

A third factor the court should consider in determining whether a child with disabilities can be educated satisfactorily in a regular classroom is the possible negative effect the child's inclusion may have on the education of the other children in the regular classroom." *Oberti*, 995 F.2d at 1217. In *Oberti*, the court explained that a child's disruptive behavior might have such a negative impact on the learning of others that removal is warranted. Moreover, the court reasoned those disruptive behaviors also impact the child's learning. The court instructs that hearing officers must consider what the LEA did or did not do (or could or could not do) to curb the child's behavior in less restrictive environments. However, 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.

Parent's Claims

This Student just completed the [redacted] grade in a District middle school and is a child with an autism spectrum disorder, intellectual disability, and speech/language impairment. The Student demonstrates behaviors that impede learning. The Parent concedes that through the years, the District has provided appropriate programming for the Student with an array of related services, supplementary aids and services and program modifications that included behavioral consultative services from PaTTAN's Autism Initiative (AI). Despite the provision of special education programming, diligent parental advocacy and community-based interventions, the Student has experienced persistent and now unmanageable behaviors in the school setting. Those behavioral issues and the District's response have led to the need for due process.

In the due process Complaint, the Parent contended during the COVID closure that the Student received no educational benefit during virtual programming. The Parent also contended that during the 2021-2022 school year, the District failed to implement the IEP properly; in December 2021, when it recommended a more restrictive educational placement and again in February 2022, when it excluded Student from school. The record is preponderant that Student was denied FAPE during the COVID closure and again in February 2022. The Parent has not sustained the burden of proof concerning the other allegations.

In March 2020, the District closed in response to the COVID-19 pandemic, and the Student received virtual instruction. Through an amended IEP, the District indicated the Student would receive individual OT and Speech services. However, the provision of these services unfairly fell to the Parent, who is uncredentialed and untrained in both of these professional areas. Instead of direct services to the Student, the District proposed

instructing the Parent on how to provide Speech and OT services to the Student as a component of activities of daily living instruction. As a result, the Student failed to receive the necessary and promised OT and Speech services. The District's plan to place the burden on the Parent to provide Speech and OT was unreasonable and inappropriate and deprived this Student of meaningful educational benefit, and denied FAPE.

The Student returned to the District for in-person education starting the 2020-2021 school year with instruction from the same special education teacher as the previous year. Although the District continued to receive consultation from the PaTTAN-AI and other supported services, their onsite presence diminished because of necessary COVID restrictions. Although the Student engaged in behavioral incidents, according to testimony, it was manageable.⁷

Next, the Parent contends that during the 2021-2022 school year, the District denied Student a FAPE for failure to implement the student's IEP, carried over from March 2021, through inadequate PCA services and a failure to update the 2019 FBA. Although the District documented the severity and intensity of many disciplinary incidents, the PBSP implemented during the 2021-2022 school year relied on an FBA from 2019. The Parent's Complaint merely indicated that escalating behaviors warranted an FBA. The hearing evidence established that in 2019, the District conducted a thorough and comprehensive FBA with requisite elements necessary for the development of a PBSP. Furthermore, the District did not simply refuse to update the FBA this school year. That decision was made after it collected, compiled and analyzed data and determined that the function of Student's behavior remained unchanged. Additionally, the Parent has not provided

⁷ In the Complaint, the Parent raised no issues with respect to the 2020-2021 school year.

preponderant evidence that the decision to use an FBA from 2019 as the basis for the implemented PBSP denied Student a FAPE. Based on the evidence presented by the Parent, I cannot conclude that the District's decision not to update the FBA resulted in a denial of FAPE.

