

*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

Child's Name: JE

Date of Birth: xx/xx/xxxx

ODR No. 00101-0910 LS

CLOSED HEARING

Parties to the Hearing:

Representative:

Boyertown Area School District  
120 North Monroe Street  
Boyertown, PA 19512

Jennifer Donaldson, Esquire  
Sweet, Stevens, Katz & Williams  
331 East Butler Avenue  
P.O. Box 5069  
New Britain, PA 18901

Date of Ruling:

April 1, 2010

Hearing Officer:

William F. Culleton, Jr., Esquire

## **INTRODUCTION**

(Student) is a seventeen year old eligible resident of the Boyertown Area School District (District); he is in tenth grade at the [Redacted School] in [Redacted city] Pennsylvania. (NT 20-6 to 16, 506-8 to 13, 515-16 to 18.) [REDACTED SCHOOL] is a private school that provides college preparatory education to students with learning differences. (NT 507-24 to 508-13.) The Student is identified with Autism.

In July 2009, the District offered the Student an IEP with part time inclusion and part time placement in its own autistic support class at Boyertown Area Senior High School (BASH). (NT 21-12 to 14; S-19 pp. 54 to 56.) The Parents requested due process on July 27, 2009, amending their complaint on September 2, 2009. (P-14.) They asserted that the District's offered program and placement were inappropriate and that the IEP planning process was inappropriate because the District refused to conduct the IEP meeting at [REDACTED SCHOOL] so that the Student and his teachers could participate. *Ibid.* They requested tuition reimbursement for the 2009-2010 school year. *Ibid.* They also requested an order that the District was liable to pay for tuition and transportation during the pendency of this matter.

The District asserted that its July 2009 offered program and placement, as revised in an IEP offered in August 2009, was appropriate. They requested that tuition reimbursement be denied for that reason and based upon equitable considerations. (P-14 pp. 277 to 281.) They also challenged certain statutory claims.<sup>1</sup> They requested an order that pendency does not apply and that the Parents should reimburse the District for tuition and travel costs for the 2009-2010 school year.

## **PROCEDURAL HISTORY**

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<sup>1</sup> The Parents' complaint was based upon the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1401 *et seq.*; the Rehabilitation Act of 1973, section 504 (section 504), 29 U.S.C. §794; and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12101. The District asserted that the latter two laws do not apply or are moot, and that the hearing officer has no jurisdiction of the ADA claims. (P-14 p276, 280, 284, 287 to 288.)

The Student had moved into the District in 2001; at that time, the Student was placed in an approved private school, the [Redacted APS], and the District continued that placement by agreement until 2008. (NT 23-3 to 21, 25-16 to 25.) In September 2008, (Parents) unilaterally removed the Student from the APS and enrolled him at [REDACTED SCHOOL]. (P-8 p. 6.) (Decision of Special Education Hearing Officer Anne L. Carroll, Esq., finding number 20.) On March 19, 2009, Hearing Officer Carroll awarded the Parents tuition reimbursement and transportation costs for the 2008-2009 school year. *Ibid.* In her decision, Hearing Officer Carroll found that the placement at [REDACTED SCHOOL] was appropriate for the Student. (P-8.) On June 17, 2009, the District appealed this decision to the United States District Court for the Eastern District of Pennsylvania. (SD- 17.) This suit was settled, effective March 9, 2010. (JE-1.)<sup>2</sup>

The hearing was convened before Special Education Hearing Officer Deborah DeLauro, Esquire, and was completed in six sessions from October 21, 2009 to March 1, 2010. After the first session, Hearing Officer DeLauro withdrew for health reasons and the undersigned was assigned to complete the matter. I read the transcript of the first session and Hearing Officer DeLauro's extensive notes. I also consulted with Hearing Officer DeLauro and read the entire documentary record. Written summations were received on March 17, 2010 and the record closed on that day.

### **ISSUES**

1. Did the District make a free appropriate public education available to the student in a timely manner for the 2009-2010 school year?
2. Is the [REDACTED SCHOOL] an appropriate placement for the Student for the 2009-2010 school year?

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<sup>2</sup> "JE" refers to the Joint Exhibit offered by stipulation through an email message dated March 12, 2010. I have admitted as a Hearing Officer Exhibit (HO-1) the email message, because it establishes the stipulation and the applicable dates.

3. Should the hearing officer order the District to pay the cost of tuition and transportation of the Student to [REDACTED SCHOOL] for the 2009-2010 school year?

## **FINDINGS OF FACT**

### **JULY 7, 2009 IEP – PROGRAM PLANNING AND LITIGATION HISTORY**

1. In August 2008, the Student was entering tenth grade at the [Redacted APS], an Approved Private School. He had been placed there by the Northampton School District pursuant to an IEP. The District had implemented the Northampton IEP and the placement at [Redacted APS] after the Student and his Parents moved into the District at the beginning of the 2001/2002 school year. (NT 23-3 to 21, 25-16 to 25; P-8 p. 183, FF 3.)
2. In August 2008, Parents provided an Independent Educational Evaluation to the District concerning the Student. The independent evaluator diagnosed the Student with Asperger's Syndrome, a Reading Disorder in Comprehension and Fluency, a Mathematics Disorder, a Writing Disorder and a Learning Disorder in the area of auditory and visual processing. (P-4.)
3. In September 2008, the Parents unilaterally removed the Student [Redacted APS] and enrolled him at [REDACTED SCHOOL], without the consent of the District. (P-8 p. 186.)
4. Based on the private evaluation submitted by the Parents, as well as its own evaluation, the District issued a Reevaluation Report dated October 31, 2008. The Report identified the Student with Autism. It found that the Student exhibited high average verbal comprehension, average perceptual reasoning and working memory, and very low processing speed. His reading and mathematics performance were poor. His reading decoding was average, but his fluency and comprehension were poor due to low processing speed in all areas of testing. His expressive language and perspective taking skills were problematic. He demonstrated problems with speech fluency, pitch, pragmatics and problem solving.

