

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

DECISION

DUE PROCESS HEARING

Name of Child: A.B.

ODR #18698 / 16-17-KE

Date of Birth:
[redacted]

Dates of Hearing:
March 21, 2017
April 17, 2017

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Representative:
Pro Se – Did not appear

Great Valley School District
47 Church Road
Malvern, PA 19355

David Painter, Esquire
Sweet, Stevens, Katz and Williams
331 East Butler Avenue
New Britain, PA 18901

Date of Decision:

April 20, 2017

Hearing Officer:

Linda M. Valentini, Psy.D. CHO
Certified Hearing Official

Background

Student¹ is a mid-teen aged District resident who is eligible for special education under the classifications of autism and intellectual disability. The parties have a history of disagreements about Student's educational programming. Because the District and the Parent have reached an impasse as to Student's program and placement the District requested this hearing, seeking an order from the hearing officer that its IEP last offered on November 2, 2016 is appropriate. The Parent maintains that the IEP does not offer Student a free appropriate public education (FAPE). For the reasons below I find for the District.

Procedural History²

The District was represented by counsel as required of LEAs in Pennsylvania. Although previously represented by two experienced special education attorneys, the Parent was pro se in the instant matter.³

On December 30, 2016 the attorney who had been working through the evaluation and the IEP process with the District and the Parent informed the District's attorney that he was no longer representing the Parent or the Student.

On January 5, 2017 the District proposed mediation, which the Parent declined, indicating she was looking for new counsel.⁴

When no attorney entered an appearance on behalf of the Parent, on January 27, 2017 the District requested a due process hearing, seeking a hearing officer Order that its proposed IEP issued on November 2, 2016 is appropriate. A hearing was scheduled for February 9, 2017, a date within the regulatory timelines for LEA-initiated hearing requests.

On January 31, 2017 the Parent requested a continuance in order to seek legal representation, noting that she hoped to find counsel in the next seven business days; the

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of 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 This procedural history is documented in exhibits S-24, S-26 and S-46.

³ Describing herself in written communication as a speech/language therapist and as providing (unspecified) services for schools on an interim basis, mother is not a naïve parent, and notably, prior to deciding not to attend the hearing sessions, involved herself competently and appropriately in pre-hearing correspondence, including sending a number of emails and participating in a conference call with the hearing officer and the District's attorney.

⁴ The Parent noted in written input that the attorney with whom she was speaking told her not to participate in mediation because he couldn't be present to represent her in mediation, and that on January 26, 2017, after talking with her for a month and reviewing all the records and seeming as if he would take the case, decided he would not take the case on a contingency basis.

hearing officer granted the continuance and rescheduled the hearing for February 17, 2017.

On February 3, 2017 the Parent filed a Motion for Pendency. Because the parties held different views as to what the pendent placement was, the hearing officer directed that the parties were to present evidence as to their respective positions on pendency at the beginning of the February 17, 2017 hearing session and stated her intent to issue a subsequent ruling on pendency as soon as possible thereafter.

On February 5, 2017 the Parent requested another continuance, noting that she had contracted the services of an educational consultant to assist with determining her child's service needs, and that she also wanted to seek to resolve the dispute through mediation. The hearing officer granted the continuance.

Mediation took place on February 21, 2017 but did not result in a resolution. The hearing was therefore rescheduled for March 14, 2017 and March 15, 2017; these sessions were canceled due to snow, and the hearing was rescheduled for March 21, 2017.

In the intervening time the Parent obtained the assistance of an advocate who, on the evening of March 19, 2017, renewed the Parent's Motion for Pendency. On March 20, 2017 the Parent's advocate gave notice that neither she nor the Parent were going to attend the hearing for various procedural reasons. On the morning of March 21, 2017, after trying unsuccessfully to reach the Parent by telephone, the hearing officer proceeded with the hearing in her absence given that the District, which bore the burden of proof, had requested the hearing.⁵

On April 7, 2017 both parties provided the hearing officer with their respective positions on pendency, and on April 10, 2017 the hearing officer ruled that the IEP offered on November 2, 2016 is the pendent placement. A copy of the ruling on pendency is attached as an Appendix to this decision.

A second hearing session was held by telephone on April 17, 2017 at 6:00 pm; the hearing was scheduled for an evening in accord with the Parent's previously shared work hours. On April 14, 2017 the Parent informed the hearing officer by email that she saw no reason to participate in the hearing, and the Parent in fact did not call in to the session on April 17th. Given her previous non-appearance and the April 14th email, a telephone call

⁵ In *A.S. v. William Penn Sch. Dist.*, 2014 U.S. Dist. LEXIS 50261 (E.D. Pa. Apr. 10, 2014) the federal court held that the fact that the hearing was conducted ex parte did not render it procedurally improper. Neither the IDEA nor state law expressly bars ex parte due process hearings. Furthermore, ex parte hearings are not a per se violation of due process principles, and indeed are permitted in numerous situations, depending on the circumstances. See also *D.Z. v. Bethlehem Area Sch. Dist.*, 2 A.3d 712, 720 (Pa. Commw. Ct. 2010). The hearing officer's decision to conduct the hearing in the Parent's absence is specifically permitted by ODR policy. The ODR's "Special Education Dispute Resolution Manual" provides that, if a party fails to appear, the hearing officer must attempt to contact the absent party, and then, "in his or her discretion, determine whether the hearing should proceed in the absence of the party who does not appear." Office of Dispute Resolution, Pennsylvania Special Education Dispute Resolution Manual § 507.

was not made to confirm her non-participation. In order to honor the decision due date of April 24, 2017 a three-day expedited transcript was requested and received.

Exhibits entered into evidence were S-1 through S-34, and S-46.

Issue

Did the District offer Student a free appropriate public education for the 2016-2017 school year through its IEP first proposed on September 6, 2016, revised on October 14, 2016, and last proposed on November 2, 2016?

Findings of Fact

Setting for the Dispute:

1. In March 2016 the parties, both assisted by counsel, entered into a settlement agreement covering the period March 1, 2016 through September 1, 2016. Among other things, the agreement provided for a sum of money the Parents could use to obtain educational and therapeutic services in the home during the covered period.⁶ The District is concerned that this home programming is not currently effective for Student, particularly in the area of post-secondary living and transition to adult life. [S-2]

Description of Student

2. As part of the settlement agreement the District was to conduct a reevaluation of Student. Nevertheless the District still sought, and obtained, parental consent; the Parent made some modifications to the Permission to Reevaluate (PTRE). [S-2; S-4]
3. Because of the complexity of Student's behavior, the District arranged for a psychological evaluation to be conducted by a private pediatric neuropsychologist with extensive experience and credentials; she conducted her evaluation on June 22, July 21 and July 22, 2016. The pediatric neuropsychologist reviewed Student's records from October 2010 to August 1, 2016 which included various evaluations, reevaluations, letters from physicians, and progress reports as well as

⁶ Settlement agreements are encouraged as a matter of public policy because they promote the amicable resolution of disputes and lighten courts' litigation loads. When the terms of a settlement agreement are relatively clear, and when the parties' decisions to enter into that settlement agreement are neither involuntary nor uninformed, it is contrary to public policy to allow either party to void that settlement agreement when it becomes unpalatable. *D.R. v. East Brunswick Board of Education*, 109 F.3d 896, 25 IDELR 734 (3d Cir. 1997); *In Re B.B. and the West Chester Area School District*, Special Education Opinion No. 1484 (2004)

