

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

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

Closed Hearing

ODR File Number:

24520-20-21

Child's Name:

J.E

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent:

None

Local Education Agency:

Environmental Charter School at Frick Park
5525 Columbo Street
Pittsburgh, PA 15206

Counsel for LEA:

Nicole Snyder, Esquire
350 Eagleview Boulevard, Suite 100
Exton, PA 19341

Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

02/28/2022

INTRODUCTION

The student, J.E. (Student),¹ is a primary elementary school-aged student in the Environmental Charter School at Frick Park (School). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² This case has a lengthy procedural history that is summarized below.

This case was initiated by the School when it filed a Complaint seeking a declaration that its program proposed for Student in February 2020 was appropriate, and that it otherwise complied with the IDEA regarding Student. The record has concluded and the issue is ripe for decision. Following review of the record and for all of the reasons set forth below,³ the School's claim must be granted.

PROCEDURAL HISTORY

1. A Complaint was filed by the School in January 2021, seeking a determination that its proposed program in February 2020, as revised in October and November 2020, was appropriate for Student; and that it complied with the IDEA in all respects. The

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

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations pertaining to charter schools are set forth in 22 Pa. Code §§ 711.1 – 711.62.

³ References to the record throughout this decision will be to the Notes of Testimony (N.T.) for hearing sessions, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. Citations to conference calls held on the record will be to N.T. Conference Call with the date specified.

School filed an Amended Complaint on February 5, 2021. Pursuant to the applicable regulations, a final decision was due 45 days after the date of the filing of the Amended Complaint.⁴ (Complaint; Amended Complaint; HO-1 at 1; HO-2.)⁵

2. A series of prehearing and interim orders followed the initial and Amended Complaints, addressing a variety of issues. (HO-2 through HO-28.)⁶
3. A Motion to Compel the School's production of education records was granted on March 18, 2021. The School complied with all related directives. (HO-3; HO-4; HO-7; HO-22.)
4. On May 10, 2021, the School's Motion for an order of pendency was granted for implementation of the January 2020 Individualized Education Program (IEP) as set forth in the October and November 2020 Notices of Recommended Educational Placement (NOREPs). That order followed several IEP meetings, two mediation

⁴ 34 C.F.R. §§ 300.508(d), 300.515(a). As permitted by the regulations, the decision due date was extended on multiple occasions on specific request of a party. 34 C.F.R. § 300.515(c).

⁵ Certain provisions of the Amended Complaint were subsequently stricken. (HO-5.)

⁶ Among those were orders addressing requested accommodations. All accommodations were granted in one form or another, but not necessary precisely as sought. (HO-4; HO-16; HO-22; HO-25.)

sessions that resulted in an agreement for an Independent Educational Evaluation (IEE), and three conference calls held on the record, all of which together resulted in continuances of the hearing date.⁷ The pendency ordered was subsequently modified in August, October, and December 2021. (HO-6; HO-14; HO-19; HO-24.)⁸

5. A hearing scheduled in June 2021 was continued after the Parent sought a lengthy delay for medical reasons, and the School advised of a scheduling conflict on the hearing date.⁹ A new hearing date was set for July 2021 based on mutual availability, and additional directives were issued for hearing preparation. (HO-8; HO-9; HO-10; HO-11; HO-12; HO-13.)
6. As part of the hearing planning directives, the parties were directed to submit offers of proof for all witnesses the party intended to call to testify. The School complied; the Parent did not, even after requesting an

⁷ The Parent was also represented by counsel for a brief period of time.

⁸ In a response to the School's Motion to modify pendency in August 2021, the Parent referenced a number of purported exhibits that were never provided via either of the ODR-arranged electronic file sharing services or through hard copy submission. (HO-14; HO-27.) In any event, a majority of the documents the Parent referenced are already part of the record as School or Hearing Officer exhibits; the probative value of the remaining few documents to the issue of pendency was not established by the Parent. and is not readily apparent.

