

*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: CP

Date of Birth: XX-XX-XXXX

Date of Hearing: 9/5/09

CLOSED HEARING

ODR No. 00016-09-10AS

Parties to the Hearing:

Parents

Representative:

Pro Se

School District

Central Bucks  
20 Welden Drive  
Doylestown, PA 18901-2359

School District Attorney

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Date Record Closed:

September 22, 2009

Date of Decision:

October 7, 2009

Hearing Officer:

Deborah G. DeLauro, Esq.

### **INTRODUCTION AND PROCEDURAL HISTORY**

“Student” (hereinafter “Student”) is a fifteen year old tenth grade student who resides in the Central Bucks School District (hereinafter “District”). Student qualifies for special education services under the Individuals with Disabilities Education Act (hereinafter “IDEA”) with a disability category of autism<sup>1</sup> and with a secondary disability of speech and language impaired. Student has substantial communication, social and behavioral delays and requires significant adaptations and modifications in all curricular areas. [N.T. 244-246; SD-33] Student’s placement was and is identified as “Supplemental Autistic Support.” [N.T. 147; 178-179; SD-19; SD-33] Student spent the majority of “student’s” ninth grade year, 2008-2009, in the [Redacted] Middle School (hereinafter Middle School) where “student” was placed in an Autistic Support Class for all of “student’s” academic subjects and direct instruction in special area subjects and had a personal care assistant (hereinafter “PCA”) at all times. [N.T. 148-150; SD-33]

In the spring of 2009, the Individual Education Plan (hereinafter “IEP”) team initiated discussions about transitioning from the Middle School to a District High School, [Redacted] High School (hereinafter High School) in the 2009/2010 school year.

The dispute in this case centers on the Parent’s disagreement with the High School proposed placement.<sup>2</sup> To that end, a due process hearing was scheduled for

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<sup>1</sup> Student’s medical diagnosis is Pervasive Developmental Delay, not otherwise specified (hereinafter “PDD/NOS”). PDD/NOS is not an educational diagnosis, therefore per his educational evaluation and IEP, it’s designated as autism. [N.T. 244-245; SD-33]

<sup>2</sup> Parent identified the nature of his complaint, *inter alia*, as follows: “To affirm the student’s right to attend his home school.” Parent’s proposed Resolution is to “Place the Student in the local setting.” [Due Process Complaint]

September 2, 2009. However, on August 23, 2009, this Hearing Officer issued an Interim Order, which provided that Student's Pendent Placement was the Autistic Support Class at High School. [Interim Order dated August 23, 2009 attached hereto and incorporated herein] At the Due Process Hearing, Parent contended that the location of the Student's educational placement at High School was inappropriate because, *inter alia*:

- 1) Student does not have a valid IEP since student and "student's" Parents were not permitted to participate in the placement decision and the special education supervisor dictated key components in advance of the May 9, 2009 IEP meeting;
- 2) The May 9, 2009 IEP was also invalid because of its dangerous omission of a PCA; and
- 3) Student's placement at High School is the furthest possible location in the District in violation of 34 Code of Federal Regulations. [N.T. 40-42]

After a due process hearing session and a careful review of the parties' testimony and evidence, I find for the District for the reasons described below.

### **ISSUES**

1. Whether the District's proposed placement in the supplemental autistic support program at High School for the 2009-2010 school year is appropriate?<sup>3</sup>

### **FINDINGS OF FACT**

1. "Student" (hereinafter "Student") is a fifteen year old tenth grade student who resides in the District.
2. Student qualifies for special education services under the Individuals with Disabilities Education Act (hereinafter "IDEA") within the disability category of

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<sup>3</sup> Parent defined the issue on a narrower basis: Whether the physical location of the proposed placement at Central Bucks South High School is appropriate?

autism and with a secondary disability in speech and language impairment in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1), (11); 22 Pa. Code §14.102 (2)(ii). [N.T. 244-246; SD-33]