- the private Board Certified Behavior Analyst's⁷ (BCBA's) progress summary from February through May 2016. [NT 80; S-3, S-7, S-29]
4. The private BCBA's progress summary from February 2016 through May 2016 indicated that Student demonstrates a great deal of anxiety when transitioning between people, when more than one person is present at a time and when new social activities are introduced. Student benefits from verbal and gestural cues to assist in reducing anxiety and responds well to being told clear expectations and consequences. [NT 35-36; S-3]
 5. The pediatric neuropsychologist noted that although Student was fourteen years old at the time of evaluation, Student was not able to have a conversation that you might expect of someone that age. Asked a direct question Student might or might not answer it. When Student did answer, it was usually with very short responses. Student seemed much younger than Student's chronological age. [NT 224]
 6. The pediatric neuropsychologist noted that standardized and non-standardized test administration was used to ascertain verbal comprehension and expression, with test performance resulting in composite scores below the first percentile. An adaptive functioning inventory completed by the Parent and Student's private BCBA also resulted in composite scores below the first percentile. These scores supported a diagnosis of Intellectual Disability, Moderate. [S-7]
 7. The pediatric neuropsychologist came to the conclusion that Student is intellectually disabled with a reasonable degree of professional certainty based upon reports of previous evaluation attempts that had been made, scores from the portions of assessments she was able to administer, her observations of Student, and the levels of adaptive functioning reported by the Parent and the private BCBA. [NT 242]
 8. On the SIB-R, an inventory for which the Parent (long form) and the private BCBA (short form) provided responses, Student's Broad Independence Score, with agreement from both respondents, was below the 1st percentile and corresponded to a skill level termed "Limited to Very Limited". The age equivalent that corresponded to the short form was 5 years 8 months. The age equivalents that corresponded to the sub-areas on the long form ranged from 3 years 6 months (Home/Community) to 10 years 5 months (Domestic Skills) with most age equivalents in the 6 year old range. [NT 240-241; S-7]
 9. The pediatric neuropsychologist cited Student's historical presentation as revealed in records; deficits in social communication, social thinking and problem-solving skills; weaknesses in social communication, restricted interests, repetitive behaviors; and substantial anxiety, to support the diagnosis of an Autism Spectrum Disorder. She noted that these symptoms may also be associated with

⁷ This BCBA had worked with Student when Student attended the District's high school and the Parent selected this individual to work with Student when home services began. For ease of identification she is referenced as the private BCBA. [NT 35, 75]

- Student's medical diagnosis of Pediatric Autoimmune Disorders Associated with Streptococcal Infection (PANDAS)⁸. [NT 244-245; S-7]
10. The pediatric neuropsychologist noted that observation of Student working with the private BCBA, review of the BCBA's February 2016 to May 2016 progress report, and the Parent's strong opinion led her to include a diagnosis of Specific Learning Disorder in reading, math, and written expression. [NT 231; S-3, S-7]
 11. In explaining how she separated learning disorders from intellectual disability, the pediatric neuropsychologist noted that she had evaluated individuals with intellectual disability who have not had the degree of difficulty with the acquisition of basic academic skills that Student is demonstrating, but also testified as follows: "honestly, to some degree that it really, I would say, made an impression on me that [Student's] mother really felt that [Student]-- she really had an emphasis on wanting [Student] to be able to develop some academic skills, and I felt that [Student's] academic skills are well below [Student's] chronological age level, and certainly below any kind of functional academic level, and I wanted to be able to identify that, or hoped that that would be able to be identified as a need when [Student's] IEP was developed. [NT 243-244]
 12. For purposes of the reevaluation the District's director of special education and autistic support facilitated the private BCBA's administration of the Assessment of Basic Language Learning Skills – Revised (ABLLS-R); having the familiar BCBA give the test could enhance Student's results on this instrument which assesses early language learning skills and early learning skills. It is typically utilized in classrooms with students who have autism, breaking skills down into discrete fashion so students can learn skills in discrete steps. [NT 38, 43, 102-104; S-6, S-10]
 13. The ABLLS-R assesses 26 domains and results are presented visually through graphs as well as in descriptive prose. If all blocks in the domain graphs are filled in, the individual has reached the level of a 5-year-old child. Student's profile did not yield completion of any of the graphs, but an overview shows areas of strength and need. [NT 39-43; S-6]
 14. For purposes of the reevaluation the District's BCBA conducted a Functional Behavioral Analysis. The District's BCBA reviewed the private BCBA's progress report and was in agreement with the private BCBA's assessment. [NT 76-66]
 15. The following behaviors of concern were identified: refusal, aggression to others, property destruction, spitting⁹/mucus sharing, inappropriate verbalizations, inappropriate touch, emotional outbursts, and rage. Spitting seemed to be the predominant behavior. [NT 80-81, 109-110; S-15, S-20]

⁸ The prominent manifestations of PANDAS are anxiety and obsessive-compulsive behavior, and there are a whole range of other manifestations that can be present. [NT 229]

⁹ As described by the pediatric neuropsychologist, the spitting is not directly from Student's mouth. What Student does is rake a finger inside the mouth getting an accumulation of spit, and then flinging it. [NT 228]

16. The District concluded based on the evaluation data that Student qualified for special education under the primary category of autism and the secondary category of intellectual disability. [NT 50; S-10]
17. On August 22, 2016 a copy of the reevaluation was sent to the Parent's then-attorney. [S-9, S-10]

Parent's Description of Student

As noted earlier, the Parent declined to participate in the hearing session on March 21, 2017 and to participate in the subsequent April 17, 2017 session wherein she would have had the opportunity, over the District's objections, to cross examine witnesses who testified on March 21st. By not participating in the hearing the Parent forfeited her opportunity to testify under oath to the facts as she understands them. Nevertheless, on April 6, 2017, after reviewing the transcript of March 21, 2017 the Parent provided the hearing officer with written input. The Parent's description of her child relevant¹⁰ to the issue raised in the District's due process complaint are briefly summarized below in italics.

Student is a beautiful, sweet, smart, silly, fun, compassionate, entertaining, and engaging person who loves to learn; Student has gone to the Franklin Institute for Student's birthday, Student attended Easter Seals Camp for four years and participated in the camp's activities, Student used to love going to a local orchard for the festivals and picking fruit, enjoyed going to the zoo, and had a successful outing with her mother to Dutch Wonderland. Student has gone out to dinner to a family restaurant, has gone to a local racetrack for the day, has gone to the circus every year, and went to the beach multiple times each summer. The family used to go to the homes of people who had children and Student liked and requested these visits. Student used to go to stores to do errands with mother. Although Student has had anxiety from a young age, with the onset of puberty Student suddenly developed severe, debilitating social anxiety. Although Student still wants to go out for activities such as those above, Student cannot, and has only been in the community a handful of times over the past four years, for very brief periods of time. Mother notes that unless the adults are in control and make appropriate expectations clear, Student's anxiety will surface and undesirable behaviors will appear as Student attempts to control the situation.

¹⁰ The Parent's written communication is included in its entirety in the case record maintained by the Office for Dispute Resolution. In her communication the Parent provided information/arguments relating to procedural issues/alleged procedural violations as well as to her position about the District's past services and why she believes Student is owed compensatory education. The hearing officer had previously informed the Parent that if she wanted to pursue the issue of compensatory education she had to file her own separate complaint with ODR as the instant matter would only address the issue in the District's due process request. Accordingly, the portion of the Parent's written input summarized above strictly relates to the issue in the instant matter, and is included so that Parent has a voice in describing her child even though at the last minute, despite prior active involvement and cooperation, she decided not to attend the hearing.