⁹ Inexplicably, the Parent subsequently objected to the continuance. (See N.T. 7-8.)

extension of time that was granted. (N.T. 50-56, 109-10; HO-9; HO-10.)

7. The July 2021 hearing convened as an initial session without the presentation of evidence, and was effectively cancelled, following the Parent's report the night before of a medical emergency. The matter was continued over the School's objection at that time. (N.T. at 3-21.)
8. Additional hearing sessions were scheduled for mutually-agreed late August 2021 dates. Also in August 2021, the School was granted permission to conduct a reevaluation of Student following completion of the IEE. Other directives were later issued regarding a School evaluation of Student. (HO-13; HO-23.)
9. The second hearing session held in late August 2021 again did not include presentation of evidence. Over the School's objection, the Parent's request to reschedule the remaining August sessions in order to permit in-person sessions¹⁰ at an agreed facility and on agreed dates in September and October 2021 was granted. A revised order for pendent services

¹⁰ The first two hearing sessions convened remotely due to the COVID-19 pandemic. (N.T. 3, 25.)

followed shortly thereafter. (N.T. 40-43, 58-60; HO-14.)¹¹

10. The third hearing session held in September 2021 was converted to a remote session based on a report of an individual with recent COVID-19 exposure who planned to attend. No evidence was presented at that session after the Parent objected to proceeding remotely despite the School's intention to proceed. (N.T. 120-29.)
11. The fourth and fifth sessions convened in late October 2021 as had been previously and mutually agreed. Several hours before the first of those was to begin, the Parent sought rescheduling due to illness. This hearing officer denied the request, granting the School's objection to further delay. The Parent's subsequent motion to strike those proceedings was denied. (N.T. 137-31; HO-21.)
12. On November 23, 2021, the Parent provided a medical excuse¹² and sought to schedule additional sessions and extend the decision due date. The request to schedule additional sessions was granted and the

¹¹ The Parent did file a Complaint in late August 2021 that was limited to extended school year services in 2021. That Complaint, assigned ODR File No. 25632-21-22, was dismissed on procedural grounds.

¹² The medical professional's apparent criticism of the School's actions taken to limit its students' exposure to COVID-19, however, is puzzling at best.

decision due date extended over objection of the School. The Parent was directed to submit proposed dates within a specified timeframe no later than December 7, 2021; the parties were also advised that further delays and extensions of the decision due date were not likely to be granted and that the failure to provide hearing dates in a timely manner would almost certainly result in a decision by the decision due date of February 28, 2022, without further hearing sessions. (HO-20; HO-25.)

13. Immediately following the undersigned's November 23, 2021 ruling on additional hearing sessions and extension of the decision due date, the School sought to modify the existing pendency order to establish the newly November 2021 IEP as the pendent program. That Motion was deferred pending another evidentiary hearing. (HO-24.)
14. In mid-January 2022, more than a month late, the Parent asked about possible February 2022 hearing dates. Despite the delay, two hearing dates were scheduled for mid-February 2022 at a convenient location, on dates when both parties and the hearing officer were available. Specific parameters were set forth for those hearing sessions

including a specified due date for submitting all exhibits. (HO-26.)

15. Approximately one week prior to the February 2022 hearing sessions, the Parent communicated an inability to access and submit exhibits, a request for multiple additional hearing sessions, and objections to the parameters set forth for the February 2022 hearings; she further expressed her intention to pursue claims not presented in the pending School Complaint. These reasons were set forth as a basis for another delay, of indeterminate length. The Parent did not identify the non-LEA attendees for the scheduled February hearing dates, information known to be necessary for the security department of the hearing location; the Parent also did not timely convey any intention to proceed with those sessions. After careful consideration by the undersigned, those hearing sessions were cancelled and a process for filing final position statements was outlined, consistent with the School's objection to further delays. (HO-27.)
16. The parties were informed on multiple occasions that the hearing would address only the issues presented in a Complaint. (See, e.g., N.T. 64-66, 109-10; HO-2 at 3;

HO-26; N.T. Conference Call 3/18/21 at 15, 19-20.)