Written sentence structure was also problematic. (P-5 p. 156 to 157; S-5 p. 8.)

5. The report found that the Student exhibited “a mild disorder in pragmatic skills and problem solving skills [and] a mild disorder in ... fluency and pitch.” His articulation and receptive and expressive skills were within normal limits. (P-5 p. 152.)
6. The Report found that the Student needed a small classroom setting, specially designed instruction “in all content areas”, individualized instruction in reading, direct instruction in reading, mathematics and writing, a social skills program with focus on perspective taking, speech therapy “throughout his school day and not in an isolated setting”, and a highly structured environment.” The report also found that the Student needs “[a]dvanced warning for transitions” and “social scripts.” (P-5, p. 156 to 157.)
7. In November 2008, the District’s Director of Special Education submitted to the District Board a budget proposal to open a new Autism Support (AS) class at BASH. The Board preliminarily and informally approved the budget item for this class in January 2009. The Director then began planning for the new class, a process that continued until after June 25, 2009; by the end of June, the District Board approved the budget for the new class, and the Director began staffing and development of the operational plan and protocols. The class opened on September 2, 2009, the first day of school for that year. (NT 1078-10 to 1084-1, 1141-1 to 17; S-22.)
8. On March 18, 2009, the Parents wrote a check for a deposit to [REDACTED SCHOOL] to reserve a place in its 2009-2010 class for the Student, signed a contract to pay the tuition for that school year, and signed an enrollment form; they mailed all of these documents immediately to [REDACTED SCHOOL]. The deadline for financial assistance for the 2009-2010 school year was March 20, 2009. (P-10 pp. 213 to 218.)
9. On March 19, 2009, Special Education Hearing Officer Anne Carroll issued a due process decision finding that the Student’s placement at [REDACTED SCHOOL] in the 2008-2009 school year had been appropriate, and ordering that the District reimburse tuition payments made by the Parents for that school year. (P-8.)

10. On or about April 1, 2009, the District issued a request to reevaluate the Student. The request included “Academic, Social/Emotional assessments to the extent required”, review of [REDACTED SCHOOL] records, Speech/Language assessment and Occupational Therapy assessment. The Parents replied by letter dated April 14, 2009, questioning the need for reevaluation. On May 1, 2009, after additional correspondence with the District by themselves and their attorney, the Parents provided permission to conduct limited evaluations, including speech language, occupational therapy and achievement testing, in addition to access to the [REDACTED SCHOOL] records on the Student. (P-12, P-13 p. 264, 266 to 270; S-6 to 11, 15 to 18.)
11. On May 26, 2009, the District’s Speech/Language evaluator entered an addendum into the October 2008 Reevaluation Report, based upon classroom observation and interview of the Student in [REDACTED SCHOOL], testing, [REDACTED SCHOOL] teacher pragmatic profiles and a review of records. The evaluator found that the Student continues to exhibit a disorder in pragmatic skills, problem solving, speech fluency and pitch. The evaluator recommended individual and small group explicit teaching with reinforcement throughout the school day. (S-5 pp. 8 to 11.)
12. On May 26, 2009, the District’s Occupational Therapy evaluator entered an addendum into the October 2008 Reevaluation Report, based upon classroom observation and interview of the Student in [REDACTED SCHOOL], testing, [REDACTED SCHOOL] teacher pragmatic profiles and a review of records. The evaluator found that the Student suffers from mild to moderate sensory processing dysfunction, with inadequate coping strategies. The evaluator recommended placement in a public high school setting to challenge the student to learn adequate coping strategies. (S-5 pp. 14 to 17.)
13. In their letter, the Parents requested an IEP meeting “with ... the [REDACTED SCHOOL]. The District replied, offering to meet to discuss the requested reevaluation, by letters dated April 20 and April 23, 2009. The Parents reiterated their request for an IEP meeting by letter dated April 22, 2009. The District offered dates for an IEP or evaluation meeting on April 20, May 1 and on June 11, 2009, and the meeting was held on June 25, 2009. The Parents, although they had agreed to that meeting date, received less than one day’s confirmation of its scheduling.

Although they had requested that the meeting take place at the [REDACTED SCHOOL], to permit the Student's participation and that of his teachers, the meeting was scheduled at the Boyertown high school. (NT 57-11 to 58-18; P-3; P-13 p. 263 to 271; S-6.)