IEP and Transition Plan Development

18. In crafting the IEP goals for Student, the IEP team including the related service providers took the information from their assessments and from the pediatric neuropsychologist's evaluation into consideration. [NT 55-56]
19. Student's academic instruction as assessed through the ABLLS-R assessment can be directly correlated to the Pennsylvania Core Standards at the level at which the skills are being targeted. Instruction would be geared toward essential elements of material presented. [NT 57-58; S-15, S-20, S-23]
20. Academic IEP goals address reading (receptively identifying words), math (making small purchases with coins), and writing (creating a signature, keyboarding through OT). [S-15, S-20, S-23]
21. Speech/language goals flow from the assessment results, including results from the ABLLS-R. Speech/language goals include articulation of multisyllabic words because in the evaluation Student's production of multisyllabic words was unintelligible; Student had a prior diagnosis of apraxia of speech. [NT 166-167, 169; S-15, S-20, S-23]
22. Another speech/language goal addressed production of longer utterances, as at the time of the evaluation Student's utterances were one to four words. [NT 166-167; S-15, S-20, S-23]
23. Since Student is at the secondary level age-wise, additional speech/language goal areas address words with multiple meanings and understanding of figurative language such as idioms. These receptive goals lead into expressive goals to aid in developing descriptive language and grammar skills for communication and socialization. [NT 167-168; S-15, S-20, S-23]
24. The IEP provides for three 30-minute individual speech/language therapy sessions per week. In addition the speech/language therapist would collaborate with the classroom team so Student can generalize what's taught in therapy sessions to other settings. [NT 169-170; S-15, S-20, S-23]
25. Findings from the reevaluation that informed the IEP occupational therapy goals were Student's needs for increased bilateral coordination for functional tasks and improved written communication. IEP goals for occupational therapy included addressing written communication in creating a signature and writing numerals to create emergency contact information and then typing emergency contact information. As the Parent had expressed interest in Student working on functional typing skills, the team added motivational items for Student such as typing words to access YouTube videos or lyrics of songs. Additionally goals address improving bilateral skills for functional activities of daily living including self-help skills such as hair maintenance, and domestic maintenance and prevocational skills such as meal preparation. [NT 187-190; S-10, S-15, S-20, S-23]
26. The IEP provides for two 30-minute occupational therapy sessions per six-day cycle as well as OT consultation with the team up to 15 minutes per week. [NT 188-190; S-15, S-20, S-23]

27. Student presents with decreased muscle flexibility, has a very stiff, tight neck which Student tilts to the side which impacts the ability to scan and look around the environment. Student has very tight hamstrings and core muscles, which impacts sitting posture. Student also presents with motor planning challenges, such as crossing the midline for functional activities, and following multistep motor directions. [NT 201-202]
28. In the classroom environment these challenges would affect sitting posture and the ability to use vision to scan the environment. Student sits with feet curled up, which impacts balance. Student does not like to sit with feet flat on the floor, which affects the ability to sit in a classroom chair and impacts the ability to generalize motor skills towards physical education programming. Student has difficulty following multistep directions which would impact ability to be amongst peers. [NT 202]
29. The IEP provides a long term goal for physical therapy based on results of the reevaluation. Student needs to improve strength, flexibility and balance in order to participate in 30 to 45 minutes of age-appropriate gross motor activities such as community based activities or PE class. Current baseline as of the reevaluation was 10-12 minutes endurance for walking or running outdoors. [NT 204-205]
30. Physical Therapy would work on various motor coordination activities such as jumping-jacks to utilize right and left sides and upper and lower body, and yoga poses to help with motor planning, motor imitation, following directions, and improving flexibility. [NT 206]
31. Physical therapy is recommended once per week for 45 minutes, and physical therapy consultation for up to 15 minutes per week with educational staff, the one-on-one assistant and/or the home health aide to provide information to work on stretches and posture, and to try out modifications that may be needed. [NT 207-208]
32. In selecting the specially designed instruction for Student the IEP team relied upon evaluation data, and particularly the FBA, that would inform approaches to Student in a classroom setting based on how Student responded in the home. [NT 59]
33. Specially designed instruction includes a Personal Care Assistant (PCA), also known as a one-on-one aide. The IEP team believed that a PCA is essential for Student to be successful within the classroom setting. The PCA would be assisting Student in daily activities, collecting data, and participating in transportation. [NT 59-60]
34. The IEP team included utilization of the SETT process for Student to explore the possibility of using an iPad to enhance curricular involvement. [NT 60]
35. The IEP provided for parent training to help the Parent, if necessary, to understand such things as the transportation protocols and the behavior plan. [NT 73; S-15]

36. The IEP provided for 180 hours of BCBA support for Student and staff, recognizing that this level would be needed to effect a good transition given Student's behaviors. [NT 74, S-15]
37. The IEP contains a positive behavior support plan developed by the private BCBA. Just before BCBA services were handed over to the District's BCBA the private BCBA added an 'overcorrection procedure' to the range of approaches to Student's spitting behavior. The District's BCBA agreed with the addition of this approach as well as with the behavior plan in its entirety. [NT 76-79, 83]
38. The IEP established Extended School Year (ESY) eligibility for Student in light of the level of Student's needs for related services of speech/language therapy, occupational therapy and physical therapy, as well as to firmly establish Student in the new placement. [NT74; S-15]
39. The District's IEP offered Student Life Skills support, Autistic support and Speech/Language support in line with the areas of need identified in the reevaluation. [NT 74; S-15]
40. The IEP team developed the IEP, including a transition plan, on August 29, 2016, with participation of District staff, the District's attorney, both Parents, the Parents' attorney¹¹, the pediatric neuropsychologist and the private BCBA. The District issued the IEP with a transition plan to transition Student from the home-based program to a school-based program, along with a transition plan for postsecondary living. A courtesy copy of the draft IEP was then sent to the Parent's attorney. The IEP and its transition plan was sent to the Parents with a Notice of Recommended Educational Placement (NOREP) on September 6, 2016. [NT 50, 61-62; S-12, S-13]
41. The Parents through their counsel provided additional input and information relative to the transition plan. The District made IEP/transition plan revisions and issued it with a NOREP, sending a courtesy copy to Parents' attorney on September 14, 2016. [S-14, S-15, S-15a, S-16]
42. The Parents were particularly concerned about the transition plan from home programming to school programming. The private BCBA and the Parent developed a proposed transition plan dated September 27, 2016; the District received this proposed plan on October 6, 2016. The District discussed this proposed transition plan in terms of its five-week length, the personnel needed to provide the portion of the instruction that would take place in the home, the transfer from the private BCBA to the placement's BCBA, hiring a staff member to initiate the transition and facilitate pairing with Student. The District made some revisions to the last transition plan in light of the transition plan proposed by the private BCBA and the Parent and added it to the IEP discussed and proposed on October 14, 2016; a NOREP was issued along with the October 14, 2016 IEP. [NT 68-70, 85-87; S-18, S-20, S-21, S-22, S-23]

¹¹ Not the same attorney who assisted the Parents in reviewing the settlement agreement.

43. The Parents did not return the October 14, 2016 NOREP as approved or disapproved and did not request a due process hearing or mediation within ten days of receiving the NOREP. [NT 88; S-22]
44. At the October 14, 2016 IEP meeting it was discussed and the District agreed to fund the cost of the then-current providers of services in the home during the months of October and November in order to help support the transition to the Private School. This also included some of the related service providers going to the new school and pairing with the new providers at the school so the transition plan was fluid. [NT 86-87; S-20]
45. Part of the transition plan discussed at the October 14, 2016 IEP meeting was that a teacher from the District who is also a BCBA would provide some instruction in the home to pair with Student and gain instructional control, then move with Student to the Private School where she would transfer the instructional control to the teacher at the Private School. [NT 89-91, 108-109; S-23]
46. The District recognized that when there is a transition there is likely to be a 'behavior burst' (the behaviors increase before they begin to diminish) and so there needed to be a BCBA to assist the team through that process. [NT 70-71, 140]
47. The Parent was concerned about Student's transportation to the new placement given previous issues when Student was transported. The District planned to have Student be the only student on the bus, to train the bus driver, to have the PCA present on the vehicle, and to provide BCBA support to these staff through, among other things, planning preferred activities for Student during the bus ride. [NT 71-73]
48. The transition plan went through several revisions with Parent and District input throughout September and October. An IEP with a newly revised transition plan and a NOREP was issued to the Parents with a copy to their attorney on November 2, 2016. This iteration of the IEP and transition plan is the version at issue in this hearing. [S-23]
49. The Parents neither approved nor disapproved the IEP and NOREP issued on November 2, 2016. They did not request mediation or a due process hearing within ten days of receiving this IEP and NOREP. [NT 83, 94-95; S-15, S-15a, S-23]
50. The District's attorney received notification from the Parents' attorney on December 30, 2016 that he was no longer representing the Parents. [NT 96; S-24]

Placement

51. Recommendations of the pediatric neuropsychologist included a school placement that will provide the highest degree of structure, supervision, and support in the context of a very small school and classroom setting that addresses Student's needs in the areas of learning, anxiety, behavior, communication, socialization, mobility, and daily living and community living skills. [NT 46-47; S-2]

