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Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: B.O.

Date of Birth: [redacted]

Dates of Hearing: 7/21/2015, 7/23/2015, and 10/16/2015

CLOSED HEARING

ODR File No. 15616-14-15AS

Parties to the Hearing:

Parents
Parent[s]

Local Education Agency
West Chester Area School District
829 Paoli Pike
West Chester, PA 19380-4551

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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November 9, 2015

November 20, 2015

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

The student (Student)¹ is a mid-teenaged student in the West Chester Area School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student's Parents filed a Due Process Complaint against the District in November 2014, asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA in its proposed program for the 2014-15 school year as the family moved to Pennsylvania. The hearing was delayed for various reasons, including the complexities created by the family's long-distance move to Pennsylvania, the need to maintain programming for Student during and after relocation, and the parties' exploration of potential resolution throughout the changing and complicated circumstances.

The dispute centered over whether Student needed a residential placement in order to receive FAPE. This hearing officer issued two pendency rulings over the course of these proceedings, one related to the 2014-15 school year and one related to Extended School Year (ESY) services in 2015. The case proceeded to a due process hearing convening over three sessions, at which the parties presented evidence in support of their respective positions.³ Much of the testimony focused on the program that Student was provided in the state where the family resided until the fall of 2014 and where Student attended until the fall of 2015, and the parties disagreed on whether that program was residential in nature. The Parents sought to establish that Student needed a residential placement in order to be provided with FAPE, while the District

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information including geographical references, are not used in the body of this decision.

² 20 U.S.C. §§ 1400-1482.

³ References to the record will be made as follows: Notes of Testimony (N.T.), Parent Exhibits (P), School District Exhibits (S), and Hearing Officer Exhibits (HO). In addition to the exhibits admitted at N.T. 753-55, and in order to ensure a complete record, P-2 is also hereby admitted. References to the few duplicative exhibits will be to one or the other or both.

maintained that its proposed special education day program was appropriate for Student.

For the reasons set forth below, I find in favor of the Parents.

ISSUE

Whether Student requires a residential placement in order to be provided with FAPE.

FINDINGS OF FACT

General Background

1. Student is a mid-teenaged student who is a resident of the District and is eligible for special education on the basis of Autism. (N.T. 25-26)
2. Student was eligible for early intervention services following a diagnosis of Pervasive Developmental Disorder around the age of two. (N.T. 242-44; P-3 pp. 2, 4-5)
3. A neuropsychological evaluation in 2006 just before Student entered first grade reported cognitive and language impairments, weak social skill abilities, and significant difficulties with attention. The neuropsychologist provided a diagnosis of Autistic Disorder based on the criteria in the Diagnostic and Statistical Manual, Fourth Edition. (P-3)
4. A re-evaluation by the same neuropsychologist in 2011 reported results very similar to the previous 2006 evaluation, and continued to provide a diagnosis of Autistic Disorder. (P-4)
5. Student has also been diagnosed with Obsessive Compulsive Disorder (OCD) and Attention-Deficit/Hyperactivity Disorder (ADHD), which are co-morbid with and directly related to Student's Autism. Student exhibits repetitive, stereotyped behaviors, can be impulsive, has a limited attention span at times, and can be aggressive towards others resulting in minor injuries. Medication has been prescribed for Student's OCD and ADHD, as well as other symptoms of Student's autism, and has been helpful in managing Student's aggression to the point that Student's psychiatrist considered Student at low risk for that type of behavior by July 2015. (N.T. 94, 96-101, 118-19, 378; P-3 p. 13, P-4 p. 11, P-16, P-17, P-18, P-28 p. 19)
6. Student experiences significant difficulty with changes to routine and environments, and requires a schedule that is highly predictable. Student can adapt to changes within the regular structured routine with thoughtful advance planning and explanation. (N.T. 102-04, 193, 280, 413-14)
7. Student uses a limited vocabulary and has a clear need to further develop communication skills. (N.T. 94, 123, 240, 419-20, 425; P-22 pp. 8, 11-12)