ISSUES

1. Whether the School's IEP of January 2020, as modified in October and November 2020, was appropriate for Student; and
2. Whether the School has otherwise complied with its obligations to Student under the IDEA?¹³

FINDINGS OF FACT

1. Student is an early elementary school-aged child and was enrolled in the School [redacted] in the fall of 2019. Student previously received early intervention and preschool services. (S-14 at 3-4.)
2. Student was identified by the School as eligible for special education based on Autism Spectrum Disorder, Other Health Impairment, and Specific Learning Disability. (S-14.)
3. The School conducted an initial evaluation of Student that was completed in January 2020. Parent input into the Evaluation Report (ER) reflected some developmental delays, a history of seizures, and a diagnosis of Attention-Deficit/Hyperactivity Disorder (ADHD) at age three. Student's diagnosis of Autism was also noted at the age of five. The Parent reported Student's difficulty with the transition to school-

¹³ The Issues are derived from the Complaint and Amended Complaint, though phrased somewhat differently. The issues to be decided were identified on the record as those set forth in the Complaint and Amended Complaint. (N.T. Conference Call 3/18/21 at 16-17.) The School's additional claims in the Complaint for relief in the form of pendency orders are now moot. (HO-6; HO-14; HO-19; HO-24.)

age programming and a number of strengths (including musical talent, creativity, technology skills, and an interest in nonfiction) and needs (including transitions, regulating emotions, attention and focus on tasks, safety concerns, and fine motor and sensory deficits). (N.T. 241-42; S-14 at 3-5.)

4. The January 2020 ER summarized various prior evaluations, including neuropsychological evaluations in September 2017 and August 2018. The results of those were fairly consistent, reflecting overall average range cognitive functioning and ADHD in addition to Autism. (S-14 at 6-13.)
5. The January 2020 ER also incorporated results of a Functional Behavior Assessment (FBA) in January 2019, based on concerns with physical and verbal aggression toward others. The hypothesized functions of those behaviors were to escape non-preferred tasks and obtain preferred tasks/objects. (S-14 at 6.)
6. Behavioral service recommendations by a private provider in June 2019 were summarized for the January 2020 ER, and included an outside behavioral specialist consultant and therapeutic staff support, in addition to group social skills services. (S-14 at 5-6.)
7. Current classroom-based assessments were reported in the January 2020 ER in addition to progress monitoring reports on goals in the then-current IEP. Teacher input into the evaluation identified a number of areas of strength (including early basic reading and mathematics skills) and need (including fine motor skills, additional phonics skills, prompting and redirection, attending to tasks, making transitions, and behavioral regulation). Occupational therapy information describing sensory needs, and a summary of a previous evaluation was also included. (S-14 at 14-17.)

8. Assessment of academic achievement for the January 2020 ER yielded below average range scores on an early reading skill subtest and on the Written Expression and Mathematics composites. Student's fine motor skill weaknesses adversely impacted Student's performance on writing tasks. Additional assessment of phonological processing confirmed areas of deficit and some areas of relative strength, but overall weak skills. (S-14 at 19-22.)
9. The Behavior Assessment System for Children – Third Edition (BASC-3) was utilized for the January 2020 ER. Parent ratings endorsed clinically significant concerns with hyperactivity, aggression, depression, atypicality, withdrawal, attention problems, adaptability, and activities of daily living; at-risk concerns were noted with the additional areas of anxiety, social skills, leadership, and functional communication. The School rater endorsed clinically significant concerns with hyperactivity, aggression, conduct problems, anxiety, depression, atypicality, withdrawal, and adaptability; at-risk concerns were noted with attention problems, study skills, and functional communication. (S-14 at 22-25.)
10. The Gilliam Autism Rating Scale – Third Edition rating scales for the January 2020 ER were somewhat variable between home and school, but all raters reported overall very likely range scores for Autism. (S-14 at 25-27.)
11. Speech/language evaluation for the January 2020 ER identified age-appropriate expressive and receptive language skills, age-appropriate articulation skills, and relatively weak pragmatic and social language skills. Speech/language therapy was not recommended at that time. (S-14 at 29-32.)