3. Student has substantial communication, social and behavioral delays and requires significant adaptations and modifications in all curricular areas. [N.T. 244-246; SD-19; SD-33]
4. Student's educational placement was and is identified as "Supplemental Autistic Support." [N.T. 147; 178-179; SD-19; SD-30; SD-33]
5. Student spent the majority of "student's" ninth grade year, 2008-2009, in the [Redacted] Middle School (hereinafter "Middle School") where he was placed in an Autistic Support Class for all of "student's" academic subjects<sup>4</sup> and where "student" received direct instruction in special area subjects and had the support of a personal care assistant. [N.T. 148-150]
6. Mr. [Redacted] (hereinafter Mr. W")<sup>5</sup> was Student's autistic support teacher and case manager for most of the 2008-2009 school year. [N.T. 134-137]
7. Mr. W testified that ongoing staff communication about the Student was critical, as every member of Student's team needed to be aware his needs and most effective ways to intervene and respond to aggressive behaviors exhibited by the Student. [N.T. 143; SD-32]
8. Mr. W testified further that if the Student was placed in an environment where there was not a team in place which could appropriately implemented effective intervention and reactive strategies, the resulting educational environment would be unsafe for the Student, other students around him and the staff. [N.T. 143; SD-32]
9. Mr. W communicated frequently with Parent about the Student and during the spring of 2009, these communications were daily. [N.T. 144; SD-42]
10. Mr. W describe the relationship between the District and the Parent as previously collaborative, but one which subsequently became unproductive as Parent voluntarily decided not to attend team meetings. [N.T. 146; SD-34; SD-35]
11. In April, Mr. W invited all parents of ninth grade students in the autistic support program to come a discuss location options for the tenth grade school year.

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<sup>4</sup> English, Reading, Writing, Math, Social Skills and Science. [N.T. 148-150]

<sup>5</sup> Mr. W holds a dual certification in special education and elementary education and is certified to teach middle school mathematics, middle school English and middle school Social Studies. He graduated *summa cum laude* from Temple University and holds a masters degree in curriculum instruction. Mr. W has recently commences participation in a doctoral program and Temple University College Education.

Parent, although advised in advance, refused to attend the meeting. [N.T. 179-180; SD-27]

12. In March and April 2009, Mr. W initiated communication with Parent about the possible location of the Student's program for 2009-2010 school year. During that time, two meetings were held to revise Student's Behavior Support Plan (hereinafter "BSP"); one in person and one by telephone. [N. T. 178]
13. Multiple IEP/Transition meetings were held in which the school which Student would attend the following year was discussed but Parent advised that "student" would not be attending these meetings. [N.T. 179-183; SD-11; SD-22; SD-28; SD-31; SD-34]
14. Mr. W provided Student direct instruction in Mathematics, Reading, English, Language Arts and Social Skills instruction. Student was included in the regular education environment for specialty areas, such as: Performing Arts, Art and Gym, Wellness and Physical Education. [N.T. 147]
15. Mr. W provided Student direct instruction in Mathematics, Reading, English, Language Arts and Social Skills instruction. Student was included in the regular education environment for specialty areas, such as: Performing Arts, Art and Gym, Wellness and Physical Education. [N.T. 147]
16. Because of safety issues, during the school day, there was always an adult with Student, including but not limited to, on trips to the restroom, cafeteria and specialty areas. [N.T. 148-149, 160; SD-32]
17. Student had a PCA, to insure that "student" was safe in the school environment. [N.T. 150]
18. From the moment the Student's bus pulled up to the school, to the moment the Student was placed back on the bus, there was an adult waiting for the Student. [N.T. 148, 150; SD-32]
19. The proper coordination of both staff and students who are in Student's classroom is of paramount importance because environmental control in Student's educational program is critical as consequences could be severe behaviors and an unsafe educational environment. [N.T. 160; SD-32]
20. It was necessary to have two certified special education teachers available in Student's educational program so that one teacher could address Student's behaviors, while the other teacher removed the other students from the classroom. [N.T. 162]