52. The pediatric neuropsychologist did not have a particular program or setting in mind, but because Student was not showing very much self-directed behavior and needed maximum prompting and cueing to participate in activities other than listening to music and using the iPad, she believes Student needs to be in an environment where there would be a very high degree of structure and support, and believes this should be a classroom-based setting. [NT 245-246]
53. The pediatric neuropsychologist's initial recommendation for placement was a residential setting because she believed that Student needed a highly specialized setting to address Student's behaviors that interfere with learning and because she also believed that the District, the Parent and the home-based team could not function in a coordinated or collaborative way. [NT 248-249]
54. The pediatric neuropsychologist recognizes the requirement for least restrictive environment and believes that a day-school option with a good transition plan and an array of supports should be tried first. [NT 255]
55. The District considered several private schools in which the IEP could be implemented; some did not accept Student because of the severity of Student's behaviors or because there were no openings for new students. The Parents themselves proposed a school, but the District deemed it not appropriate for Student as it did not provide the daily BCBA support that Student needs. [NT 92-93]
56. The District has now proposed a particular private school (Private School) because it serves students with needs similar to Student's, and is willing to work with the District and the Parents to transition Student there. The Private School director participated in the August 29, 2016 IEP meeting at which the District, the District's attorney, the Parent and the Parent's attorney were present. [NT 84; S-20]
57. Private School utilizes principles of applied behavior analysis, and with BCBA's on staff the behavioral programming is infused throughout the day. Private School is located reasonably close to the District. Private School is in a three-story school building; on the floor where students are presently being served there are six classrooms. In every classroom there is a certified special education teacher and there are instructional assistants that, combined, provide a one-to-one teacher to student ratio. Currently there are nine students at the Private School, one of whom is a resident of the District. [NT 147, 151]
58. Students placed at the Private School typically have significant behavioral needs that are impeding their ability to access any educational programming. The behavioral component is completely enmeshed in every aspect of programming. Private School is strictly an ABA program utilizing all the different strategies under applied behavior analysis. [NT 146-147]
59. There is often a misconception that ABA is synonymous with discrete trial teaching, but discrete trial teaching might only be appropriate for a very specific type of student. Under ABA the Private School uses all strategies. [NT 147]

60. The Private School looks at all areas of a student's functioning when accepting an incoming student. Areas examined include academic performance, community skills for activities such as medical appointments, home behaviors and life-skills, vocational skills, social interaction and communication. The school looks at behaviors that might impede the child's ability or affect involvement in each area. The school then examines how skill areas can be broken down and tailored to the individual student. [NT 147-148]
61. Reinforcement and motivation is a primary piece of the program in order to reduce inappropriate or maladaptive behavior, and to teach a number of other skills so the child can do other things than engage in maladaptive behavior. For a child such as Student, the school looks at what are the baseline skills and how momentum can be built off those skills through systematic teaching that reduces frustration and increases or facilitates skill acquisition. [NT 148]
62. Although transportation is the primary responsibility of the sending school district, the Private School assists in recommending strategies for transportation and in talking with the team about implementing the strategies. [NT 151-152]
63. The program has the facility to be able to meet Student's academic needs and to do a significant amount of pairing to meet Student's postsecondary outcomes and transition outcomes. The program has a generalization process that happens from the beginning so that Student can generalize with various staff members, which is a significant difficulty at present. [NT 96]
64. Based on her participation in two IEP meetings, listening to a description of the Private School, and the total sum of the information she has about Student, the pediatric neuropsychologist believes that the Private School being offered to Student could provide appropriate programming for Student. [NT 254-255]
65. The pediatric neuropsychologist recommended careful development of a transition plan that would lead from home instruction to the placement. She advised that, as feasible, the transition plan should include using the same team initially within the school setting before transferring support to the school-based staff. She agrees that the final iteration of the transition plan was what she had in mind. [NT 47; S-2; S-20, S-23]
66. Although it is extremely difficult to get personnel from a private school to go into the home as part of transition, fortunately, the Private School that the District is proposing is willing to send personnel into the home to assist in effecting a transition. [NT 47-48]

Witnesses

Director of Special Education and Autistic Support:

67. This witness holds a Master's Degree in Special Education with an Autism Endorsement and is certified as a special education supervisor by the state of Pennsylvania. From 2007 to 2015 she was an autistic support teacher, and has been in her current position since 2015. She is an adjunct professor at two area universities where, among other topics, she provides instruction in autism and applied behavior analysis. [S-29]

68. The witness knows Student through providing support to the IEP team, conducting observations and serving as the LEA for the 2016 IEPs. [NT 31, 50]
69. The witness testified to the District's extensive collaboration with the Parents to try to work through the moving parts and variables of Student's needs and the transition process. She believes that by the time the District came to its final offer, the IEP and its transition plan to the Private School was "very, very solid". [NT 94]
70. This witness is familiar with the proposed Private School as she visited the program and spoke with the teacher/supervisor in charge, and because there is currently another District student at the School. [NT 95-96]
71. The witness believes the Private School is appropriate for Student because it has the ability to individualize Student's programming to provide the daily BCBA support Student needs. The director, who has extensive BCBA experience, has worked at another systematic program that created good outcomes. The District's other student at the School had significant needs and has made progress and great gains. [NT 96]
72. The witness has been involved in facilitating many transition plans. Although there is not a scientifically-based formula for how long it should take to transition a Student, this witness believes that a shorter rather than a longer process would be beneficial so Student can get into the new setting and the new day can be tailored. She opined that drawing out a transition where a person goes back and forth between the old and the new placements could have an adverse effect. [NT 71, 82]
73. This witness, in reviewing available evaluation data, concludes that there are no indications that Student could not be transitioned to a school-based program. [NT 52-53]

Autistic Support Teacher

74. This witness holds a Master's Degree in special education, is a Pennsylvania certified special education teacher, a Board Certified Behavior Analyst, a certified Tucci Coach (Competent Learner Model curriculum based on principles of Applied Behavior Analysis) and a certified Crisis Prevention Institute (CPI) instructor. [NT 99-101; S-29]
75. The witness was a special education teacher for one year, then an autistic support teacher from September 2002 through June 2006, a behavior specialist for an Intermediate Unit for one year, a behavior analyst for another school district from September 2007 through June 2016 and has been in her present position since August 2016. [S-29]
76. The witness has extensive experience in transitioning students with severe needs from one placement to another. She authored the draft IEP for Student as well as participating in the development of the transition plan iterations. [NT 100-101, 105-106; S-13, S-16, S-18, S-21]

77. Although this witness has not met Student she used Student's records and the various parts of the reevaluation to inform the draft IEP. She is very familiar with the ABLLS-R and used the results to address goals based on Student's present levels of academic achievement functioning. [NT 102]
78. This witness has worked with students whose behaviors of concern are similar to Student's. Being a behavior analyst for ten years, and as a teacher before becoming a behavior analyst, she worked with some very challenging students with significantly challenging behaviors that were uncomfortable for staff including aggression involving bodily fluids/wastes such as fecal smearing. She is confident that she could implement Student's behavior plan, including the overcorrection for spitting. [NT 109-113; S-20]
79. This witness' specific role in transitioning Student would be to start the pairing process with Student, observing and gaining more knowledge and understanding of what Student is doing in the home so as to implement the behavior support plan and then transfer that knowledge in helping train staff for the transition to the Private School. [NT 113]
80. The Parent raised concerns about Student's behavior on the bus and that the transport on the bus would be too long. This witness participated in brainstorming about handling the behavior on the bus, and how the PCA could be trained to implement some strategies that would prevent Student from engaging in problem behavior on the bus as well as having a plan so that if Student did engage in problem behavior, it could be minimized. The brainstorming also included what positive reinforcement would be available to motivate Student to get on the bus. The planning also included the possibility of doing a trial bus ride during the transition period to be sure that when it came time to ride the bus preparations would be ready. [NT 113-115]
81. This witness believes that the transition plan is very appropriate. Her professional opinion would be to transition Student faster with more of an emphasis on getting Student to the program so that Student could really start in the program. However, given Student's history and really listening to the Parent's concerns, she agrees that taking it more slowly so that there would be some data to know whether things were going well and so that everyone truly understood the plan that was in place in response to difficult behaviors was appropriate to effect a good transition to the Private School. [NT 115]
82. This witness believes the IEPs proposed were very appropriate for Student. The IEP team has a great deal of information from the ABLLS-R assessment to look at skill level and a lot of information behaviorally about what was going on at home. The witness endorsed a strong emphasis on reducing the problem behavior, on getting Student to be able to get out of the house to access the community, to learn to respond to basic directions, and to expand Student's ability to engage in leisure activities with other people appropriately without engaging in problem behavior. [NT 116]