12. A new FBA completed for the January 2020 ER identified the following behaviors of concern: physical aggression, work refusal, inappropriate language (generally verbal aggression), and disruptive behavior. The hypothesized functions of the behaviors were to escape a task demand and gain attention. (S-14 at 27-29; S-13.)
13. The January 2020 ER identified a number of areas of strength and need, with the latter including academic weakness in reading, writing, and mathematics skills; behavioral support; full time one-on-one support; prompts and cuing; support for transitions; self-regulation skills; sensory needs; fine motor skills; and support for safety needs. Student was determined to be eligible for special education based on Autism Spectrum Disorder, Other Health Impairment (ADHD), and Specific Learning Disability in basic reading skills. Recommendations were for special education (learning and autistic support), a personal care assistant (PCA), occupational therapy, and a Positive Behavior Support Plan (PBSP) along with specialized transportation and supports for social skills. (S-14.)
14. The Parent agreed with the ER, but added Dyslexia and Dysgraphia to that agreement. (S-14 at 38.)
15. An IEP was developed in February 2020 over two meetings of the team. That IEP summarized results of the recent ER and added additional curriculum based assessment and other current information. At that time, Student was not meeting grade level benchmarks on measures of literacy and mathematics skills. (N.T. 179-81; S-17; S-19.)
16. Goals in the February 2020 IEP addressed reading (sight word fluency and early phonics) skills; occupational therapy skills (fine motor skills, sensory processing/self-regulation); and behavior support (task

completion and coping skills). A PBSP was part of this IEP, with antecedent strategies, replacement behaviors, and consequences for engaging in replacement and problematic behaviors. Program modifications/items of specially designed instruction included the PBSP; support for transitions; redirection and prompting; support for fine motor skill development; a safety plan; and limited distractions. The PCA, occupational therapy, and transportation were specified related services along with nursing services and a seizure action plan. The program was autistic and learning support at an itinerant level, with Student participating in regular education except for thirty minutes of daily learning support, thirty minutes of weekly autistic support, and thirty minutes per week of occupational therapy. Student was also determined to be eligible for extended school year (ESY) services. (S-17.)

17. The School thereafter issued a NOREP that was not returned; the Parent also did not file for due process or mediation.¹⁴ (HO-6; S-18; S-24 at 3.)
18. The School implemented the February 2020 IEP after the Parent failed to return the NOREP. (N.T. 182.)
19. Progress monitoring data after schools closed was limited because of the timing of the February 2020 IEP in relation to the third quarter, and the school closures that impacted the third and fourth quarters. (S-22 at 32-33, 35, 37, 39.)

¹⁴ ODR confirmed that no such request was made in 2020. (Email message on file with ODR and the undersigned.)

20. Schools were closed on March 13, 2020 and remained closed through the end of the 2019-20 school year by order of the Governor due to the COVID-19 pandemic.¹⁵
21. The February 2020 IEP was revised in March 2020 following the closure of schools. (S-17 at 6.)
22. The February 2020 IEP was revised again in June 2020 to reflect the ESY program Student would attend. The Parent requested mediation regarding ESY programming, but did not formally make such a request at that time.¹⁶ (N.T. 188; S-22; S-24.)

2020-21 School Year

23. In October 2020, the School issued a NOREP that provided for a return to in person instruction for a portion of the school day. The Parent did not return the form; she also did not request mediation or due process.¹⁷ (N.T. 186-878; S-31.)
24. The School implemented the program described in the October 2020 NOREP. (N.T. 192.)
25. The School issued another NOREP in November 2020 that provided for additional in person instruction. The Parent did not return the form but agreed to a revised proposal via text message. (N.T. 194-95; S-35; S-36.)
26. The School implemented the program described in the November 2020 NOREP. (N.T. 195.)