21. Student's behaviors<sup>6</sup> "drove the day," as "student" required a significant amount of intervention, both proactive and reactive, in order to prevent some extremely dangerous behaviors from occurring in the school environment. [N.T. 153; SD-32]
22. In addition, Ms. [Redacted] (hereinafter "Ms. S") a behavior specialist, met with Mr. W once a week and communicated with him by e-mail about the Student once a week. [N.T. 165]
23. Ms. S is extremely knowledgeable about the Student's behavioral needs as she has worked with "student" for the past 3 years and has routinely been present at least one time per week in "student's" classroom. Her work has included data analysis of behavior interventions, staff training leading the Student's behavioral team. [N.T. 247; SD-32]
24. It was and is critical that an experienced crisis intervention team be available to intervene with Student when necessary. [N.T. 169; Sd-26; SD-32]
25. Student received direct instruction in Saxon Math, Corrective Reading, Comprehension Plus and Comprehension Skills, which are research-based programs, which included, *inter alia*, decoding. [N.T. 169]
26. Student made meaningful educational progress in the supplemental autistic program at Middle School during the 2008-2009 school year. This progress included meaningful progress in Student's willingness to accept re-direction, participation in activities with a larger number of students and academic progress. [N.T. 174-177]
27. Student is going to be 16 years old during the 2009 – 2010 school year and the Middle School autistic support class has entering 7<sup>th</sup> graders who are going to be 12 years old, which is a tremendous age difference. [N.T. 167]
28. Academically, the Student is ready for the next step, which will be provided to him at High School. [N.T. 166-167]
29. Physically, Student is much bigger than the other students who will be in the autistic support classroom at the Middle School. [N.T. 167]
30. It is not educationally appropriate for Student to remain at Middle School for the 2009-2010 school year. [N.T. 184-185]

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<sup>6</sup> Student's behaviors included: giggling (which was a prelude to more aggressive behavior); verbalizations; kicking shoes toward students and staff; punching computer monitors when the web pages loaded slowly; punching himself with closed fists on the leg when verbalizing "I am not happy!"; punching the desk; throwing books at students or staff; kicking chairs, trash cans and the teacher's desk; flipping over desks, computer monitors and chairs; kicking students; punching staff. [SD-32]

31. Student's placement during the 2008-2009 school year was a supplemental autistic support placement. The placement proposed by the District for the 2009-2010 school year is a supplemental autistic support placement. Student's educational placement has not changed. [N.T. SD-19; SD-30; SD-33]
32. The Student had a PCA during the 2008-2009 school year. The District has offered a program at High School that includes a PCA for Student during the 2009-2010 school year. [N.T. 178-179, 253; SD-33]
33. High School will provide Student with opportunities to learn functional job skills. [N.T. 167]
34. The social skills opportunities and program at the High School includes a network of partners in the Doylestown community, who actually work with the Students in businesses and would provide Student with the opportunity to participate in applying vocational skills in a school store environment. [N.T. 171-172] Job coaching and peer coaching are also included. [N.T. 173-173]
35. The program and physical location of the proposed placement at High School is very similar to the program provided to him at Middle School. The High School environment has the physical structure and location, staffing, academic components, vocational components, crisis intervention team and classroom composition which make it an appropriate environment for Student. [N.T. 183-184]
36. Ms. [Redacted] (hereinafter "Ms. JS"), a special education supervisor in the District, supervises<sup>7</sup> all 31 autistic support programs, K through 12, in the District among all 16 schools. [N.T. 237]
37. Ms. JS who is in her 27<sup>th</sup> year as an educator, holds certifications in elementary and special education, counseling and has both a principal's and special education supervisor's certification. She has two Master's degrees; one in Counseling and another in Leadership. [N.T. 240-241]
38. Ms. JS is a member of the Autism Society of America and serves as president of the Bucks County Autism Coalition, which is a community-based coalition that collaborates between mental health agencies/personnel, parents and educators to work to better the lives of autistic individuals in the community. [N.T. 242]