BCBA

83. This witness holds a Master's Degree and a Doctorate in special education and is a Board Certified Behavior Analyst. Prior to September 2008 she was a general education teacher, and from September 2008 through July 2011 she was a special education teacher. From September 2008 to February 2013 she was a home program ABA consultant and from July 2011 to February 2013 she was an autism consultant. From February 2013 to the present she serves as the clinical supervisor for an agency that contracts with schools to provide behavior services to students. [S-29]
84. The witness knows Student because she conducted the FBA in August 2016 as part of the reevaluation process. She went to Student's home twice and conducted observations of Student engaging in problem behavior as well as in acceptable behavior. During the observations she took data, recording all observed behaviors as well as the interactions that occurred between the staff that were working with Student in the home. She also recorded indirect assessment data such as interviewing staff members working with Student and interviewing the Parent and reviewing records. [NT 119-120]
85. Based on data collection the witness created graphs with various variables including behaviors, frequency and staff involved. [NT 120-121; S-11]
86. This witness observed that almost all the challenging behaviors occurred in the presence of the home health aide versus the OT or the PT, and hypothesized that this was because the home health aide was not implementing Student's positive behavior support plan, whereas the OT and the PT were implementing it. The home health aide had a copy of the behavior plan but the witness did not know if she was trained on how to implement it. [NT 120-121, 126-132; S-11]
87. The witness draws the inference that if you follow the positive behavior support plan that is put in place for Student you are less likely to see problem behaviors. [NT 122]
88. This witness served as a "second set of eyes" by conducting the FBA and then reviewing the positive behavior support plan (PBSP) the private BCBA had developed for Student. Reviewing the data and the FBA results this witness concluded that the PBSP the private BCBA created was appropriate to be included in the IEP. [NT 135-136; S-15]
89. The private BCBA contacted this witness to tell her that she had added an "overcorrection procedure" to the PBSP and the witness agreed this procedure is appropriate for Student as she has seen it be successful with other children with similar behaviors to Student's. [NT 137-140, 142]

Executive Director of Private School

90. The executive director of the Private School testified. She holds a Master's Degree in applied behavior analysis and is a Board Certified Behavior Analyst. [NT 145]

91. This witness has been in her field for 14 years. She started as an instructor in a school similar to the currently offered school, and then moved up to a training role. From 2008 to 2015 she was the director of that school. She then assumed her current position. [NT 149]
92. This witness knows Student from being with Student and mother when they came to tour the Private School and from reviewing Student's records. Other than two instances of spitting, Student presented as pleasant. Notably, at the time of the visit Student had not been out of the home for a considerably long while, according to mother as reported to this witness. [NT 150-151]
93. The witness participated in the October 14, 2016 IEP meeting and believes that the Private School can 'absolutely' implement the IEP created for Student. [NT 153-154' S-15, S-20]
94. In reviewing the pediatric neuropsychologist's report, this witness found it to be 'typical' of the types of behaviors and needs that the Private School's students present. [NT 152]
95. This witness, for purposes of a transition plan, was involved in providing input regarding what the Private School would be able to do to facilitate a successful transition in light of the Parent's concerns, sharing what some of the factors are that affect a new student coming, particularly a student like Student where there's a lot of legwork to be done up front so that a strong program is ready to be rolled out the first day. Someone has to be trained prior to a student's arriving, looking at the student's needs and how the school can help with transition. [NT 155-156; S-16, S-21, S-23]
96. If the Parents had agreed with the IEP and the transition plan the school would have hired another staff member given the one-to-one ratio. Whether that person would work with Student or someone already on staff who was strong behaviorally, and creative enough for programming and curriculum development would be assigned, would have to be decided. [NT 156-157]
97. In September the Private School did a very intensive search to find someone who could meet Student at the place where Student's needs were and could 'wear as many hats as are needed to program the best' for Student. This witness found someone, but because Student did not enroll that person went to another position elsewhere. [NT 156-157]
98. The last iteration of the transition plan provided for Student's assigned Private School teacher to conduct in-home visits and work together with the private BCBA and build on the private BCBA's success with Student. [NT 158]

Speech Therapist

99. This witness holds a Master's Degree in Speech/Language Pathology. After undergraduate, graduate and post-graduate experience starting in September 2009, this witness has been employed as a speech/language pathologist for three and a half years. [S-29]

100. This witness is familiar with Student through reviewing the recent reevaluation and the IEP. In the scope of her duties the witness has been called upon to review information about children whom she has not personally seen. The individual who evaluated Student and contributed to the IEP is no longer working for the District. [NT 162-164; S-10]
101. Evaluation data showed that Student had some good foundational skills and a good core vocabulary. Student demonstrated a desire to communicate but did not always do that in the best way. Student's needs appeared to be for higher level language to become more expressive and to understand higher level reasoning, such as figurative language, which would assist in social communication.

Occupational Therapist

102. This witness holds a Master's Degree in Occupational Therapy, is a Pennsylvania licensed occupational therapist, and is certified to administer the Sensory Integration and Praxis Test. In January 2006 she began student fieldwork and in June 2008 started various positions in her field. From August 2007 she has worked for a contracted agency, seeing students with autism, sensory processing differences, and learning disabilities. [NT 174-175; S-29]
103. This witness knows Student from working with Student at the high school from September 2015 to the winter break in December 2015 and she observed Student in Student's home at the end of June 2016 for the reevaluation. She has also been supervising the certified occupational therapist who provided Student's home occupational therapy after Student left the high school. She attended the August 29, 2016 IEP meeting. [NT 176-177, 184-185]
104. Although Student presented behavioral challenges during the time this witness worked with Student at the high school the behaviors in the occupational therapy sessions improved over time. The witness attributes the improvement to establishing rapport and to consistent implementation of the behavior plan. [NT 177-178]
105. In the occupational therapy field, clinical observation along with document review is a standard way to conduct reevaluations. Because this witness had worked with Student previously she did not believe that administering standardized instruments would accurately reflect Student's abilities. [NT 179-180]

Physical Therapist

106. This witness holds a Master's Degree in Physical Therapy and a Pennsylvania state license to practice physical therapy. She has been employed as a pediatric physical therapist since 2003 working in an approved private school, and early intervention in an outpatient physical therapy clinic. [NT 193]
107. This witness knows Student through providing physical therapy services in the home since April 2016 through December 2016. The private BCBA trained this witness on implementing the PBSP that the private BCBA had drafted. She attended the August 29, 2016 IEP meeting. [NT 193-194, 206-207; S-20]

108. Student demonstrated behavioral challenges depending on the day and the environment but the behavior subsided with the consistency of following a schedule, a routine, and using the positive behavior support plan. The physical therapist worked inside Student's home but also would occasionally walk with Student around the complex where the home was located. Student was anxious when encountering people walking from the buildings or when there were noises from large lawn maintenance machinery. [NT 197-198]
109. The witness testified that neither the home nor the outdoors area permitted her to conduct physical therapy appropriately because a much larger, climate controlled space was needed. [NT 199-200]
110. This witness contributed to the reevaluation based on her work with Student. [NT 197-198; S-10]