¹⁵ Notice is taken of the orders of the Governor of the Commonwealth of Pennsylvania, see <https://www.governor.pa.gov/newsroom/governor-wolf-announces-closure-of-pennsylvania-schools/> and <https://www.governor.pa.gov/newsroom/governor-wolf-extends-school-closure-for-remainder-of-academic-year/> (last visited February 11, 2022).

¹⁶ See n. 14, *supra*.

¹⁷ *Id.*

27. A new IEP was developed in January 2021. The Parent did not respond to repeated efforts by the School to attend a meeting for that IEP. (S-48 at 1-2, 33.)
28. The January 2021 IEP summarized curriculum based assessment and other current information including progress on goals; teacher and related service provider input was also included. At that time, Student had mastered the sensory processing/self-regulation and coping skills goals; but had not met the reading, fine motor, and behavior goals. (S-48.)
29. Goals in the January 2021 IEP maintained goals not previously met, and added new goals. The goals addressed reading (fluency and early phonics) skills; occupational therapy skills (self-regulation, and fine motor skills slightly revised from the previous IEP); and behavior support (task completion and coping skills). The PBSP was modified to add new antecedent strategies. Program modifications/items of specially designed instruction were essentially maintained: the PBSP; support for transitions; redirection and prompting; support for fine motor skill development; and limited distractions. The PCA, occupational therapy, and transportation were specified related services along with nursing services and a seizure action plan. The program remained autistic and learning support at an itinerant level; Student was also eligible for ESY services. (S-48.)
30. The School sent a NOREP on February 2, 2021 to the Parent that was not returned. (N.T. 199-200; S-49.)
31. The January 2021 IEP was revised in February 2021 to reflect detail about ESY services; and again in April 2021 to document the parties' agreement to increase the level of learning support. Slight

modifications to goals were also suggested to reflect current functioning. (N.T. 202; S-55.)

32. The School offered COVID Compensatory Services (CCS) in May 2021 via a NOREP based on Student's recoupment following a return to in person instruction in the fall of 2020. The Parent did not respond to the NOREP. (N.T. 203, 208, 365-66; S-57; S-58.)

Independent Educational Evaluation

33. In April 2021, the School agreed to the Parent's request for an Independent Educational Evaluation (IEE). (N.T. 201; S-56.)
34. The IEE was completed in May 2021 by a private pediatric neuropsychologist who previously evaluated Student in 2018. The IEE included a review of records and interview with the Parent. (S-62.)
35. During assessment administration for the IEE, Student exhibited significant distractibility, inattention, impulsivity, task avoidance, and frustration; the private psychologist determined that the results must therefore be considered with caution since they likely provided an underestimate of Student's functioning. (S-62.)
36. Cognitive assessment for the IEE (Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V)) yielded an average range General Ability Index score, consistent with previous results. (S-62 at 7, 9, 19.)
37. Academic achievement was assessed for the IEE (Wechsler Individual Achievement Test – Fourth Edition (WIAT-IV)). Student's scores were overall in the average range on the mathematics numerical operations subtest, but in the very low to extremely low range in all assessed areas of basic reading and written expression with the exception of orthographic fluency. (S-62 at 9, 21-22.)

38. Assessment of behavioral/emotional functioning for the IEE yielded a number of areas of clinical significance, including learning problems, anxiety/depression, social problems, thought problems, attention problems/ADHD, and aggressive/oppositional/rule-breaking behavior by the Parent and/or teachers. (S-62 at 9-10, 22-23.)
39. Social/communication assessment for the IEE was completed through Parent rating scales, confirming Student's Autism Spectrum Disorder diagnosis. Specific assessment of language skills reflected low average to average range scores. (S-62 at 7-9, 22-23.)
40. Assessment of Student's visual motor integration skills for the IEE was somewhat variable but overall reflected weaknesses. (S-62 at 8, 20.)
41. Results of executive functioning skills was conducted through rating scales for the IEE yielded scores indicating significant deficits. (S-62 at 8-9, 21.)
42. The private neuropsychologist reached the conclusion that Student met diagnostic criteria for Autism Spectrum Disorder with a language impairment; ADHD; Disruptive Mood Dysregulation Disorder; Generalized Anxiety Disorder; and specific learning disabilities in the areas of reading and written expression. (S-62.)
43. The private neuropsychologist provided a number of recommendations in the IEE. Educationally, she recommended a program of increased learning support (for 80% or more of the school day) for individualized, one on one Language Arts and Mathematics instruction; she also suggested daily push-in autistic support, weekly direct speech/language and occupational therapy, and ESY services. She also emphasized that the full-time PCA should be trained in Applied Behavior Analysis, and that Student required in-person instruction. Suggestions for instructional strategies, interventions, and