8. Because of Student's OCD, Student can be overly focused on items that are, from Student's perspective, not properly lined up or orderly. For example, Student is bothered by seeing a zipper that is not zipped, or untied shoelaces, and Student will try to close the zipper or tie the shoelaces, even if those items are on the clothing of a stranger. (N.T. 186, 190-91, 193, 241, 261, 282, 376, 409-10; P-28 pp. 15, 17)
9. Student does not have awareness of safety, and may be at risk for placing Student's self in danger of physical injury such as from a car driving down a street. Student sometimes has difficulty sleeping, and will get up in the middle of the night requiring others to check on Student. Student requires constant supervision 24 hours a day. (N.T. 105-06, 108-09, 124, 129, 191, 241, 262, 265, 279-80, 301, 309, 338, 376, 740)
10. Student thrives when provided a full schedule of planned activities throughout the day. Student is better able to self-regulate, and to learn, when engaged throughout the day. (N.T. 263, 299-301, 326, 376)

Programming through the 2013-14 School Year

11. Student previously resided in another state (hereafter other state), beginning in July 2012. Prior to that time, Student resided in a different state where Student attended public school, then a residential school beginning at age seven and continuing through age thirteen. The Parents explored public and private school options for Student in the other state in early 2012, and were focused on another residential placement. (N.T. 241-42, 246-52, 257, 265-66, 269-70, 272-74; P-5, P-6, P-7, P-8, P-9)
12. The Parents worked with the school district in the other state to identify a school for Student, but there was no appropriate residential placement near where the family was to reside. The Parents decided on a particular out of district school (hereafter ODS) because of its small student population, large campus, and child-oriented approach, and they determined that Student would live in a group home. (N.T. 170, 273-77, 343, 348)
13. The Parents and school district in the other state entered into an agreement in April 2012, wherein that school district agreed to place Student in the ODS, with a residential placement funded by a regional service program for individuals with developmental disabilities. However, the regional program requires that parents share the cost of out-of-home placements for children under the age of 18. (P-13 pp. 1-4; S-2 pp. 1-2)
14. Student's May 2012 Individualized Education Program (IEP) for the ODS provided for goals and short term objectives addressing needs in reading, mathematics, receptive and expressive language, activities of daily living, and behavior. This IEP also included program accommodations/modifications/supports and related services. (P-10)
15. Student experienced difficulty with the transition to the other state and the ODS. For several months, before arrangements for the group home were complete, Student resided with the family. The Parents hired people to supervise Student in the home. (N.T. 279-80, 371, 729-30)

16. Student became a resident of the group home in July 2012, and was successful integrating into that environment. The group home operates 365 days a year without breaks or holidays. The residents had a routine with activities in the evenings and weekends including community outings. Student was approximately three miles from the family's residence, and they visited with Student weekly at the group home and at the family residence where Student sometimes spent the night. (N.T. 284-85, 307-09, 368-69, 414-15)
17. Student experienced difficulty with the hour or more bus ride between the group home and the school. Staff from both the group home and school worked together to coordinate the structure of the bus ride, and Student became more comfortable with the routine. (N.T. 102, 296)
18. Student was evaluated by a certified school psychologist in the other state in September 2012 at the request of Student's school district there. The psychologist observed Student at school and obtained input from Student's teacher and service providers but not staff at the group home. Student had limited expressive language at that time. Student's teacher completed a Child Behavior Checklist, indicating clinically significant concerns with Thought Problems, which was consistent with the Autism and OCD diagnoses. Student's adaptive behavior, communication, daily living, and social skills were all judged to be areas of deficit. (N.T. 168-69, 171-72, 174; P-20, P-21)
19. The psychologist was a member of Student's IEP team after the 2012 evaluation, and was involved in programming decisions for Student at that time. (N.T. 207)
20. Student's June 2013 IEP for the ODS provided goals and short term objectives addressing needs in reading, written expression, mathematics, speech/language, occupational therapy, activities of daily living, self-regulation, social skills, and behavior. This IEP also included program accommodations/modifications/supports and related services. (P-11)
21. The Parents entered into a new agreement with the school district in the other state in the fall of 2013, wherein that school district agreed that Student would reside in the group home. Student's residential cost was provided through a regional center, with some cost to the Parents and some cost to that school district. (N.T. 277, 279, 302-04; P-13 pp. 5-10)
22. The group home developed an Individual Service Plan (ISP) in January 2014 for that entire calendar year. The ISP reflected that Student at that time exhibited tantrums, physical aggression, and self-injury, and pica was a significant concern. Student demonstrated some independent self-care skills while requiring prompts for others, and many independent activities of daily living skills. Student required close supervision in the community due to concerns over safety, removal of clothing in public, inappropriate touching of others, and pica. The ISP included a Behavior Support Plan and goals addressing self-care, daily living, communication, and recreation/leisure/community involvement skills in the group home. (N.T. 294-95; P-14)