14. During this period of time, an appeal to District Court and other litigation was commenced concerning the District's requirement that Parents advance security before it would fund the placement ordered by Hearing Officer Carroll. (P-12.)
15. On June 24, 2009, the Parents received from the District a fifty one page draft IEP for discussion. The Parents rejected this IEP at the meeting the next day. (NT 88-4 to 7; P-3; P-13 pp. 271-272; P-14.)
16. The Parents concluded that the IEP was inadequate because BASH is a large public high school with numerous students. The Parents also objected to putting the Student into an atmosphere where typical students and children with disabilities are educated together, because this necessitates singling out the children with disabilities for special or unusual treatment, such as having assistance in inclusive settings and assignment to special education classes. The Parents were especially concerned with the risk of bullying, and concluded that this risk was unacceptably high at the BASH. (NT 97-11 to 17.)
17. On July 7, 2009, the District offered a placement at the new AS class, with a program including inclusion, supportive services, specially designed instruction, related services and measurable educational goals. This offered program and placement were revised at a resolution session on August 20, 2009. (S-19.)
18. The District offered a plan to have the Student come into the BASH building before the first day of classes to meet with his teacher and learn the physical layout of the school, as well as numerous other transitional supports. The Parents did not avail themselves of this offer. (NT 98-1 to 13; S-22.)

#### THE JULY 7, 2009 IEP FOR THE 2009-2010 SCHOOL YEAR

19. The teacher assigned to the new BASH Autism Support (AS) class is a certified special education teacher with thirteen years of experience,

including teaching students identified with Autism and Asperger's Syndrome. Although the teacher does not have a Masters degree, she has most of the credits necessary for such a Masters equivalency. She has experience teaching reading in a learning support classroom. She is supervised by the Director of Special Education for the District, and has access to her. The teacher is reputed and admitted to be very capable as a special education teacher. (NT 82-7 to 9, 196-23 to 198-22, 201-1 to 12, 245-20 to 22, 849-14 to 16, 1080-4 to 9.)

20. The Intermediate Unit provided consultative support to the teacher in starting the AS class. (NT 202-10 to 203-16.)
21. The AS class in 2009-2010 appropriately serves seven students, ranging from tenth graders to twelfth graders. Not all are identified with Asperger's Syndrome, though all but one are identified with Autism. The staffing is one teacher and two aides. (NT 203-19 to 206-13, 846-25 to 848-5, 860-13 to 15.)
22. The new class is functioning well and has not experienced any significant problems. (NT 259-8 to 260-23, 811-22 to 812-6, 860-13 to 15.)
23. The AS class provides supportive services in inclusion and other settings through the aides assigned to the AS class. Lunch is partially supervised, depending on the students' need for support in the lunchroom setting. (NT 230-22 to 232-3.)
24. Social skills are taught in the AS class and progress monitoring data is taken across all classes. Academic skills are reinforced and academic learning problems are addressed individually. A certified speech/language pathologist teaches social skills once per week to the entire group. (NT 239-23 to 242-3, 256-13 to 257-8, 362-3 to 363-2, 257-9 to 259-2.)
25. The District provides a special education mathematics class that is based upon a computer – based curriculum. The AS class provides support through its assigned aides. (NT 232-13 to 233-25.)
26. The District also provides a research based special education reading class. (NT 234-9 to 235-13, 1106-4 to 1107-8.)
27. The District offered two measurable goals in reading, addressing the Student's needs in reading comprehension. (S-22 p. 53.)



28. The District offered five measurable goals in mathematics, addressing the Student's needs in fluency and mathematics concepts. (S-22 pp. 54 to 56.)
29. The District offered two measurable written expression goals, addressing the Student's needs in sentence formation, conventions and organization, which would be implemented by the AS class teacher, who would monitor progress according to the IEP through the PSSA writing rubric. (NT 238-9 to 239-22, 107-9 to 1108-12; S-22 pp. 56-57.)
30. The District offered six measurable speech/language goals, addressing the Student's needs in conversation, perspective taking, requesting help, problem solving, speech fluency and pitch variety. These would be provided in speech/language therapy by a certified speech/language pathologist. (NT 301-10 to 22; 349-9 to 357-23; S-22 pp. 57 to 60; P-9 pp. 201 to 205.)
31. The District offered three occupational therapy goals, addressing the Student's sensory needs for self-regulation. (S-22 pp. 60 to 61.)
32. The District offered one goal in self-advocacy, which appears to be measurable, but whose measurement formulation is unclear. (S-22 p. 62.)
33. The District offered one social skills goal addressing the Student's need to develop the ability to make friends, which appears to be measurable, but whose measurement formulation is unclear. (S-22 p. 62.)
34. The District offered one goal in anxiety regulation, which addresses the Student's emotional needs, and which appears to be measurable, but whose measurement formulation is unclear. (S-22 p. 63.)
35. At least four students in the class have transitional plans with goals of college admission. The AS class provides all students with instruction and resources to identify and pursue career goals based upon self-identification of personal preferences and skills, and follows their IEP transition goals. The program provides support for transition to college, including visiting college campuses. The District offered to provide this program to the Student and to individualize it through IEP goals. (NT 208-9, 212-2 to 219-22, 220-2 to 222-10, 236-8 to 237-22; S-22 p. 48 to 50.)