Pediatric Neuropsychologist

111. This witness holds a doctoral degree in clinical psychology with concentrations in neuropsychology and school psychology, is licensed to practice psychology in Pennsylvania, is certified as a school psychologist in Pennsylvania, has authored or co-authored six professional publications, and has made thirty-two professional presentations. She has conducted several thousand evaluations. She has been Director of the Neuropsychology Assessment Center at a local university since 2004. [NT 256; S-29]
112. The witness is familiar with Student because the District asked her to conduct an independent evaluation in order to obtain some information about Student's overall cognitive functioning, with the idea that that information and any additional information that would be included in the assessment would help inform educational planning and placement questions. [NT 220]
113. Although the District paid for the evaluation it placed no conditions of any kind on evaluation conditions or findings. [NT 220]
114. The District provided very little background information about Student. The witness obtained information from written records she reviewed. [NT 221]
115. Records revealed that there had been attempts in the past to administer an IQ test on two different occasions, but administering the test in standardized fashion, following all the guidelines, had to be discarded in order to try to make the questions more available to Student. The previous evaluators were not able to complete those evaluations, and IQ scores were not reported. [NT 223-224]
116. In looking over previous assessments, in talking with Student's mother, and in considering the services that Student received in the past, the witness wanted to start by getting some measure of overall cognitive ability, intellectual functioning, basic language skills, and if possible visual motor skills. The witness also wanted to get some information from Student's mother about adaptive functioning to look at what Student's daily living skills were like. [NT 221-222]
117. The methods the witness selected are considered valid and reliable in the field of pediatric neuropsychology and school psychology. [NT 222]

118. Although her plan was to complete an intellectual assessment battery, Student's ability to tolerate the testing demands and Student's ability to respond altered some of what the witness planned to do. [NT 222-223]
119. The first session was conducted in the presence of the private BCBA. Although Student seemed a little nervous when the witness first arrived, this abated and Student was able to finish work being done with the BCBA and then to engage in some tasks with the witness. On the second and third testing occasions the witness was alone with Student and Student was less cooperative. On all three occasions Student demonstrated spitting behavior. [NT 226-228]
120. The witness deliberately chose the Differential Ability Scale - Second Edition Early Years Battery, specifically the Verbal Ability Cluster, in order to get a good sample of what skills Student could show given that in previous testing the examiners had not been able to get through the age-appropriate batteries and she wanted to be able to give Student something that Student actually was capable of doing. [NT 233]
121. Although the Differential Ability Scale - Second Edition was developed for children in age ranges 2 years 6 months to 3 years 5 months and 3 years 6 months to 6 years 11 months, it also has extended-level norms for children age 9 years 0 months to age 17 years 11 months. Because the test has a "low floor" that allows explanation of items it enables the examiner to tease out whether the individual doesn't know the information or knows the information but doesn't understand the question. [NT 232-233]
122. On the Differential Ability Scale - Second Edition Early Years Battery age-equivalent scores are based on the raw score (number correct) that a child in the normative sample typically received at a certain age. Standard Scores reported for Student are based on the extended-level norms that that can be used for children ages 9 years 0 months to age 17 years 11 months. [NT 234-235]
123. When the witness attempted to get academic achievement scores she was only able to try to determine whether Student could recognize some basic letters, even using non-standardized administration to make the test more accessible to Student. [NT 235-236]
124. The private BCBA was more successful in eliciting information such as letter recognition from Student, and the witness believes that this is because the private BCBA had a fairly longstanding relationship with Student and was already skilled in knowing exactly what to do in terms of how to present the information, how to cue Student, and how to reinforce Student. [NT 236]
125. Although their responses were generally congruent on the measure of adaptive functioning, the Parent and the private BCBA produced significantly discrepant results when responding to the GARS-3, an instrument used to assess autism spectrum symptoms. The witness draws the conclusion that these two reporters are perceiving Student's behaviors in a very different way. The Parent doesn't view Student as having a lot of those symptoms indicative of an autism spectrum disorder, and/or doesn't seem to see that they could be related to an

autism spectrum disorder, testifying, “You know, I can't be in her head and know exactly what she's thinking as an alternative explanation, but for the difficulties Student is having, she doesn't based on these responses”. [NT 238-239]

126. In addition to evaluating Student over three occasions, this witness participated in person at the August 29, 2016 IEP team meeting and by telephone in the October 14, 2016 IEP team meeting. She believes that the transition plans attached to each of the resultant IEPs satisfied the recommendation she made about transition planning in her evaluation report. [NT 251-254; S-15, S-16, S-20, S-21, S-23]
127. In her professional opinion, this witness believes, from all the information available to her, that Student has the capability to learn, and learn more than Student was learning at the time when she saw Student and all the services were home-based. [NT 256]
128. The witness believes that Student’s behaviors get in the way of Student’s being available for instruction but that there has been a lot of thought given to how to help manage these behaviors in order to make Student available for instruction. She believes that it is important that Student has the behavioral support that Student needs to be able to allow instruction to occur. [NT 256]
129. This witness concludes that Student needs both instruction and behavioral supports to a significant degree. [NT 256]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party’s evidence outweighs the other party’s evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in “equipoise”, then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the District asked for the hearing and thus bore the burden of proof.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); see also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community*

School District, 88 A.3d 256, 266 (Pa. Commw. 2014). I found no credibility issues with any of the witnesses.

FAPE: Students with disabilities are entitled to a free, appropriate, public education (FAPE). Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), which took effect on July 1, 2005, and amended the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). ‘Special education’ is defined as specially designed instruction...to meet the unique needs of a child with a disability. ‘Specially designed instruction’ means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26.

In *Endrew F. v. Douglas County School District RE-1*, No. 15-827 (U.S.C. March 22, 2017), the Supreme Court of the United States held in a unanimous opinion authored by Chief Justice John Roberts that, “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* at 11 (slip op.).

Least Restrictive Environment: There is a strong and specific preference in the IDEA that (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. §300.114(a)(2).

The IDEA regulations recognize above that there are circumstances where “the nature and severity” of an eligible student’s disability makes education in a regular school setting unsatisfactory because the district does not have access to supports and services that allow it to address the effects of a severe disability. For those situations, the IDEA regulations require an LEA to provide “a continuum of alternative placements,” such as “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” 34 C.F.R. §300.115(a), (b).

Placement: A placement decision is a determination of where a student’s IEP will be implemented. Placement decisions for children with disabilities must be made consistently with 34 CFR 300.116. The IEP team, including parents, makes placement decisions. Like the formulation of an IEP, a placement decision is not a unilateral matter for school district determination. 34 CFR 300.116(a)(1) however, is also clear that parental preference cannot have been the sole nor predominant factor in a placement decision. The IDEA mandates parental participation in the placement decision, 34 CFR 300.116(a)(1), but does not suggest the degree of weight parental preference should be given.

Discussion

The District filed for this hearing because it and the Parents have come to an impasse regarding placement despite a five-month-long process including a multidisciplinary reevaluation, IEP development and several revisions, and transition plan development/revisions – all of which included participation by counsel for the District and counsel for the Parent.

The issue in this case, simply put, is whether or not the program and placement put forth in the November 2, 2016 IEP and NOREP were reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. Developing the program/placement was, however, far from a simple matter. The planning and development included the Parents, education-related professionals who all hold Master's or Doctoral degrees including a very highly qualified independent pediatric neuropsychologist, three BCBA's, an autistic support teacher who is also a BCBA, a speech/language therapist, an occupational therapist, a physical therapist, and the director of autistic support programming, as well as two highly experienced special education attorneys. Through its testimonial and documentary evidence the District has met its burden of proof, and has clearly established that the IEP, the transition plan, and the placement it has offered Student are appropriate under the IDEA and go far beyond the standard of 'appropriate' entering into the realm of superb.

The offered program and placement articulated in the IEP and NOREP of November 2, 2106 is based upon a thorough multidisciplinary evaluation that included an independent psychological evaluation and parental input. Results of the evaluation segments were used to create the IEP's goals and objectives. Careful consideration was given as to where the IEP could be delivered, and the placement chosen meets the Student's significant needs for instruction and behavior management as well as being the least restrictive environment appropriate for Student at the present time. The Parent's legitimate concerns about transition planning from home instruction to school-based instruction were carefully considered and a reasonable plan for transition, including overlapping of home and school staff, was developed. The Parent's concerns about transportation were also thoughtfully addressed and a plan was created to address these concerns.