accommodations were also provided for both home and school, including behavioral health services at home. (S-62; S-70.)

Summer 2021

44. The School proposed ESY services for 2021; however, Student did not attend its ESY program. (N.T. 213-15; S-67.)
45. In early June 2021, the School invited the Parent to an IEP meeting to discuss revisions to Student's IEP. The Parent returned the invitation with revisions and comments, and noted her intention to attend. That meeting convened. (S-63; S-64; S-65.)
46. An invitation to participate in a second IEP meeting to be held in late June 2021 was issued. The Parent responded again with revisions and comments, indicating her intention to attend. (S-68.)

2021-22 School Year

47. Student's January 2021 IEP was revised again in August 2021 to address the IEE recommendations. The Parent opted to have Student be retained [redacted] for the 2021-22 school year.¹⁸ (S-72; S-78; S-84.)
48. The August 2021 IEP provided information on Student's progress toward IEP goals as of the end of the 2020-21 school year. Student made steady progress toward the reading, behavior, and fine motor skills goals, with mastery of the self-regulation goal. (S-78.)
49. The School proposed to revise the IEP to increase daily learning support and weekly autistic support; increase occupational therapy support; add weekly speech/language support; and provide for training of the PCA. The level of special education support was also to increase. (S-78.)

¹⁸ See Act 66 of 2021.

50. The Parent disapproved the NOREP proposing the August 2021 IEP revisions. (S-89.)
51. The School issued a pendent IEP following that August 2021 IEP meeting consistent with a revision to the pendency order in place. (S-99.)
52. The School conducted a reevaluation of Student in the fall of 2021 and issued a Reevaluation Report (RR) on October 8, 2021. That report did not contain input from the Parent because none was provided. (S-87.)
53. The October 2021 RR summarized previous evaluations, including the IEE. Input from the nurse was provided including the most recent plan for addressing seizures. The results of curriculum-based assessments was also included. (S-87.)
54. Teacher and related service providers gave input into the October 2021 RR, reflecting Student's performance and functioning. They also made recommendations for future programming. (S-87.)
55. The October 2021 RR reflected some new assessments including select subtests of the WISC-V and WIAT-IV not previously administered for the IEE. Teacher rating scales indicated a very high probability of Autism Spectrum Disorder, and clinically significant areas of concern on the BASC-3 and a measure of executive functioning. (S-87 at 30-39.)
56. Assessment of speech/language functioning was conducted for the October 2021 RR. Those results indicated a strength in receptive language, and weakness in pragmatic language. (S-87 at 53-60.)
57. An FBA was also conducted in October 2021, examining the behaviors identified in the January 2020 FBA that were essentially identical. Multiple observations of Student's behavior and its consequences were

reported. The hypothesized functions of Student's behaviors of concern were to escape or avoid a task demand and gain attention or obtain a desired object or activity, similar to the previous FBA. (S-86.)