36. The District offered the Student five periods of special education classes, including the Autistic Support class, the special education mathematics class and the special education reading class. The schedule originally proposed was adjusted in consultation with the Parents. (NT 235-14 to 18; P-1 p. 55, 58, 58A.)
37. The District offered the student specially designed instruction including social scripts, specific visual feedback, advanced warning and discussion of transitions, video modeling techniques, assignment chunking with detailed calendar, slower paced instruction, clear role definition when working in groups, specific social skill instruction, role playing, community based instruction in social skills and sensory diet. (NT 357-24 to 360-23; S-22 pp. 64 to 65, 71.)
38. The District offered related services including two aides assigned to the AS class, speech and language services, occupational therapy services, one-to-one classroom paraprofessional assigned to the Student as needed, school counselor and transportation. (S-22 pp. 65 to 66.)
39. The District offered to provide supports to school personnel including a District behavior specialist, Intermediate Unit consultation, District and Intermediate Unit autism consultants, a transition consultant from the Intermediate Unit, a school based therapist and weekly staff meetings to discuss the student's transition needs and speech/language/occupational therapy progress. (NT 361-6 to 18, 1102-14 to 23; S-22 pp. 67 to 68.)
40. The District offered to provide transition services for the Student relating to his transition from [REDACTED SCHOOL] to the High School. These included opportunities to navigate the BASH building with a map before the first day of classes, when there would be few if any other students present; to follow the proposed schedule during the summer; to meet and question his proposed teachers; "very, very detailed written information" with visuals given daily about events at the BASH and projected environmental conditions, including crowding in halls and bells and other signals; teaching skills regarding locker and cafeteria use and student procedures for bathroom absence, seeking counseling help, business with the school office; emergency procedures such as fire drills; bus procedures; one to one orientation to the BASH; pairing with another student in the AS class and meetings with the school counselor. Teachers would also meet weekly to discuss the Student's transition to BASH. (NT 712-25 to 718-23, 1094-7 to 1096-4; S-22 pp. 2 to 7, 47 to 49, 68.)

41. The District offered a schedule of classes including college preparatory academics, social and speech skills, transitional planning and special subjects. (NT 728-3 to 738-13, 1096-8 to 1099-8, 1104-23 to 1106-3; S-22 p. 12.)
42. The offered reading instruction and the behavior support plan would not be implemented at the beginning of the school year, due to the need to assess the Student's achievement levels, including conducting a functional behavior assessment to place him at the appropriate level of instruction. (NT 858-23 to 859-6, 888-4 to 889-20, 1110-13 to 1111-5, NT 1143-1 to 1149-10, 1150-11 to 1151-13, 1158-7 to 1159-21.)
43. Some elements to be included in the program in fact, such as a research based reading program, writing program and peer mentor program, were not listed in the August 20 IEP. This included baseline data, which could not be taken until the Student should start in BASH. (NT 1151-15 to 1153-2; S-22 p. 20.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **BURDEN OF PROOF**

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.<sup>3</sup> The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed "equipoise" – that is, where neither party has introduced a preponderance of

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<sup>3</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

evidence<sup>4</sup> to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail. Schaffer, above. Therefore, the burden of proof, and more specifically the burden of persuasion, in this case rests upon Student's Parents, who initiated the due process proceeding. If the evidence is in "equipoise", the Parent will not prevail.

### APPROPRIATENESS OF THE PROPOSED PLACEMENT

This dispute comes down to two different and apparently irreconcilable perspectives on how best to deal with the student's prominent areas of educational need. The record makes clear that the Student has good academic potential and good motivation to succeed, but he can be distracted and held back academically due to his social and pragmatic skills deficits, coupled with his heightened sensitivity to crowded environments and negative social encounters, such as jostling and aggressive behavior by peers. (FF 2, 4 to 6.) The problem is whether or not to deal with these weaknesses through intensive teaching and a challenging inclusive public school environment, while still supporting the Student's aspirations to succeed academically – or through a protective, academically challenging private environment with a slower, gentler approach to teaching the Student self-regulation, speech and social skills. (FF 2 to 6.) The Parents invited me as an administrative hearing officer to decide on the best answer to this question.

I cannot make this choice for Student, nor should I. As an administrative hearing officer, my only decisional authority is to determine whether or not the District has complied with its legal obligations. I find that it has complied with the law with regard to its offer of a program and placement for the 2009-2010 school year. However, I also find that the District's obligations are governed by the pendency provisions in the IDEA,

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<sup>4</sup> A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810 (please note that the Manual was promulgated before the Supreme Court ruled in Schaffer v. Weast, at a time when the Local Educational Agency had the burden of persuasion in Pennsylvania and elsewhere in the federal Third Judicial Circuit. Thus, the first sentence of section 810, indicating that the LEA has the burden in most cases, is outdated and was effectively overturned by Schaffer).

and I find that [REDACTED SCHOOL] is the pendent placement to the date of this decision.

## LEGAL STANDARD

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student’s “intellectual potential.” Shore Reg’l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

Under the Supreme Court’s interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Rather, an IEP must provide a “basic floor of opportunity” – it is

not required to provide the “optimal level of services.” Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

I find that the July 7, 2009 IEP offered by the District in this matter satisfied these minimal requirements of the law. The proposed program was individualized to address the educational needs of the Student. (FF 2 to 5, 27 to 41.) It was based upon a thorough District re-evaluation performed less than one year prior to the offer. (FF 4.) The District re-evaluation in turn was premised upon an up-to-date independent educational evaluation that the Parents had provided to the District, and upon which the District relied extensively. (FF 2, 4.) The evaluation identified educational needs throughout a broad range of academic, social, cognitive and emotional functioning, including needs related to poor reading fluency and comprehension, mathematics fluency and comprehension, writing conventions, speech fluency and intonation, speech pragmatics, social skills and sensory regulation. (FF 4 to 6.) The July 7, 2009 IEP offered multiple goals to address each of these areas of need. (FF 27.) These goals generally were measurable, although not perfectly so. (FF 32 to 34.)