I find that the District's proposed program and placement more than meet the requirements of the IDEA as interpreted in relevant case law and are appropriate for Student.

Order

It is hereby ORDERED that:

The IEP and NOREP the District offered to Student on November 2, 2016 represent an appropriate program and placement.

Any claims not specifically addressed by this decision and order are denied and dismissed.

Linda M. Valentini, Psy.D. CHO

April 20, 2017

Linda M. Valentini, Psy.D. CHO
Special Education Hearing Officer
NAHO Certified Hearing Official

RULING ON PARENT'S MOTION FOR PENDENCY

Re: [Student] vs. Great Valley School District
ODR # 18698/16-17 KE

Background:¹²

On January 27, 2017 the District requested a due process hearing, seeking a hearing officer Order that its proposed IEP issued November 2, 2016 is appropriate¹³. A hearing was scheduled within the regulatory timelines for February 9, 2017. On January 31, 2017 the Parent requested a continuance in order to seek legal counsel, noting that she hoped to find counsel in the next seven business days; the hearing was rescheduled for February 17, 2017.

On February 3, 2017 the Parent filed a Motion for Pendency. On February 3, 2017, because the parties held different views as to what the pendent placement was, the hearing officer directed that the parties were to present evidence as to their respective positions on pendency at the beginning of the February 17, 2017 hearing session and stated her intent to issue a subsequent ruling on pendency as soon as possible thereafter.

On February 5, 2017 the Parent requested another continuance, noting that she had contracted the services of an educational consultant to assist with determining her child's service needs, and that she also wanted to seek to resolve the dispute through mediation. The District agreed to mediation, which was scheduled for February 21, 2017. Mediation did not result in a resolution. In light of the calendars of all participants the hearing officer rescheduled the hearing for March 14, 2017 and March 15, 2017. The Parent, counsel for the District, and the hearing officer held a prehearing conference call on March 13, 2017. Unfortunately, because of an impending severe snowstorm, the two sessions were canceled and the hearing was rescheduled for March 21, 2017 in accord with the participants' calendars.

In the intervening time the Parent obtained the assistance of an advocate who, on the evening of March 19, 2017 renewed the Parent's Motion for Pendency. On March 20, 2017 the Parent's advocate gave notice that neither she nor the Parent were going to attend the hearing. Notably, during the period prior to this date, the Parent had been conscientious and cooperative, seeking guidance and clarification about procedures and giving every indication of her intent to participate in the proceedings. .

On the morning of March 21, 2017, after trying unsuccessfully to reach the Parent by telephone, the hearing officer proceeded with the hearing in her absence given that the hearing had been requested by the District which bore the burden of proof. At the hearing the District briefly provided its position on pendency. A copy of the hearing transcript was sent to the Parent. The Parent indicated that she would provide her position

¹² Unless otherwise specified, Parent refers to the mother.

¹³ The IEP is dated August 29, 2016 and was re-issued on November 2, 2016 with a revised Transition Plan dated October 26, 2016 and a NOREP dated November 2, 2016. [S-23]

on pendency by April 7, 2017 and did so. Having received both parties' positions on pendency, the issue is now ripe for ruling.

Findings of Fact:

For reasons not contained in the record, the parties entered into a private Settlement Agreement and Release that controlled Student's educational programming between March 1, 2016 and September 1, 2016. The Settlement Agreement and Release was signed by both Parents on March 7, 2016 and by the President of the School Board on behalf of the District on March 14, 2016. [S-2¹⁴]

The Settlement Agreement and Release included a provision for attorney fees to Frankel and Kershenbaum, LLC "for two hours of legal service rendered for review of this Agreement and Trust". [S-2]

The Settlement Agreement and Release included a provision that "if the Parents unilaterally provide notice to the District pursuant to Paragraph 12 of this Agreement that they intend to obtain educational programming and placement for the Student from the District prior to September 1, 2016, the District's and Trustee's obligations to fund privately-obtained services under this Agreement shall cease effective ten (10) school days after said written notice from the Parents".

The Settlement Agreement and Release contained a clause addressing pendency: "The Parties agree that in the event that a dispute arises regarding the Student's proposed program and/or placement pursuant to an IEP and NOREP, the Student's then-current placement for purposes of pendency shall be the program and placement recommended by the District's evaluation and program planning process described in this Agreement and Release, unless the Parties agree otherwise."

On November 2, 2016 the District sent the Parent by email, with a copy to Parent's attorney Frederick Stanczak¹⁵, a revised Transition Plan dated October 26, 2016, an IEP dated August 29, 2016, and a NOREP dated November 2, 2016. [S-23]

The NOREP states, as per the Pennsylvania Department of Education's model NOREP/PWN, "PARENTAL CONSENT - Directions for Parent/Guardian/Surrogate: Please check one of the options, sign this form, and return it within 10 calendar days. In circumstances when this form is NOT completed and parental consent is NOT required the school will proceed as proposed after 10 calendar days". [S-23]

The NOREP later reiterates, "If you do not request due process or mediation through the Office for Dispute Resolution, the LEA will implement the action/recommendation". [S-23]

The Parent did not return the November 2, 2016 NOREP to the District, approved or disapproved within ten calendar days of receiving the NOREP. The Parent did not file

¹⁴ Exhibits referenced herein were introduced and admitted into the record at the March 21, 2017 hearing.

¹⁵ Mr. Stanczak has long represented parents in Pennsylvania special education cases.

for a due process hearing or make a request to ODR for mediation within ten calendar days of receiving the NOREP. [NT 95¹⁶]

Legal Basis:

Student is a “child with a disability” within the meaning of the Individuals with Disabilities Education Act [IDEA], 20 U.S.C. § 1402(3)(A), 34 C.F.R. § 300.8, and a “qualified individual with a disability” within the meaning of § 504 of the Rehabilitation Act [Section 504 or Rehabilitation Act], 29 U.S.C. § 705(20) and Title II of the Americans With Disabilities Act [ADA].

The District is a local educational agency [LEA] within the meaning of 20 U.S.C. § 1401(15), 34 CFR § 300.28, 22 Pa. Code 14.102(a)(2)(vii), a federal funds recipient within the meaning of IDEA, 20 U.S.C. §1401 and Section 504, 29 U.S.C. § 794(b)(2)(B), and a public agency as defined by the ADA.

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 [IDEA] which took effect on July 1, 2005, and amended the Individuals with Disabilities Education Act. 20 U.S.C. §§ 1400 *et seq.* [see also 22 Pa. Code §§ 14.101 *et seq.*] The IDEA includes procedural safeguards intended to ‘guarantee parents both an opportunity for meaningful input into all decisions affecting their child’s education and the right to seek review of any decisions they think inappropriate.’ *Honig v. Doe*, 484 U.S. 305, 311-12 (1988). Procedural safeguards include, but are not limited to: the right to challenge the identification, evaluation or educational placement of a child, or the provision of FAPE by filing a due process complaint; the right to an impartial due process hearing on that complaint; the right to bring an action seeking state or federal judicial review of the administrative decision; and the right of the child to remain in his or her current educational placement during the pendency of such proceedings. 20 U.S.C. § 1415(b)(6), (f), (i)(2), (j).” *M.R. v. Ridley Sch. Dist.*, 2012 U.S. Dist. LEXIS 113600, at *7 (E.D. Pa. Aug. 13, 2012).

The IDEA specifies that “during the pendency of any proceeding...the child shall remain in the current educational placement.” 20 U.S.C. § 1415(j). Section 1415(j) requires maintenance of the current educational placement even if another public agency made the original placement decision. *See Pardini v. Allegheny County Intermed. Unit*, 420 F.3d 181 (3d Cir. 2005)¹⁷.

Consideration of risk, cost, ultimate success, or equities are impermissible inquiries in determining stay put. The Third Circuit, and the Commonwealth Court, consider stay put an automatic preliminary injunction which “substitutes an absolute rule in favor of the *status quo* for discretionary consideration of the factors of irreparable harm and either a

¹⁶ Transcript of March 21, 2017 hearing.