23. Student's school district had an agreement with a community service organization (hereafter CSO) for case management services for students who were in residential placements. Student had a CSO case manager who visited the school Student attended quarterly and conducted observations which were then reported to the school district. She additionally met with the group home supervisor to discuss Student's abilities in that setting, with discussions on how strategies used at school effectively could similarly be used in the group home. The case manager also reviewed Student's progress on IEP goals. The case manager communicated with the Parents about how Student was generalizing skills from Student's IEP into the home and group home environments. By May 2014, the CSO case manager recommended coordination of services and care across all environments and monitoring of generalization of skills learned in therapy. (N.T. 166-67, 179-80, 210-11, 290-91, 384, 417-18; P-23)
24. When Student first had CSO case management services, the focus was on Student's anxiety and OCD. That focus changed over time to involve generalization of skills demonstrated at school into the group home environment. Specifically, Student worked on daily living skills that required Student to practice continually and outside of the school day in order to begin to approach independence with those skills. (N.T. 181-82, 195-96)
25. Student's June 2014 IEP for the ODS summarized Student's present levels of academic achievement and functional performance, provided goals and short term objectives addressing needs in reading, written expression, vocational skills, social skills, self-regulation, receptive and expressive language, occupational therapy, and behavior. With respect to adaptive living skills, Student reportedly had effectively generalized social skills strategies from the school to the group home, and a new goal provided for Student's use of case management services for generalization of those skills (such as folding laundry, buying groceries, and demonstrating social skills) to the home environment. Many of the goals targeted use of skills across two or more settings (as contrasted with across school environments). This IEP also included program accommodations/modifications/supports and related services as well as a transition plan. (P-12; S-8)
26. The group home provided progress reports on the ISP. Student met several of the ISP goals over the course of the 2014 calendar year: self-care (tooth-brushing with prompts), daily living (performing household chores and making a salad with prompts), communication (cooperative activities), and the recreation/leisure/community involvement goals; Student also reached the behavior objectives. Student engaged in few tantrums after March 2014 and had only one incident of self-injury after that time. In the fourth quarter of 2014, Student reportedly engaged in one incident of aggression, with no other incidents of the targeted behaviors. (P-15, P-41 p. 2)

Programming During the 2014-15 School Year

27. In September 2014, the Parents and the school district in the other state executed an Addendum to their previous settlement agreement. In that Addendum, the parties set forth terms relating to Student's move out of that state; specifically, language specified

that if the Parents moved from the District by September 15, 2015, an IEP Amendment would document that “Student’s last agreed upon placement” was residential (P-13 p. 11). (P-13 pp. 11-15; S-10 pp. 3-7)