Based upon the testimony of the teacher for the AS class and the Director of Special Education, the testimony of whom I credit as credible and well founded, as well as that of the Parents’ experts, I find that the District appropriately proposed to implement these goals through the combination of its newly established AS class and inclusion in its regular education programs, many of which are “co-taught” by special education teachers, thus providing supportive services. (FF 19 to 26.) The AS class program at the same time would provide additional support to the Student to address individual needs such as difficulties with transitioning into the District’s program, and incidental difficulties that might arise. (FF 24, 38.) The AS class offered a small, well staffed classroom environment for teaching social and career transition skills. (FF 19 to 22.) Its teacher is a highly qualified, experienced and skilled professional, and she is well supported through District consulting personnel and consultation contracts with the Intermediate Unit. (FF 19, 20, 39.) The program is well organized and all conceded that it is a good program. (FF 21, 22.) In addition, the Student would be assigned to special education classes in reading and mathematics. (FF 25, 26, 36.)

The IEP offered extensive related services, including one-to-one supportive services in inclusive environments, as needed, speech therapy by a certified speech language pathologist, occupational therapy for sensory issues, counseling, mental health services and transportation. (FF 38.) Numerous specially designed instruction techniques were also offered. (FF 37.)

The IEP extensively addressed the student's needs for support and assistance in transitioning from the [REDACTED SCHOOL] to the public school environment. (FF 40.) The program also made extensive opportunities available for academic advancement and college preparatory work. (FF 23, 24, 35, 36, 37, 41.) Thus, on its face, the offered program and placement was reasonably calculated to provide the Student with a meaningful opportunity for significant learning and meaningful educational benefit. On its face, it provided far more than "de minimis" educational benefit.

#### Parents' Testimony and Criticism

The Parents' chief contention is that this facial benefit would be nullified by the fact that it is placed in BASH, a large public high school, in which, they argue, the Student cannot adequately or safely function. They assert that, due to his sensory regulation issues, the Student cannot function in large, crowded, noisy and uncontrolled environments, such as he would encounter throughout the school day at BASH. This they couple with his lack of speech and social skills, which they project would make him a target for typical peers. They predict that the Student would be bullied and would misinterpret social events in a way that would increase his anxiety and diminish his ability to focus on academic achievement.

The Parents base this prediction upon the Student's known disabilities as described by themselves and in the various evaluation reports, his experience at the [Redacted APS], in which they assert that he was bullied, and the testimony of two experts who opined that the Student would not be able to handle a public school.

The Parents have no training or experience in education, yet they offered many opinions about the quality of the [REDACTED SCHOOL] and the District programs. The Parents' basis for their own conclusions about the comparative quality of the District's program and the [REDACTED SCHOOL]

program were not based upon an adequate foundation of facts and education, training or experience. The Mother visited the District's high school only twice before the hearing, once in June 2008 and once in October 2009, just before the due process hearing commenced. (NT 146-1 to 148-16.) The Father did not visit the AS class at all. (NT 694-10 to 11.)

I cannot rely upon the Parents' testimony in support of this contention. I find that the Mother's testimony is not sufficiently reliable for this purpose. The Mother's judgment was based upon three primary concerns that were unrelated to the legal standards set forth above. First, she wanted the Student's program be "college preparatory." (NT 183-1 to 20.) Second, she was concerned, from "look[ing] at the IEP", that it would be "a step back" from the Student's program at [REDACTED SCHOOL]. (NT 183-7 to 13, 190-23 to 191-7.) Third, she was concerned that the environment of the Boyertown Area High School would not be safe for the Student because of her fear of bullying. (NT 183-14 to 20, 194-1 to 16.) The basis for these concerns was impressionistic and not based upon any expertise in drawing inferences from the brief, episodic observations she had been able to make at the high school.

As to the first two concerns, the Mother seemed to ignore the District's assertion, as evidenced in the plain language of its offered IEP, that its programming would provide an opportunity for college preparatory academic work and transition to college, even though the law, as discussed above, does not require a local educational agency to offer a college preparatory program. As to the Student taking a backward step, the Mother based this on her observation that the AS class would include students with autism who were not identified with Asperger's Syndrome. She also based this on the fact that the IEP devoted much attention to non-academic skills such as speech and social skills development. The Student's Father made it clear that, in his judgment and that of the Student's Mother, no risk of disrupting the Student for a new program would be acceptable. (NT 656-17 to 657-13, 691-10 to 694-9.)

From my observation of the Mother's demeanor at the hearing, it was clear that her fear of the public school environment for her child is palpable. She repeatedly and with deep concern referred to this concern. At one point, during students' noisy movement in a nearby hallway, an object struck the door of the hearing room. I observed the Mother's startled reaction, and it revealed a heightened sensitivity to the sometimes unruly atmosphere of a



large school for adolescents. (NT 1119-1 to 1120-9.) However, her fear that the Student would be subjected to bullying at BASH was based largely on his experience at [Redacted APS] some years earlier, in a different environment and at a different time in his emotional and social development. She also heard discussion of bullying at BASH on the day before her testimony, but did not follow up to verify the hearsay reports of students that she heard, and these reports did not disclose any serious problem with bullying at BASH. (NT 193-25 to 194-16, 260-24 to 263-2.) This is an insufficient basis for concluding that the Student is predictably likely to fail at BASH because of bullying.