The second aspect concerns the school day PCA assigned to support the Student. Although assigned early in the 2021-2022 school year, she remained untrained and unable to assist with the Student's behaviors. Instead, the autistic support teacher already tasked with instructional responsibilities for Student's classmates frequently filled this role and was required to provide one-on-one intervention. Although this scenario is less than ideal, the Parent has presented no evidence that Student's needs were unmet and denial of FAPE occurred. The Student's autistic support teacher provided direct instruction, managed behaviors, and implemented and monitored IEP goals. The Student received all IEP-mandated related services, and student's progress and behavioral incidents were communicated to the Parent along with quarterly formal progress monitoring data. Although considerable disruption to the Student's education occurred because of behaviors, the Student did receive educational benefit. The Student's IEP was reasonably calculated to enable meaningful educational benefit in light of intellectual potential. The Student was not denied a FAPE.

The next issue for resolution involves the recommendation the Student receive education, out of the District, at a private, non-residential academic school. The Parent's assertion that this contemplated placement violates IDEA mandates is unsupported by the evidence of record. The District's proposed placement is more restrictive than the Student's current

placement; however, that does not render this proposal an automatic denial of FAPE. Applying *Oberti*, the District provided the Student with a litany of aids and services in the form of accommodations and behavioral interventions that included a PBSP that was fully implemented. All of the staff members who worked with the Student in the [redacted] classroom were trained in ABA principles and used those behavioral and instructional strategies which the Student's treating psychiatrist endorsed as appropriate. In addition to the behavioral strategies, the team consulted with a BCBA from the Intermediate Unit, who conducted several classroom observations, reviewed the positive behavior support plan, and offered suggestions. Despite the interventions, the record has established that Student's behaviors were frequently uncontrollable.

The Parent attributed Student's decline in behavior to the lack of consultative PaTTAN services the District refused to accept during the 2021-2022 school year. Although PaTTAN did provide services to the District in previous school years, the record evidence is clear that Student still experienced severe behavioral episodes, albeit better controlled. Although the AI services were helpful to staff and provided strategies that benefitted the entire classroom, the Student did not receive the individualized, one-on-one services that appear to now be required. Although the consultant's testimony was credible and very compelling, based on the evidence adduced during this hearing, the conclusion is still inescapable that this Student's educational needs cannot be met in the District at this time. The Parent has advanced no legal theory under which the District is obligated to reinstate PaTTAN services under the circumstances as presented. Although parents play a role in the development of an IEP, they do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. See *Rowley*, 458 U.S. at 199, 102 S.Ct.

3034 (stating that a FAPE does not require "the furnishing of every special service necessary to maximize each handicapped child's potential"). The nature of this Student's disability, as manifested through classroom behavior, is such that education in regular classes using supplementary aids and services cannot be achieved satisfactorily. The Parent has presented no persuasive evidence to the contrary nor that the District demonstrated insufficient efforts to include the Student in programs with nondisabled children whenever possible. *Oberti*. Furthermore, the record is preponderant that during the 2021-2022 school year, despite the efforts of the team members, the Student's behavior interfered with the education of the Student and peers in the autistic support classroom. The continued placement in full-time Autistic support at the District middle school is no longer appropriate for this Student. Student has social and behavioral challenges that require intensive support, such that continued placement in the current setting does not permit attainment of either academic or non-academic benefits. Continued placement in the current setting would be highly disruptive to other students and teachers and deprive this Student of educational benefit. Thus, the Parent has failed to meet its burden of demonstrating that the District's recommendation to change the Student's placement failed to offer FAPE. Accordingly, the IEP offered Student a FAPE, and District may implement it without Parental consent to the placement.

The District has a continuum of placements and recommended a non-residential, private school. The Private School recommended by the District works solely with students with autism, and intellectual disabilities, utilizes principles of ABA and verbal behavior programming and offers smaller classes. The onsite crisis behavioral team is within ten feet of a classroom and can provide immediate support and redirection to a student in need. Unlike the District, the Private School has secured doors that do not open

unless accessed by a swipe card to assure safety and prevent elopement. A playground, currently under construction, would allow for outdoor time, an option not available in the District. The Private School placement proposed by the District met the LRE requirements in this matter because the record evidence has satisfactorily established that the Student's behavior prevents any benefit in a less restrictive environment. The Private School recommended by the District is this Student's LRE.