28. The ODS had approximately 34 students at the time of the due process hearing. The majority of students have been diagnosed with autism. Students at Student’s level worked on academics at his or her individual level and were provided with individual and group related services, in addition to engaging in community activities. (NT. 407-09, 454)
29. Student’s sensory needs were met at the ODS through opportunities for physical activity approximately one time every hour, and Student would ask to take breaks for that activity. (N.T. 411-12)
30. Students had community meals and chores at the ODS, and worked on activities of daily living, particularly as the children were transition-aged (beyond Student’s age during the 2014-15 school year). (N.T. 418-23, 456-57)
31. A new ISP was developed for Student in January 2015. This ISP reflected that Student at that time had had only one incident of targeted behavior (physical aggression) in the last quarter of 2014. Student demonstrated several independent self-care skills while requiring prompts and assistance for others, and many independent activities of daily living skills. Student required close supervision in the community due to concerns over safety. The ISP included a Behavior Support Plan and goals addressing self-care, daily living, communication, and recreation/leisure/community involvement skills in the group home. (P-41)
32. CSO services terminated in the spring of 2015 at the request of the school district in the other state after the family moved to Pennsylvania. (N.T. 208-09)
33. As of the summer of 2015, Student demonstrated better-developed adaptive skills in the school environment than elsewhere, including in the group home. (N.T. 197; P-22 p. 11)

Transition to the District

34. In early August 2014, the Parents contacted the District to advise that the family was moving into the District from another state. They explained that Student had been in residential placements since the age of seven. (N.T. 29, 310-12, 671-72; P-38; S-10 p. 1)
35. When a student moves into the District from another state, the assigned supervisor of special education gathers information from the previous school district in order to schedule a meeting with the parents and to make a recommendation for placement pending an evaluation under Pennsylvania law. (N.T. 31-33, 702-03)
36. The District responded to the Parents’ initial contact, explaining that it would need to conduct an evaluation but would implement the other state’s IEP to the extent possible, with recommendations based on the child’s needs. The District also advised that it did

not make recommendations for residential placements, and would only be responsible for the school portion of any such tuition. (P-38)

37. An advocate for the Parents contacted the District in early September 2014. Later that month, the District convened a meeting with the Parents, their advocate, and its staff. The Parents related their understanding of Student's program in the other state, and the District advised that it would provide a similar day program while an evaluation was conducted. (N.T. 37-39, 46-47, 50-51, 53, 675-76; P-29, P-40 p. 1; S-14)
38. The Parents enrolled Student in the District on September 8, 2014, and explored schools on their own in September and October 2014. One of those schools was an approved private school where Student ultimately began attending as a residential student in the fall of 2015. (N.T. 317-19, 351, 559-60, 727-28; S-11)
39. A second meeting convened in early October 2014. Around this time, the District provided referrals to the Parents of several private schools with programs similar to what Student was provided in the other state. Some of those referrals were for programs with a residential component, since that is what the Parents were seeking, but the District confirmed its determination that it would provide a non-residential program for Student. A District social worker attended and provided information to the Parents about Medical Assistance as a source of funding for residential programming. At that meeting, the District provided a Notice of Recommended Educational Placement (NOREP) for a day program of autistic support operated by the county Intermediate Unit (IU) (hereafter IU Program) pending completion of an initial evaluation. That conclusion had been reached by District members of the IEP team before the meeting. The Parents did not approve the NOREP. (N.T. 50, 55, 56-57, 59-61, 63-64, 65, 143-44, 317, 320-21, 328, 387-89, 394-95, 560-61, 632, 661, 677, 679-82, 685-86; P-31, P-32, P-40 p. 2; S-13, S-15, S-16, S-18)
40. District personnel interpreted the then-current IEP from the other state to mean that Student's residential placement there was not related to Student's school-based programming. (N.T. 70, 149-50)
41. During that October 2014 meeting, the District sought permission to conduct an evaluation of Student. The Parents gave their consent; however, as of the summer of 2015, Student had not been brought to Pennsylvania for that evaluation. The Parents believed that having Student come to Pennsylvania for an evaluation and then return to the other state would be very difficult for Student. The District advised the Parents in early November that the evaluation timelines would be held "in abeyance" until Student was in Pennsylvania. (N.T. 144-45, 157, 329-30; P-31; S-19, S-21)
42. After the October meeting, the Parents toured the IU Program (hereafter IU Program). (N.T. 319, 321-23, 721)
43. The IU Program has a classroom with a small crisis/de-escalation room, as well as a separate area set up like an apartment with a kitchen, living room, and bedroom; a sensory room is also nearby. The classroom also has access to an outdoor area that is enclosed. Students are provided a standards-based academic program, with individual

and group activities, that includes life skills, community outings, and vocational activities. IU Program staff utilize Applied Behavioral Analysis (ABA) approaches. Occupational, physical, and speech/language therapy are available. There were seven students and ten staff members in that IU Program at the time of the due process hearing, with all children provided a personal care assistant or therapeutic staff support worker. The children demonstrate varying communication abilities. (N.T. 490-93, 495-96, 501-02, 616-20, 622-25, 634-35, 637-38, 640-41, 644-46, 649, 658-59)