While I mean in no way to diminish the validity or importance of the Parents' concerns, I cannot credit them as a sufficient factual basis for finding the District's offered program and placement to be inappropriate, based upon the minimal standard the law requires for measuring appropriateness. Moreover, their protestations that they would accept the District's offered placement if it were appropriate, (NT 181-4 to 182-10), cast doubt on their reliability as witnesses, because the overall tenor of their testimony about [REDACTED SCHOOL], (FF 8, 10), strongly implies that they would not accept an appropriate placement at BASH – rather, both Parents would always be dissatisfied with the District's offers. (NT 80-2 to 8.) This is not to imply anything but the most sincere concern for the Student's welfare; still, it is clear from the transcript and Hearing Officer DeLauro's notes that any assertion of a willingness to consider placement at BASH was not credible and I so find from the record.

### Experts' Testimony

The Parents presented two expert witnesses who opined that the District's offered program and placement were inappropriate for the Student. They included [Redacted name], an educational consultant, and [Redacted name], the Student's treating clinical psychologist. Both witnesses were personally qualified to offer such opinions and I find them to be credible. (NT 833-19 to 844-14, 778-23 to 785-22.)

Dr. [Redacted name] Ph.D., is an educational consultant with experience in evaluating educational programs. Dr. [Redacted name] opined that the District's program was not "suited" to the Student. Her rationale included "the actual makeup of the students" in the AS class, the crowded

hallways and larger academic classes for inclusion, the potential for typical students to “target” the Student, and that the autistic students in the AS class do not “offer the potential of peers” for the Student. She also relied upon the Student’s inability to socialize with typical students, the absence of an “explanation” of how supports would be faded for the Student in time for graduation, the absence of three hours per night of homework, as attested by staff in the AS classroom itself, and the fact that the curriculum offers a mixture of “transition skills, life skills and academic skills”. (NT 860-13 to 869-3, 886-11 to 887-12.)

This expert made cogent observations in two visits on two different days, and drew reliable inferences from her observations in some but not all instances, based upon her experience. The reliability of her conclusions was reduced by the limits of her methodology, which consisted largely of interviews during her visits with the AS class teacher and the aides, as well as visual observation of students in the program. (NT 898-10 to 17, 994-12 to 995-1.) She did not read to any cognizable degree the District’s planning or program descriptive documents, was not familiar with the programs and needs of the other students whom she characterized, and did no testing to support her characterizations of the Student’s needs and capabilities. She spoke to the Student for about 20 minutes. (NT 886-4, 891-21 to 892-17.) She did not interview academic class teachers at BASH or review their curricula. (NT 906-11.) As with the District witnesses, Dr. [Redacted name] necessarily had no opportunity to observe the Student in the BASH setting, in order to test the validity of any prediction as to his likely behavior in that environment. (NT 925-4 to 14.)

Dr. [Redacted name], Ph.D, testified that the student would encounter “extreme difficulty” in transitioning to the BASH from [REDACTED SCHOOL]. He also predicted that the transition would set the Student back by at least two semesters. (NT 795-25 to 796-23.) He based this prediction upon the Student’s difficulties with transitioning, anxiety, and his need for “intellectual stimulation.” (NT 788-8 to 798-5.) He offered that the Student has mastered many of the life skills being taught in the BASH autism program, and that the Student would need an inappropriately stigmatizing one-to-one aide in order to be included in mainstream classes for academic work. (NT 803-4 to 22, 809-10 to 812-6; S-22 p. 73.) He testified that the District’s offered program and placement would not be appropriate for the Student. (NT 797-22 to 798-5.)

The witness did not observe the District's program, and has never seen BASH. (NT 8-2-10 to 25, 808-1 to 5.) He was not clearly knowledgeable about the details of the autistic program. (NT 804-4 to 805-2.) He conceded on cross examination that "there's no guarantee in either place" that the Student will learn the social skills that he will need after graduation. (NT 806-12 to 807-14.) He also conceded that it is an appropriate goal for the Student to learn how to make transitions in life. (NT 814-7 to 25.)

Both of Parents' experts clearly stated that their concern regarding the crowded, noisy hallways at BASH was not based upon the Student's sensory regulation issues, but solely on the potential that he would misinterpret social interactions in that atmosphere or be targeted for bullying. (NT 817-7 to 23, 916-10 to 917-9.) Dr. [Redacted name] advanced a "cost benefit" analysis, indicating that it is less important for the Student to learn the skill of dealing with such an environment than it is to focus on academics and "more common" social skills. (NT 917-9 to 921-14.)

Similarly, District witnesses conceptualized a cost-benefit analysis, but with the opposite conclusion: essentially that the benefit outweighs the cost. (NT 975-23 to 978-17, 1002-15 to 1005-9, 1112-18 to 1113-11.) Several highly qualified District staff - familiar with the Student and his needs, as well as with the program and how it operates at BASH - opined that the District's offer was appropriate. (NT 273-10 to 274-22, 275-22 to 276-4, 997-16 to 998-14, 1111-21 to 1112-18, 1118-17 to 20.)

I find that the evidence on this issue preponderates in favor of the District. I give little weight to the Parents' judgments on this matter, for reasons stated above. I give greater weight to the testimony of the District's expert witnesses than to that of the Parents' witnesses, because the former have greater underlying knowledge of the salient facts. Therefore, I find that the District's program is appropriate as designed and individualized for the Student.