Finally, the Parent has preponderantly established that the District's exclusion of the Student from school in February 2022 constituted a denial of FAPE. This removal occurred after a particularly aggressive episode of the Student, characterized by the District as non-disciplinary; however, the Parent received no advance notice of the removal. There is no doubt that this was a procedural violation of the IDEA, which requires parental participation in any changes to the IEP. 34 C.F.R. 28 §300.324(b)(1); 34 C.F.R. §300.321(a)(1)(IEP team must include parents). The nature of the change convinces this hearing officer that this procedural violation was a deprivation of FAPE. The Parent did not receive notification of the proposed exclusion and should have been consulted. The uncommunicated change deprived the Parent of the opportunity to participate in the fine-tuning of the virtual plan to assure educational access could occur and the Parent's role was understood. FAPE is denied if a procedural violation "significantly impeded" a parent's participation in educational decision-making. 34 C.F.R. §300.513(a)(2)(ii). Parent has proven by a preponderance that she was deprived of participation "significantly." Indeed, she was not notified of the change until she took the Student to school. I conclude that lack of notice and the resultant inability to plan and ensure access to the Student's education deprived the Parent of the opportunity to participate in educational planning "significantly."

Furthermore, the record is preponderant that the removal deprived the Student of educational benefit. 34 C.F.R. §300.513(a)(2)(iii). During the five days of removal from school, the Parent's attempts to access the District's virtual platform to continue the Student's education were unsuccessful. During this time, the Student lacked access to educational opportunities and was denied a FAPE.

Compensatory Education

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 the student is receiving only trivial educational benefit and fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has endorsed an alternate approach, sometimes described as a "make whole" remedy, where the award of compensatory education is crafted "to restore the child to the educational path he or she would have traveled" absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Here, absent evidence to support a make-whole award, the hour-for-hour approach must be used, which is appropriate in this matter.

The Parent suggests that 200 hours of compensatory education are warranted. See *Keystone Central School District v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education). However, the remedy must be equitable under the circumstances. In this matter, two distinct periods of a FAPE denial were determined to occur; the first for unprovided related services during the COVID closure and again during the exclusion from school in February 2022. Student shall be awarded a total of thirty-five hours of compensatory education for the FAPE denial, twenty-five hours for the lack of related services during the COVID closure and the remainder for the February exclusion from school. This figure provides the approximate amount of time that Student should have been provided with remote individualized special education services.

ORDER

AND NOW, this 8th day of July 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District may change the Student's placement to a non-residential Private School that works solely with students with autism and intellectual disabilities, utilizes principles of ABA and verbal behavior programming, and has an onsite crisis behavioral team.

2. The Private School should offer academic programming, instruction in transition skills and daily living activities, and have a safe area for outdoor recreation with a completed playground or under construction.
3. The Student is awarded thirty-five hours (35) of compensatory education subject to the following conditions.
 - a. The Parent may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers Student's educational and related service needs.
 - b. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP.
 - c. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent.
 - d. The hours of compensatory education may be used at any time from the present until Student turns eighteen (18).
 - e. The compensatory services shall be provided by appropriately qualified professionals selected by the Parent. The cost to the District of providing the awarded hours of compensatory services shall be limited to the average market rate for private providers of those services in the county where the District is located.

4. Within six months of the Student's enrollment at the Private School, the District shall convene a meeting of the IEP team to review the Student's transition, progress and address any concerns.
5. No further remedies are necessary or ordered.
6. Nothing in this decision and order should be read to preclude the parties from mutually agreeing to alter any of its terms.

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

Joy Waters Fleming, Esq.

Joy Waters Fleming, Esq.
Special Education Hearing Officer

July 8, 2022