44. Mental health therapists are available at the IU Program. In addition, a full-time Board Certified Behavior Analyst (BCBA) works in the building. (N.T. 620, 624, 649-50, 662-63)
45. Student was evaluated again in the other state in March 2015 by the same certified school psychologist who had done so in 2012, but this time the Parents requested the evaluation. The psychologist obtained information from staff at the group home for this evaluation, as well as from the Parents, teacher, mental health, speech, and occupational therapists, and Student's psychiatrist. She also observed Student in the classroom. As in her prior evaluation, this psychologist concluded that Student continued to demonstrate needs in adaptive behavior, communication, daily living, and social skills, and was exhibiting a lack of growth in adaptive behavior skills (*compare* Vineland Adaptive Behavior Scales, P-21 p. 6 and P-22 p. 11; *see* N.T. 201). (N.T. 183-85, 201, 208; P-22)
46. The psychologist from the other state believed that Student required a residential placement for educational purposes because Student requires constant support and supervision in order to be safe. She also believed that Student needs to continually practice adaptive skills throughout the entire day, all week long, and across environments. (N.T. 190-91, 199-202, 205, 216; P-22 pp. 13-14)
47. A meeting at the school district in the other state convened in May 2015. The Parents attended this meeting along with Student's teachers and related service providers from the school, but no one from the District participated (although the record does not establish that the District was notified of the meeting). This IEP revised the Behavior Intervention Plan and the transition plan, and provided reports on Student's progress toward goals; for the CSO goal, the case manager recommended a goal for generalization of adaptive living skills from the school to home environment. This IEP proposed new goals addressing pragmatic language, expressive language, reading, written expression, functional daily living skills, self-regulation, occupational therapy, and behavior. (N.T. 354-56; S-29 pp. 3, 37-81)
48. Several District personnel traveled to the other state to observe Student in the group home and school in June 2015. They also saw Student on a community outing. One of the Parents was present for those observations. (N.T. 330-34, 468-69, 497-98, 689)
49. The District personnel observed Student in the classroom for a mathematics lesson, and spoke with Student's teacher at the School about the curriculum used in Student's class as well as behavioral and transition strategies she used with Student. They also observed

Student participate in a physical activity. (N.T. 333-34, 470-71, 485-86, 517-18, 699-701, 710-12)

50. The District personnel observed Student and other students performing activities in the group home. Student had a snack and interacted with staff and the Parent who was present during the time spent at the group home. The District personnel also joined the students and group home staff who went on a community outing, including Student. In that outing, the students were required to navigate a city transit system to get to a city attraction where Student had been many times, walking among tourists and exploring the venue for several hours. Student required redirection at times during this outing. (N.T. 332-34, 472-80, 509-11, 514-15, 696-99, 709-10)

Residential School

51. Student came to Pennsylvania in early September 2015 and began attending a residential school (hereafter Residential School) at District expense pursuant to this hearing officer's pendency order. A teacher from the Residential School had accompanied the District staff who traveled to the other state, and that observation was part of its acceptance process of Student. (N.T. 335, 562-63; P-35, P-36; HO-1 p. 6)
52. The Residential School is an approved private school for children with intellectual disabilities. It serves both day and residential students from kindergarten through twelfth grade at its main campus, and also has a second campus for students who are 18-21 years of age in a transition program. There are approximately 84 students in the regular program, 51 who are residential students. The Residential School has a 180-day school year that does offer an ESY program, and closes for one or two weeks several times during the course of the calendar year as well as one month during the summer. (N.T. 541-544, 546-47, 558-59, 587)
53. The Residential School implements IEPs created by the home school district for each child and provides progress reports. In its classrooms, the ratio of staff to students is between 2:3 and 1:2. Some students have a one-on-one aide. Certified speech/language, occupational, and physical therapists provide related services. (N.T. 544-46, 548-49)
54. The main campus program at the Residential School is on a large campus with classrooms and residential buildings set up as a village with open spaces including walking trails. All students are assigned to a house on campus, and practice daily living skills each day. The school day includes academic instruction and activities such as art, music, and physical movement. All students are assigned chores to perform. Students also participate in community outings and activities, and older children are provided vocational training. (N.T. 543, 549-54, 585-86)
55. Students who reside at the Residential School have goals in their IEPs that are specific to the residential component of their program. These children develop and practice daily living skills from early morning through the evening. These children participate in after-school, evening, and weekend activities with the other students that reside together. (N.T. 554-57, 587-89)