#### Timeliness of the District's Offer

The Parents argue that the offer came too late for them to transition the Student into it appropriately. They correctly point out that the District was not even authorized to propose it to them as of June 25, 2009, when they met in an IEP meeting to plan the Student's program. (FF 7.) They argue

that the District did not at that time provide them with sufficient details of the program and how it would work, and therefore they had to plan for the Student's continuation at [REDACTED SCHOOL]. The Parents complain that the District's program was not finalized until August 20, (FF 17), and by that time, the family had vacation plans, making it impossible to transition the Student into BASH – a critical step to permit meaningful educational benefit from the new plan and placement. They also correctly assert that elements of the program were not implemented immediately upon the start of the school year, including the behavior support plan and the researched based reading program, which was not even listed in the specially designed instruction section of the August 20, 2009 IEP. (FF 42, 43.)

The IDEA requires timeliness; it requires the IEP to be “in effect” before the start of the school year. 20 U.S.C. §1414(d)(2)(A). Parents argue that the District's offer was not “in effect” on September 2, the first day of school, (S-22 p. 6), because certain elements were not ready to be implemented on day one. While this argument has the appeal of a bright line test for FAPE, it argues too much.

In this matter, for instance, the District offered a multiplicity of elements, most of which it was prepared to implement on the first day of class. (FF 19 to 43.) However, it did not have a behavioral support plan, because that could not be provided until a functional behavior assessment should be completed – which had to be performed with the Student at BASH. Similarly, the District needed to place the Student in a reading instructional level, but needed to assess his reading level first. (FF 42, 43.)

The IEP drafters omitted to include programs that they were prepared to offer, including class assignments, and this might have engendered some delay. Yet, the delay would not have been substantial, while the offered services were substantial. (FF 43.)

I need not allocate blame for these delays; there is an acrimonious history between these parties. (FF 3, 10, 13 to 16.) Parents contend that the District took too long to offer their plan, while the District blames Parents for delaying necessary evaluations. It is sufficient to note that the finalized IEP was offered before the start of school, (FF 17), and there was no evidence to suggest that any delay in implementing behavioral support, reading, or peer counseling was so extensive or fundamental as to vitiate the basic program that was offered.

Parents made much of the argument that they were unable to cooperate with any transition activities offered to the Student before the first day of school. They claimed that the District waited until August 20 to offer the numerous services set forth in the IEP, and that by that time, the Student was unable to participate due to vacation plans. The record does not support their contention. The June 2009 plan, though incomplete, offered a full range of activities for transitioning the Student to BASH, including activities to be provided during the summer. (FF 17, 18; P-3 pp. 94 to 96.)

Thus, I cannot credit the Parents' claim that their vacation schedule precluded participation, since the offer was made as early as June. Moreover, I cannot rely upon the Mother's testimony as to the reason for the Student's non-participation, because her memory for central events in the enrolment of the Student at [REDACTED SCHOOL] was faulty. For example, she forgot that she had signed the financial contract for [REDACTED SCHOOL] on March 18, a day before the decision of Hearing Officer Carroll. (NT 138-2 to 140-4.) She was also very vague about the dates of ESY at [REDACTED SCHOOL] and the time that the ESY program ended each day at [REDACTED SCHOOL], even though the reason given for the Student not attending various IEP meetings in the summer was that he had to attend the ESY program at [REDACTED SCHOOL]. (NT 143-21 to 145-22.) The Mother was vague and contradictory about the dates and duration of the vacation that she said was the reason that the Student could not participate in transitional activities offered again by the District in August, prior to the start of classes, at one point suggesting that the vacation endured until September 25, even though she had signed a NOREP on September 4. (NT 176-3 to 178-179-12, 192-9 to 193-13.)

The Mother's memory was more generally faulty. She also testified that she received no NOREP from June 25 to August 20, yet was confronted with a NOREP that she signed on July 9; she later explained that she had been referring to an IEP meeting rather than an evaluation meeting, but the testimony evidences at least some confusion on her part in answering questions, as repeatedly demonstrated during her testimony. (NT 141-6 to 143-12, 170-11 to 171-13, 188-6 to 24, 190-13 to 19, 191-17; S-19 p. 62.)

### Procedural Deficiencies

The Parents argue that the IEP was inadequate because of procedural inadequacies, including the District's refusal to conduct an IEP meeting at [REDACTED SCHOOL], so that the Student and his [REDACTED SCHOOL] teachers could attend. (FF 13.) They also argue that the District gave no evidence of even considering [REDACTED SCHOOL] as a placement. This argument fails in the circumstances of this case. A local educational agency's failure to follow procedural requirements does not per se establish a failure to provide meaningful educational benefit. In re Educational Assignment of E.D., Spec. Educ. Op. 1564 at 7-8 (January 10, 2005). In this case, the record overwhelmingly demonstrates that the alleged procedural failures of which the Parents complain did not cause the District to offer an inappropriate placement, as I have found above. Therefore, the District's offered program and placement were not rendered inappropriate by these alleged deficiencies.<sup>5</sup>

#### Appropriateness of the [REDACTED SCHOOL] Program

I find that the above findings render the controversy about the appropriateness of the [REDACTED SCHOOL] placement moot. Therefore I do not reach the issue.

#### PENDENT PLACEMENT

Both parties have asked me to adjudicate the issue of pendency in this matter. The District urges me to order the Parents to reimburse the District for all private school tuition and expenses advanced by it since its final offer of placement and program in the July 2009 IEP, as revised in August 2009. I find no basis for finding that the equities in this hotly litigated matter weigh in favor of one party or the other. Both parties took adversarial actions that their opponents consider inequitable.