58. Occupational therapy evaluation for the October 2021 RR identified areas of strength and weakness, with the latter including some fine motor skill functioning as well as sensory needs. (S-87 at 45-52.)
59. The October 2021 RR identified a number of educational strengths and needs and recommendations for programming. Student was determined to be eligible for special education based on Autism Spectrum Disorder, Specific Learning Disability (basic reading and written expression), Speech/Language Impairment; and Other Health Impairment (due to ADHD and other diagnoses). (S-87.)
60. The School developed a new IEP for Student in November 2021 without the participation of the Parent despite efforts of the School for her to attend a meeting. (S-97; S-100; S-101; S-102; S-104; S-105; S-106; S-S-110; S-111; S-113; 115 at 6.)
61. Student has reportedly not attended school since late November 2021. (S-115 at 6-7.)¹⁹

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d

¹⁹ Though not a part of the evidentiary record and not properly before the hearing officer, the parties reportedly have had new disagreements arise subsequent to the October 2021 hearing sessions. (HO-26; HO-27; HO-28.)

Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the School filing for this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). Although this hearing officer found each of the witnesses who testified to be credible and the demeanor of no witness suggested any deception, the direct examinations were not subject to cross-examination, through no fault of the School. The testimony was accorded weight as needed where the documentary evidence was unclear. The findings of fact were made as necessary to resolve the issues presented; thus, not all of the evidence is explicitly cited. The School’s closing statement and final position statement was also fully considered.²⁰

General IDEA Principles: Substantive Requirements

The IDEA requires each of the states to provide a “free appropriate public education” (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Some years ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S.

²⁰ The parties were given opportunities on November 11 and 15, 2021 to provide closing statements by November 30, 2021; those email message directives have been made part of the record as HO-29. The parties were also given the opportunity to provide final position statements by February 24, 2022. (HO-27.) The Parent did not submit either.

Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with the procedural obligations in the Act.

The various states, through local educational agencies (LEAs), meet the obligation of providing FAPE to an eligible student through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court has confirmed, an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

Individualization is, thus, the central consideration for purposes of the IDEA. Nevertheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands services that are reasonable and appropriate in light of a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Endrew F., supra*; see also *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); see also *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same). “The IEP *must aim* to enable the child to make progress,” but progress is not measured by what may be ideal. *Dunn v. Downingtown Area School District*, 904 F.3d 248, 255 (3d Cir. 2018)(emphasis in original).

Nevertheless, the IEP team is required to monitor a student's progress toward IEP goals and make appropriate revisions as may be necessary. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320, 300.324.

General IDEA Principles: Procedural Requirements

From a procedural standpoint, the family plays "a significant role in the IEP process." *Schaffer, supra*, at 53.

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

Winkelman v. Parma City School District, 550 U.S. 516, 530 (2007). Full participation in the IEP process does not mean, however, that parents have the right to control it. *See, e.g., Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) (noting that IDEA "does not require school districts simply to accede to parents' demands without considering any suitable alternatives" and that failure to agree on placement does not constitute a procedural violation of the IDEA); *see also Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D. Md. 2002) (explaining that "parents who seek public funding for their child's special education possess no automatic veto over" an LEA's decision). As has previously been explained by the U.S. Department of Education,

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

of any disagreements by initiating an impartial due process hearing or filing a State complaint.

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

The School's Claims

Before turning to the issues that have been presented, it should be noted that the Parent was accorded significant latitude throughout this proceeding in light of her *pro se* status. She was, additionally, supported by two knowledgeable professionals. Nevertheless, a fundamental precept in the IDEA is the prompt resolution of administrative claims, and the statute and its implementing regulations contain a myriad of provisions intended not to delay due process but rather to ensure timely disposition. “[T]here is no bright-line rule for determining when protracted review proceedings run afoul of due process.” *Campos v. Cook County*, 932 F.3d 972, 976 (7th Cir. 2019)(citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). A final decision in this case simply cannot be further postponed for some indeterminate period of time without offending principles of due process.

It is also important to keep in mind what this case is, and is not, about. The only issues relate to the School's February 2020 IEP, as modified by the October and November 2020 NOREPs in response to the pandemic, and its compliance with the IDEA, all as set forth in the School's Complaint and Amended Complaint. There are no properly raised claims by the Parent to address. The first issue to be decided may be effectively moot at this juncture, but nonetheless the matter is ripe for a final disposition.