56. For Student, staff at the Residential School were implementing the IEP from the other state as revised in June 2015. Student was working on daily living skills that Student had not yet mastered at the Residential School, including personal hygiene, doing laundry, and performing cleaning tasks in the housing unit. Student was assigned to a particular group for work activities in the afternoons. At the time of the final session of the due process hearing, Student had adjusted well to the Residential School, with one exception: when Student goes home for the weekend, Student exhibits more anxiety and agitation, and OCD behaviors, upon returning to the Residential School. (N.T. 563-70, 573, 581-83, 595-98, 601-02, 729)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as 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 to be credible overall, and the testimony as a whole was consistent with respect to most factual matters, despite the conflicting positions of the parties at the hearing; the credibility and reliability of specific testimony is addressed further as necessary as below. It

should also be noted that the Parents presented as caring, devoted, and passionate advocates for Student; similarly, all of the District personnel presented as dedicated and qualified professionals.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision.

General IDEA Principles

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to a student who qualifies for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 247 (3d Cir. 1995). Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Substantively, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, the IEP need not “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). The standard is not maximization of the

child's potential. *Rowley, supra*, at 198.

The IEP is developed by a team, and a child's educational placement must be determined by the IEP team based upon the child's IEP, as well as other relevant factors. 34 C.F.R. § 300.116. In a situation such as this, where a child moves from one state to another, parents must still play an important role in the placement decision:

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

20 U.S.C. § 1414(d)(2)(C)(i)(II); *see also* 34 C.F.R. § 300.323(f). Key principles in this statutory provision are “services comparable to those described in the previously held IEP” and “in consultation with the parents.”

Parents play “a significant role in the IEP process.” *Schaffer, supra*, at 53. Indeed, 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).

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). Thus, where a child with an existing IEP moves into another state, there must be an interim determination of how comparable services will be provided prior to completion of the IEP process in the new state. While the procedure for making an interim determination of services for a child who moves into a state differs somewhat from the typical IEP process, the role of the parents must not be

minimized.

LRE and Residential Placement

Another essential consideration in this matter is the IDEA obligation for eligible students to be educated in the “least restrictive environment” (LRE) which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); 22 Pa. Code § 14.145; *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1205 (3d Cir. 1993), the Third Circuit adopted a two-part test for determining whether a student has been placed into the least restrictive environment as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, successfully be educated within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the school has included the child with non-exceptional children to the maximum extent possible. *Id.* All local education agencies are required to make available a “continuum of alternative placements” to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa Code § 14.145(5).

The federal regulations implementing the IDEA do provide for residential placement if it “is necessary to provide special education and related services to a child with a disability.” 34 C.F.R. § 30.104. The question of whether a residential placement must be at public expense requires an assessment of whether that full-time placement is “necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process.” *Mary Courtney T., supra*, 575 F.3d at 243-44 (quoting *Kruelle v. New Castle County School District*, 642 F.2d 687, 693 (3d Cir.

1981)). In other words, if the medical, social, and emotional components of the residential program are “part and parcel of a specially designed instruction to meet the unique needs of a handicapped child,” the local education agency is responsible for that placement. *Id.* at 244 (quoting *Kruelle* at 694).