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<sup>7</sup> Ms. JS's supervision includes: acting as LEA at IEP meetings, overseeing and writing curriculum, hiring and supervising staff members, training and staff development on methodologies, both academic and behavioral, oversees and coordinates the extended school year (hereinafter "ESY") between the District and the Bucks Co. Intermediate Unit (hereinafter "BCIU") and oversees the behavioral specialists and behavioral services in the District. [N.T. 237]

39. Ms. JS has worked collaboratively with Parent and Student's psychiatrist with regard to medication because of the significant impact medication has had on Student's behavior in prior years. [N.T. 255]
40. With Parent's consent, the District conducted two psychiatric evaluations of Student in 2008. [N.T. 258; SD-9]
41. The psychiatric recommendations for the Student included a facility that could ensure the safety of staff and others from Student's aggressive behaviors, requiring a behaviorally oriented treatment and educational program to extinguish aggressive violent behaviors and helping Student to develop social skills, tolerate change in his environment and address conditions which traditionally have been triggers for Student's aggression. [N.T. 260]
42. Ms. JS stated that the District's relationship with the Parent was collaborative until approximately March, 2009 after which time Parent refused to come to meetings and would not engage in conversations with the District concerning the location of the Student's high school program. [N.T. 261-262]
43. Parent made it clear that he did not want Student to attend High School, but never explained the nature of why or what it was about the program that he opposed, nor did he allow the District to explain in entirety why the IEP team was recommending High School. [N.T. 262-263]
44. Student did not attend "student's" "home school"<sup>8</sup> in 2007-2008 or the 2008-2009 school years. [N.T. 266]
45. The difference in distance between Student's home and High School is 11.5 miles, whereas the distance between Student's home and [Redacted] [second district high school] is approximately 4.5 miles; approximately a 7 mile difference. [N.T. 268]
46. Student attended the ESY program at High School during the summer 2009 and there were no issues or problems related to the transportation. [N.T. 267]
47. There are a few students who have been with the Student during extended school year program that are also attending High School, therefore there is already an established peer connection between the Student and other peers.[N.T.289]
48. The issue of the physical location/school, which student would attend was discussed at the May 5, 2009 and June 4, 2009 IEP meetings, but Parent chose not to attend either of those meetings, despite receiving written notice in the form of multiple e-mails and invitations. [N.T. 251-252, 269; SD-3]

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<sup>8</sup> Student's home school is Holicong Middle School. In 2007-2008 Student attended Tohickon Middle School and in 2008-2009 he attended Middle School.



49. The educational placement offered by the District via the NOREP dated May 5, 2009 was the exact program which Student was participating at Middle School, which is a supplementary autistic support program. [N.T. 270-271; SD-19; SD-30]
50. The Student's attendance at High School in the supplementary education, autistic support program is appropriate from a standpoint of academic instruction, participation in the general education environment during portions of the school day, attendance with students with similar profiles which are also academic in nature, the use of successful instructional academic programs with the student and use of simulated prevocational activities and work-based learning. [N.T. 274]
51. The High School location is appropriate for the Student, as the staff in that program includes two certified special education teachers who are highly qualified for high school, a personal care assistance and a highly trained, already existing crisis team to address the Student's behaviors. [N.T. 275]
52. The autistic support program at [Redacted] [second district high school] is not appropriate<sup>9</sup> for Student as it is a program that is functional life skills in nature and includes numerous students who are non-verbal and only one student who has spontaneous verbal ability. The program does not include the use of various academic curriculum and methodologies utilized successfully by Student in the past and is focused on functional life skills in comparison to the academic, prevocational program at High School. Then [Redacted] [second district high school] classroom includes students who have many characteristics that serve as triggers for the Student's behavior in the school environment. [N.T. 279-282; SD-37]
53. Parent sought to introduce a report from the Student's psychiatrist, Daniel Hartman, M.D., dated August 26, 2009, which was obviously secured in preparation for litigation. However, this hearing officer finds this report unreliable as Dr. Hartman's only knowledge of the program at High School came from Parent. [N.T. 293-294, 296; P-70 (admitted over objection)]