At the time the February 2020 IEP was developed, Student was [redacted] new to school-age programming, experiencing difficulty with the transition. The School conducted an initial evaluation that included input from the Parent, a review of previous evaluations, and information from

teachers and a related service provider. Various assessments were administered and additional information was obtained through rating scales; an FBA was also part of that ER.

The February 2020 IEP followed the ER and was developed through meetings at which the Parent participated. All of the areas of need identified by the ER were specifically targeted in the February 2020 IEP. The evidence is more than preponderant that the February 2020 IEP was individualized and directly responsive to Student's unique circumstances as they were known at the time, and was reasonably calculated to provide meaningful educational benefit. The NOREPs in October and November 2020 were issued based on the changing circumstances of the pandemic and were similarly appropriate in serving to continue implementation of that IEP.

It is likely that the February 2020 IEP did not incorporate each and every wish of the Parent. That is not an unusual circumstance; indeed, the IDEA contemplates and provides for resolution of such disagreements. As noted above, parents have the right to participate in special education programming decisions, but they do not control the LEA or its proposals. It is the responsibility of the LEA to determine appropriate services for its students and provide parents with notice of its recommendations, together with information on avenues available to challenge its decisions. That is exactly the process that the LEA followed in this case.

In the fall of 2020, Student returned to the School and recoupment of skills was assessed, with an offer of CCS made at the end of the school year. The School proposed a new IEP in January 2021 that was again responsive to Student's then-current functioning and progress toward prior IEP goals. Revisions followed as the IEP team considered ESY programming and a higher level of learning support. Then, as of early May 2021, the School was required to implement a program based on directives of this hearing officer: various pendency orders remained in effect through the date of this decision.

There is no evidence that the School failed to appropriately implement Student's IEPs during the 2019-20 or 2020-21 school years, or that the School otherwise failed to comply with its IDEA obligations to Student either substantively or procedurally. Thus, the School has unquestionably and preponderantly sustained its burden of establishing the appropriateness of the February 2020 IEP and the October and November 2020 NOREPs, as well as its implementation of Student's program over the 2019-20 and 2020-21 school years.

This hearing officer cannot reach the same conclusion, however, with respect to ESY in 2021. Here, the Parent did present a Complaint on that very issue, and it was not dismissed on the merits. While the offer of ESY services may well have been appropriate at the time, no such determination based on this record can fairly be made.

Finally, the School presented an outstanding Motion to again modify pendency that requires some brief discussion. Specifically, the School sought a determination that the November 2021 IEP was appropriate for Student and entitled to implementation. This hearing officer declines to do so for several important reasons. First, the Parent for whatever motives did not participate in the development of that IEP. While the School certainly had an interest in ensuring it complied with IDEA provisions regarding timely program development, this hearing officer cannot conclude that the formerly very actively involved Parent would no longer have an intention of continuing to participate in special education programming decisions for Student. Second, that issue was deferred for further evidentiary hearing that unfortunately did not convene. Nevertheless, and although not a matter of evidence, it is very apparent that circumstances have changed to some significant degree as of November and December 2021. Whether and how any such conditions may have an effect on Student's special education

program is wholly unknown, and this hearing officer concludes that caution strongly militates against the relief sought by the pending Motion.

CONCLUSIONS OF LAW

1. The School's January 2020 IEP as written, and as reflected by the October and November 2020 NOREPs, was appropriate for Student.
2. The School complied with its obligations to Student under the IDEA over the entirety of the 2019-20 and 2020-21 school years.

ORDER

AND NOW, this 28th day of February, 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The School's January 2020 IEP as written, and as later modified by the October and November 2020 NOREPs, was appropriate for Student.
2. Should Student return to the School, the Order for pendency dated December 2, 2021 shall remain in effect until further order of a hearing officer or court, or a written mutual agreement on programming executed by both parties.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
Hearing Officer
ODR File No. 24520-20-21