The Parties’ Claims

As a preliminary matter, this hearing officer rejects the District’s contention that I lack jurisdiction to decide the issue presented because the District has not yet been provided with an opportunity to evaluate Student and to develop a program to offer to the family. This argument was not raised until its Closing Argument, seemingly because it did not learn until testimony during the due process hearing that Student had made the transition to the Residential School in Pennsylvania. (District’s Closing Argument at 7-8) Regardless of the questionable timing of this assertion, and irrespective of any future determinations that may be made regarding Student’s programming needs, I find no impediment to my jurisdiction over the issue raised in the Due Process Complaint (S-22), identified at the beginning of the hearing without objection (N.T. 21), and addressed over the course of three hearing sessions, merely because Student’s contemplated move to Pennsylvania has now taken place. Thus, this contention is dismissed.

Both parties suggest in their Closing Arguments that the other party “predetermined” Student’s placement before Student arrived in Pennsylvania. The Parents claim that the District concluded, with very little information about Student, that residential programming was not necessary for FAPE but rather for other purposes; and the District contends that the Parent were entrenched in their belief that a residential program was necessary. (Parents’ Closing Argument at 2-3, 6-8; District’s Closing Argument at 6) While it does appear that both parties held firm opinions on the residential vs. non-residential placement issue, this matter is complicated by the

arrangements that Student had in the other state, and the obligations imposed on the District upon learning of the family's move and Student's transfer to Pennsylvania.

As noted above, the District had a responsibility to consult with the Parents on how it would provide "comparable services" to those in the IEP from the other state. It is somewhat puzzling how the determination could reasonably be made from a single email communication and brief review of Student's then-current IEP that Student would not be eligible for residential services as part of Student's FAPE. (P-38 p. 2; S-10 p. 1) On the one hand, on paper alone, Student's IEP for the fall of 2014 did not specifically provide for residential placement, and it arguably was not crystal clear based on the previous home and school documents it then had from the other state what educational services related to the home setting. Still, the District was aware of the Parents' viewpoint that Student required a residential setting for educational programming. Thus, at the very least, some further investigation and discussion was indicated before the District would be in a position to propose a program as Student made the move to Pennsylvania.

The District argues that it did not dismiss outright the Parents' desire for a residential placement for Student and instead presented only an interim proposal while it conducted an evaluation (District's Closing Argument at 4-7; *see also* N.T. 392).⁴ Accepting for the moment that its initial determination that Student required only a day program was reasonable in the short term pending an evaluation, this argument is at best plausible only as a preliminary determination. The concurrent failure to engage the Parents meaningfully in that decision-

⁴ Following submission of the parties' Closing Arguments, the District sent a copy of a recent, unpublished Third Circuit decision, *J.F. v. Byram Township Board of Education*, 2015 U.S. App. LEXIS 18826 (3d Cir. 2015), with no objection by the Parents. Neither party made any argument about the application of that case that addresses the FAPE obligation of a school district when a student transfers from within the same state in light of the IDEA pendency provisions. While this case may have provided some support for the District's position on the offer it made via the October 2014 NOREP, its relevance to the substantive question of whether Student requires residential programming is tangential at best.

making process in the fall of 2014 is troublesome, as is the lack of any evidence that it ever, at any point, wavered from its initial recommendation made before the first meeting with the Parents. All of this is concerning, even accepting that many aspects of the IU Program appear to be appropriate in relation to Student's needs.

Predetermination arguments aside, the issue to be decided is whether Student does require a residential program. The evidence establishes that Student has significant needs including, but not limited to, adaptive behavior, daily living, self-care, communication, self-regulation, safety, and anxiety; and that Student requires a fully structured, predictable, and coordinated program throughout the entire day, without disruptions, to allow Student to practice and become more independent with demonstrating skills across all environments. Review of the June 2014 IEP reveals a clear focus for Student in generalizing skills, particularly those related to independent living and social/communication, across environments. (P-12, S-8) CSO services for Student, including quarterly reporting, were arranged by the school district in the other state. (Finding of Fact (FF) 23) The CSO case manager met with the group home supervisor on a regular basis, and by May 2014, was recommending coordination of services across all environments including the monitoring of generalization of skills Student was demonstrating. (FF 23, 24) That recommendation continued in the spring of 2015, with a marked focus on Student acquiring independence with adaptive living skills in home environment. (FF 47) Clearly this increasingly greater emphasis was logically placed on post-school independent living as Student reached transition age in the other state.