### **CREDIBILITY OF WITNESSES**

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision should be based solely upon the substantial

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<sup>9</sup> CB East has a "buddy coaching" social skills component which is not appropriate for Student, whereas CB South uses an interactive social skills program which is more appropriate for Student. [N.T. 283-284]

evidence presented at the hearing.<sup>10</sup> Quite often, testimony or documentary evidence conflicts; which is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at \*28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person.

This hearing officer found Mr. W to be experienced and very knowledgeable with regard to developing, coordinating and implementing Student's academic and behavioral program. His sincere and sensitive understanding of Student's educational needs and the antecedents to and the consistent implementation of the positive intervention plan to control of Student's extreme behaviors, made him highly credible.

Ms. JS, the District's supervisor of special education, also testified credibly and showed a clear understanding of the Student, "student's" needs, strengths and weaknesses. Ms. JS was a vital member of the IEP team and a major force in coordinating, developing and implementing the District's special education programs. Her extensive experience working with families and students with Autism added weight to her testimony.

The Parent was clearly very concerned about "student" and sincerely believes that traveling eleven miles rather three or four to "student's" educational placement would be

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<sup>10</sup> Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

detrimental. Parent wants “student” in what “parent” terms a “local” placement and it is very clear that “parent” would go to great lengths to get what the “parent” wants.<sup>11</sup> However, Parent’s refusal to participate in the IEP/BSP and transition meetings and “parent’s” personal attacks on District personnel have shown “parent” to be irrational, uncooperative, and belligerent in “parent’s” dealings with the District, and in “parent’s” behavior at the due process hearing.<sup>12</sup> This Hearing Officer appreciates the passion Parent has for “student”, but feels obligated to point out that a more cooperative, less belligerent approach might have been more effective. Therefore, since the documentary and testimonial evidence does not support Parent’s claims, this Hearing Officer is not able to give “parent’s” testimony much weight.

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **Burden of Proof**

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This

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<sup>11</sup> Parent writes in his closing statement: “I can’t accept the placement. I can’t accept the Teacher that comes with this placement, they do not merit my respect based on inexperience and their character. Were my son to be forced to go there I would battle with them day-in and day-out for I will surely find flaws in their performance.” [Parent’s Closing Statement]

<sup>12</sup> During the due process hearing, Parent repeatedly raised his voice inappropriately, acted in a belligerent and disrespectful manner and made offensive comments.[See N.T. 33, 34, 37, 38, 51, 73, 74, 80, 81, 86, 128, 129, 190, 197, 221, 222, 332, 333, 334, 335, 340, 341, 342].

burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

In this case, the Parent requested the hearing and therefore “parent” bore the burden of proof. The burden of proof is in two parts: the burden of production (simply, which party presents its case first) and the burden of persuasion (which side has to convince the decision-maker(s) by a preponderance of the evidence that its position should be upheld).

However, application of the burden of proof does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this matter the evidence was not in equipoise. As described in greater detail below, the Parent did not meet “parent’s” burden of persuasion on the issue.

### **Legal Standard for Appropriateness**

In order to determine whether Student’s placement in the Supplemental Autistic Support program at the High School is appropriate, we must first look to see whether “student’s” IEP is appropriate and whether it can be appropriately implemented in the proposed placement.

Children with disabilities who require specially designed instruction are guaranteed a FAPE by federal and commonwealth statutes.

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). Eligible students are entitled under the IDEIA and

Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a FAPE.

A school district offers FAPE by providing personalized instruction and support services pursuant to an IEP that need not provide the maximum possible benefit, but that must be reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or de minimis educational benefit. Whether an IEP is reasonably calculated to afford a child educational benefit can only be determined as of the time it is offered to the student and not at some later date.