¹⁷ *Pardini* involved a child transitioning from Part C to Part B services and a claim of pendency. Subsequently, IDEA’s regulations were amended to provide that pendency would not attach to the Part C services. 34 C.F.R. 300.518(c). However, Pennsylvania explicitly did not adopt that regulation, *see* 22 Pa. Code § 14.102(1)(xxxi). Thus, *Pardini* remains the law in Pennsylvania and requires LEAs to provide pendent programming even when a student is moving from Part C to Part B services.

likelihood of success on the merits or a fair ground for litigation and a balance of the hardships." *Drinker*, cited by Judge Robreno in *Brown v Ogletree*, 2012 U.S. Dist. LEXIS 21968 (ED Pa 2012). Once a court ascertains the student's current educational placement, the movants are entitled to an order without satisfaction of the usual prerequisites to injunctive relief. *R.B. v. Mastery Charter Sch.*, 2011 U.S. Dist. LEXIS 3429, at *8-9 (E.D. Pa. Jan. 11, 2011); *see also M.R.*, at *8; *J.E. v. Boyertown Area Sch. Dist.*, 452 Fed. Appx. 172, 177-178 (3d Cir. 2011).

The Third Circuit has ruled that "the dispositive factor in deciding a child's 'current educational placement' should be the Individualized Education Program...actually functioning when 'stay put' is invoked." The critical question is what is the 'operative placement' actually functioning at the time the dispute first arises. *Drinker v. Colonial School District*, 78 F.3d 859 (3d Cir, 1996). In *M.R.* the court clarified that the operative placement is determined by the date the dispute between the parents and the school district 'first arises' and proceedings conducted pursuant to the IDEA begin.

Arguments:

As noted above, the IDEA provides that during the pendency of any proceeding...the child shall remain in the current educational placement. The District initiated proceedings pursuant to the IDEA on January 27, 2017; the Parent invoked 'stay put' on February 3, 2017. The issue arises here because the Parties disagree about what constitutes 'current educational placement' as of the date the Parent invoked 'stay put'.

The Parent maintains that Student's pendent placement is the home school program pursuant to the Settlement Agreement that expired September 1, 2016. The Parent asserts that the District has knowingly changed the Student's placement in the last seven months by removing Student's educational services and has attempted to place the student in an out of district setting without any evaluations to support such a placement.

The District maintains that Student's pendent placement is that articulated in the IEP and NOREP issued on November 2, 2016. The District bases its arguments on two points: 1) The Settlement Agreement and Release signed by the parties in March 2016 contains a pendency provision that in the event that a dispute arises regarding the Student's proposed program and/or placement pursuant to an IEP and NOREP, the Student's then-current placement for purposes of pendency shall be the program and placement recommended by the District's evaluation and program planning process described in the Agreement and Release; and, 2) The Parent failed to return the November 2, 2016 NOREP in ten calendar days noting approval or disapproval, and did not request a due process hearing or mediation through the Office for Dispute Resolution.

Discussion:

The pendency provision in the parties' settlement agreement notwithstanding, the Parent believes that the Student should receive the services provided prior to the September 1, 2016 expiration of the settlement agreement. Without adducing supporting documentary evidence the Parent also asserts that the District has attempted to place Student in an out of district setting without evaluations to support such a placement. The issue of the

appropriateness of the District's proposed program and placement is the subject of the due process hearing that was begun on March 21, 2017 and is scheduled to conclude on April 17, 2017; as such, whether the Parent is correct or incorrect, that issue is not ripe for adjudication and the outcome of that adjudication has no bearing on the instant matter of pendency. As noted above, consideration of ultimate success or equities are impermissible inquiries in determining stay put.

Although whether a Pennsylvania special education hearing officer has jurisdiction to enforce settlement agreements appears to be an open question in this circuit [see for example *Baker v. Lower Merion School District*, 2010 U.S. Dist. LEXIS 142268 (ED PA 2010)] the Eastern District of Pennsylvania ruled that special education hearing officers do have jurisdiction over disputes about whether an enforceable settlement agreement exists. *I.K. ex rel. B.K. v. School District of Haverford Tp.*, 2011 WL 1042311 at *5 (ED. Pa. Mar 21, 2011). The hearing officer has before her a copy of a document, titled 'Settlement Agreement and Release'. The document bears the signatures of both Parents as well as that of the District's School Board President. The Parents, now acting pro se, had benefit of counsel when they entered into the agreement as evidenced by a provision for Parent attorney fees to "review the Agreement and Trust". I therefore conclude that an agreement existed between the parties. The document requires no interpretation – it unequivocally provides that in the event that a dispute arises regarding the Student's proposed program and/or placement pursuant to an IEP and NOREP, the Student's then-current placement for purposes of pendency shall be the program and placement recommended by the District's evaluation and program planning process.

The December 16, 2008 Letter to Pugh from the Director of the Pennsylvania Department of Education Bureau of Special Education¹⁸ is directly on point and supports the District's second argument. The PDE makes it very clear that under the dictates of Pennsylvania law and policy, parents are required to initiate a due process complaint within ten days of receipt of the NOREP/PWN or waive their right to prevent the District's implementation of the disputed IEP and waive their right to stay put. PDE/BSE has determined that, "Because it provides the necessary balance of competing interests – the parent's right to disagree with the LEA's decision and maintain pendency, the student's right to the timely provision of a free appropriate public education [FAPE], and the LEA's obligation to defend its offer of a FAPE, the PDE has determined ten calendar days' notice to be "a reasonable time before" an LEA takes the action proposed in the NOREP/PWN to be consistent with its obligations under the IDEA".

As to the calculation of the ten days, "PDE would calculate the ten days from the date the parent was handed the NOREP/PWN or would have received the document through the mail". Turning to the highlighted language following the asterisk on the annotated NOREP/PWN, the PDE/BSE quotes, "...if you do not approve the action/recommendation your child will remain in the current program/placement only if you request a due process hearing or mediation through the Office for Dispute

¹⁸ Letter to Pugh, Bureau of Special Education, Commonwealth of Pennsylvania Department of Education, December 16, 2008.

Resolution. If you do not request Due Process or Mediation through the Office for Dispute Resolution the LEA will implement the action/recommendation”.

PDE/BSE goes on to state, “The language cited above does not simply imply, it actually requires parents to initiate a proceeding within the ten calendars [sic] days in order to preserve the “stay put”.” The PDE/BSE then explains that “In Pennsylvania, state regulation defines the term “proceeding” as a due process hearing, any judicial appeals (34 C.F.R. Sec. 300.518(a)) and mediation (22 Pa. Code Sec. 14.162(s)). So in addition to a request for a due process hearing, the last agreed upon educational placement also must be maintained once a parent has requested a mediation proceeding.” Further, “...PDE has designated the Office for Dispute Resolution (ODR) as the entity responsible to receive and process requests for the now single-tier state educational agency administrative review and mediation. The intention of the NOREP/PWN annotation was to convey to parents that they must file their mediation request and due process complaint notice with the ODR within the ten-calendar day period or the LEA must implement its proposed action within ten school days. A parent can ask for mediation or due process whenever they wish, the issue of the ten calendar day time-frame relates only to invoking stay-put”.

Finally the PDE states, “The concept of a “reasonable time” for parents to file for mediation or due process does not exist in the law – either the parents initiate the proceeding during the timeframe to invoke pendency or they do not; if they do not they waive pendency”.

Conclusion:

Given that the Parents entered into a written and executed settlement agreement that contains a specific provision for pendency in favor of a District-recommended placement, and given that upon receiving a NOREP offering that placement the Parent did not return the NOREP signed as approved or disapproved and did not request a due process hearing or mediation through the Office for Dispute Resolution, I must conclude that Student’s pendent placement is that put forth in the IEP, transition plan and NOREP that the Parent received on November 2, 2016.

ORDER

It is hereby ORDERED that:

The Parent’s Motion for Pendency is denied.

April 10, 2017

Date

Linda M. Valentini, Psy.D. CHO

Linda M. Valentini, Psy.D. CHO
PA Special Education Hearing Officer
NAHO Certified Hearing Official