Furthermore, the testimony in this case from the various professionals who know, and have worked closely with, Student, and have experience with and understanding of special education programming, is compelling and quite persuasive on Student's current needs; and, that

testimony mirrored the belief of the Parents. Those witnesses, who included the school psychologist who evaluated Student twice, Student's treating psychiatrist, and Student's special education teacher for the previous two school years in the other state, testified unequivocally and resolutely that Student requires a program with a residential component that provides reliability and consistency and structure across environments; and that such programming was necessary in order for Student to further develop and generalize the independent living skills that Student does and will need approaching and after adulthood. (N.T. 103, 108 (treating psychiatrist); N.T. 427-28, 431-32, 427 (former special education teacher); FF 46 and citations therein (evaluating school psychologist from the other state)) All of this testimony must be evaluated in the context of the recent recognition that Student is exhibiting a lack of growth in adaptive behavior skills (FF 45), which are quite critical at Student's age. The Residential School witness, who provided an opinion similar to that of the witnesses from the other state, summed up this collective viewpoint quite cogently, explaining that, "Now that I know [Student] close up, a day program would not be appropriate" because of Student's significant need to develop independent functional daily living skills, social and communication skills, and management of behaviors. (N.T. 570, 592, 598, 600) This hearing officer cannot disregard the knowledgeable and informed testimony of those individuals who are in the best position to assess and provide opinions on Student's current programming needs.

The observations of District personnel on a single visit to the group home (*e.g.*, N.T. 473) that the services provided in that setting did not appear to be coordinated with the school program are, simply put, insufficient to overcome the credible opinions of those witnesses and the objective evidence in the record. The spectrum of Student's documented needs, and the testimony of these particular witnesses for the Parents, combined with the clear indications of the

IEP team in the other state in the spring of 2014 and 2015⁵ that Student needed progressively more involved coordination and monitoring of services between the school and home environments, together provide more than preponderant evidence that Student does require residential programming in order to be provided with FAPE. Stated another way, the record establishes that Student's need for residential programming is necessary "for educational purposes, [not in] response to medical, social or emotional problems that are segregable from the learning process," *Mary Courtney T., supra*, at 243-44, and not principally to address mental health needs, as the District posited (*see, e.g.*, N.T. 662-63).

Lastly, the District contends that because of the funding scheme that was utilized for the residential aspect of Student's combined program in the other state, it cannot as a matter of law have the obligation to provide for Student's programming beyond a day school. (District's Closing Argument at 10-11) It further points to the fact that the Parents entered into various settlement agreements with prior school districts in other jurisdictions in order to secure the composite services that were provided to Student outside of day school programs. (*Id.* at 11, 13) While these factors were certainly considered in deciding the FAPE issue that was presented, none of these circumstances can overcome the fundamental conclusion reached above, namely that Student at this time requires a residential placement in order to be provided with FAPE. Accordingly, these contentions must be rejected.

As a final observation, it appears that the District is currently evaluating Student and that the parties will soon be in a position to meet as a team to determine an appropriate program for Student going forward. This hearing officer encourages them to keep open minds as they collaborate together armed with current information on Student and knowledge of Pennsylvania

⁵ That the District did not participate in the May 2015 meeting does not undermine the recommendations of those who knew Student well and remained responsible for implementing Student's educational program.

resources; and suggests that the parties also consider including a facilitator at any upcoming IEP meeting, which may be arranged through the Office for Dispute Resolution.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, the Student requires a residential placement in order to be provided FAPE at this time.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Student requires, and the District is obligated to continue to provide, a residential program as part of Student's need for FAPE.
2. Nothing in this decision should be read to prevent the IEP team from making any determinations with respect to Student's educational program following completion of an evaluation by the District.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: November 20, 2015