20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3<sup>rd</sup> Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

The IEP must be likely to produce progress, not regression or trivial educational advancement *Board of Educ. v. Diamond*, 808 F.2d 987 (3d Cir. 1986)]. *Polk*, *supra*, citing *Board of Education v. Diamond*, 808 F.2d 987 (3<sup>rd</sup> Cir. 1986) held that “*Rowley* makes it perfectly clear that the Act requires a plan of instruction under which educational progress is likely.” (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. Additionally, the court in *Polk* held that educational benefit “must be gauged in relation to the child’s potential.”

Districts need not provide the optimal level of service, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. *Carlisle Area School District v. Scott P.*, 62 F. 3d at 533-534. What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a “free appropriate public education as defined by the Act.” *Polk, Rowley*. The purpose of the IEP is not to provide the “best” education or maximize the potential of the child. The IEP simply must propose an appropriate education for the child. *Fuhrman, supra*.

In the case at bar, there was no dispute that the IEP being implemented during the 2009-2010 school year was appropriate or that Student was not receiving a FAPE. In fact, there isn’t even any dispute over whether Student made academic and non-academic progress pursuant to his potential during the 2008-2009 school year. Here, the dispute is focused simply on where the IEP can be appropriately implemented.

To that end, a review of the documentary and testimonial evidence clearly shows that the supplemental autistic support programs are nearly identical and there was no change of placement when the location of Student’s supplemental autistic support program moved from the middle school to the high school. More specifically, the High School environment has the physical structure and location, staffing, academic and vocational components, crisis intervention and classroom composition which make it an appropriate placement for Student.

Even though Parent contends that the May 29, 2009 IEP is flawed because “parent” was allegedly not permitted to participate in the placement decision, the record does not support “parent’s” claim. Parent was invited multiple times to participate not only in the IEP meetings but also in the meetings held to discuss placement options, but “parent” refused to attend.

Parent also now complains that the IEP is inappropriate because of its’ “dangerous omission of a PCA.” Here again both the testimonial and documentary evidence does not support “parent’s” claim. The May 29, 2009 IEP like the January 22, 2009 IEP which the Parent signed in agreement with, include a PCA as an integral part of Student’s individual education plan/program.

Therefore, it is clear that the May 29, 2009 IEP provided more than a basic floor of opportunity, it was calculated to confer meaningful educational benefit and provided Student with a FAPE. Accordingly, the May 29, 2009 IEP and NOREP identifying placement in a supplemental autistic support program are appropriate.

### **Pendency Legal Standard**

Special education programming and placement issues are similarly governed by IDEIA, which took effect on July 1, 2005, and amended the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). The implementing Regulations for the IDEIA can be found at 34 CFR §300 *et seq.*

34 CFR §300.518(a) reads:

§300.518 Child’s status during proceedings.

(a) Except as provided in §300.533, during the pendency of any administrative or judicial proceeding regarding a due process hearing under §300.507, unless the State or local agency and the parents of

the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

The language of stay put provision clearly demonstrates Congress's intent that all handicapped children, regardless of whether their cases meritorious or not, or to remain in their current educational placement until the dispute with regard to their placement is a ultimately resolved.

A student's current educational placement is not defined in the IDEIA or its regulations. Generally, courts have interpreted the term to mean the current education and related services and placement provided in accordance with the most recently approved IEP. *George A. v. Wallingford Swarthmore School District*, 2009 WL 2837717 (E.D. Pa.); *Drinker v. Colonial School Dist.*, 78 F.3d 859, 864 (3d Cir. 1996), The Court in *Drinker*, *supra* stated in pertinent part that the current educational placement is the IEP actually functioning when the dispute arose and "stay put" was invoked. If an IEP has been implemented, then that program's placement will be the one subject to the stay put provision. *Drinker*, 78 F.3d at 867 (quoting *Thomas v. Cincinnati Bd. Of Ed.*, 918 F. 2d 618, 625-26 ( 6th Cir. 1999)