Moreover, I have no authority to make such an equitable determination. Rather, I am bound by the holding of the Third Circuit Court of Appeals in Susquenita School District v. Raelee S. 96 F.2d 78 (3d Cir. 1996), which I find governs the facts in the case at bar. There, the Court

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<sup>5</sup> Moreover, Commonwealth regulations do not provide an unfettered right to an IEP meeting at the place of their choosing; rather, the governing regulation limits the District's obligation to providing a meeting "in the school district ... ." 22 Pa. Code §14.62(d).

ruled in favor of a parent in a tuition reimbursement matter based on the parent's unilateral removal of the student due to a claim of failure to provide FAPE. The Special Education Appeals Panel had found that the unilateral placement was appropriate and had ordered tuition reimbursement. The Court held that this decision of the Commonwealth's last and final administrative authority established the pendent placement for purposes of the dispute ongoing at the time of the decision.

The Court held that, under 20 U.S.C. §1415(j) and 34 C.F.R. §300.518, the pendent placement is the placement that is in effect when the proceeding commences. Susquenita, 96 F.2d at 83; see generally, Drinker v. Colonial School Dist., 78 F.3d 859, 864 (3d Cir. 1996)(stating that pendency functions in effect as an automatic preliminary injunction). Ordinarily, this is the last agreed-upon placement in effect when the parent files for due process. Drinker, 78 F.3d at 865. In Drinker, the Court held:

‘Implicit in the maintenance of the status quo is the requirement that a school district continue to finance an educational placement made by the agency and consented to by the parent before the parent requested a due process hearing.’  
(quoting Svi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982)(emphasis supplied).)

The Court recognized an exception to these basic principles. It held that, when the final administrative reviewer decides that the placement offered by the local educational agency was inappropriate and the unilateral placement is appropriate, this decision constitutes an agreement of the Commonwealth to the unilateral placement, within the meaning of 20 U.S.C. §1415(j), as well as under 34 C.F.R. §300.518(d)(“unless the State or local agency and the parents of the child agree otherwise”). Susquenita, 96 F.2d at 83-84. Thus, the local education agency is bound to pay for the unilateral placement from the time of the administrative decision forward until the dispute is resolved. Ibid.

In the instant matter, Hearing Officer Carroll found:

The school Parents unilaterally selected for [the Student], [REDACTED SCHOOL], is currently providing, and from the beginning of the current

school year, did provide an appropriate program and placement for Student.  
(P-9 p. 197.)

Although the Hearing Officer's decision found only that the District's offer for the 2008-2009 school year was inappropriate, her finding for the appropriateness of the [REDACTED SCHOOL] placement was for the entire school year and "currently." (FF 9; P-8 p. 197.) This is the final determination of the Commonwealth's highest administrative level, because now the Commonwealth is a "single tier" state for due process purposes.

In light of this finding, and under the authority of Susquenita, [REDACTED SCHOOL] became the agreed-upon, "then-current" placement from the beginning of the school year in 2008 until the dispute was resolved. In this case, the District appealed the hearing Officer's ruling to the District Court, and that litigation was resolved by settlement agreement on March 9, 2010. (JE 1.)

Meanwhile, in July 2009, the District proposed to change the pendent placement by offering a new IEP. (FF 17.) The Parents did not agree to this placement and filed for due process while the student was still enrolled in the agreed-upon placement. Ibid. Under these circumstances, I find that the pendent placement was not changed by the District's offer of a new placement, to which the Parents did not agree. Drinker, 78 F.3d at 865. Therefore, the pendent placement at the time of filing the instant request for due process was [REDACTED SCHOOL]. See Pardini v. Allegheny Intermediate Unit, 420 F.3d 181, 190-191 (3d Cir. 2005)(governing factor is the "status quo", citing Drinker.) This pendent placement continued until today's decision date. Therefore, the District remains liable for tuition and transportation payments for the unilateral placement at [REDACTED SCHOOL] until today, pursuant to Hearing Officer Carroll's March 29, 2009 decision.

The IDEA provides that a local educational agency is not required to pay for the cost of a private school education if it has made a FAPE available to the student. 20 U.S.C. §1412(a)(10)(C)(i). Under this section, the District's obligation to pay for tuition and transportation for the [REDACTED SCHOOL] placement would have terminated on the date of its offer, July 7, 2009. However, because of the operation of pendency, as discussed above, the District's obligation continued until the date of this



decision. Therefore, the District will be ordered to pay for that placement to the date of this Decision.

### SECTION 504 AND ADA CLAIMS

I decline to address these claims for two reasons. First, as to the section 504 claims, there is no evidence or argument addressing those claims and whether or not they are distinct from the IDEA claims in the matter. Second, as to the ADA claims, this administrative hearing officer has no jurisdiction.

### CONCLUSION

For the reasons set forth above, I find that the program and placement offered by the District on July 7, 2009 is appropriate, and that the District is obligated to pay for the cost of placement at [REDACTED SCHOOL] by operation of pendency, until the date of this Decision.

### ORDER

1. The program and placement offered by the District in the July 7, 2009 IEP is appropriate.
2. The [REDACTED SCHOOL] was the pendent placement during the full course of these proceedings, until today, and the District was liable for the costs of tuition and transportation until today. To the extent that it has not satisfied this obligation, the District is ordered to pay those costs.

*William F. Culleton, Jr. Esq.*

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WILLIAM F. CULLETON, JR., ESQ.  
HEARING OFFICER

April 1, 2010