The court in *George A.*, *supra*, stated that the stay put provision is not construed so narrowly as to mandate the student remain in the exact physical location where he was schooled at the time the dispute arose. See *Michael C. v. Radnor Twp. Sch. Dist.*, Civ. A. No. 98-4690, 1999 WL 89675 at \*3 n. 10 (E.D. Pa. Feb. 4, 1999) The term placement, however is not synonymous with "place..." See *A.K. v. Alexandria City Sch. Bd.*, 484 E.3d 672, 680 (4<sup>th</sup> Cir.2007); see also *A.W. v. Fairfax County Sch. Bd.*, 372 F.3d674, 681 (4<sup>th</sup> Cir.2004) which states in pertinent part, "We find little support in the IDEA's underlying principles for the assertion that educational placement should be construed to



secure “student’s” right to attend school in a particular classroom at a particular location.”

The Third Circuit has instructed that what constitutes a change in “educational placement” is fact specific and depends upon whether the change is likely to affect in some significant way the child’s learning experience. *In re: Educ. Assignment of Joseph R.*, 318 F. App’x 113, 119 (3d Cir.2009).

In this case, the Student’s educational placement was and is a supplemental autistic support program. Specifically, a review of the evidence reveals that during the 2008-2009 school year while Student was attending Middle School, the last agreed upon IEP dated January 22, 2009 identified “student’s” educational placement as a supplemental autistic support placement. [N.T.147; SD-19] A further review of the documentary evidence confirms that the May 5, 2009 NOREP and the May 29, 2009 IEP also identify Student’s educational placement as a supplemental autistic support placement. [N.T. ;SD-33] Moreover, the record reveals that the proposed autistic support class at High School is nearly identical to the educational placement at Middle School and addresses Student’s educational needs to include behavioral interventions, self regulation and safety for Student and those around “student” so that “student” will be available to learn. The only difference is that it is located at the high school and it encourages a higher level of independence from the standpoint of academic educational programming, prevocational employment, supported employment and transition opportunities so that Student can be a successful member of the community in the future. [N.T. 245-246].

Therefore, for all of the reasons delineated above, Student's pendent placement was in the supplemental autistic support program at High School.

### **Placement and LRE Standards**

A placement decision is a determination of where a student's IEP will be implemented. Placement decisions for children with disabilities must be made consistently with 34 CFR 300.116 of the 2006 IDEA regulations. IEP team, including parents, makes placement decisions. Like the formulation of an IEP or a placement decision is not a unilateral matter for school district determination. 34 CFR 300.116(a)(1) however, is also clear that parental preference cannot have been the sole nor predominant factor in a placement decision. The IDEA merely mandates parental participation in the placement decision 34 CFR 300.116(a)(1), but does not suggest that the degree of weight parental preference should be given. Nevertheless, the placement should be based on the child's IEP, and, of course, allow its implementation.

Here, Parent contends that "parent" was denied participation in the placement decision for "student", and yet the testimonial and documentary evidence does not support Parent's claim. To the contrary, the record is replete with evidence showing that it was Parent who refused to participate even though "parent" was invited multiple times to attend not only transition meetings where placement decisions were being made but also IEP and BSP meetings, which were vitally necessary to facilitate a positive transition for Student. In fact, a review of the evidence clearly shows that Parent's refusal to participate had a deleterious effect on Student's attitude, behavior and progress. This Hearing Officer would even go as far as to suggest that the Parent's steadfast refusal to participate in the IEP/Transition process and the steady stream of negative information

“parent” was feeding “student”, set Student up for the very failure, “parent” was accusing certain District personnel of setting.

Nevertheless, the evidence also reveals that the placement decision as to where the IEP could best be implemented was made by the IEP team after several meetings, careful consideration and many discussions. Parent cannot now claim that the decision was invalid because “parent” refused to participate. Parent agreed with the IEP team in January 22, 2009 that “student’s” IEP could best be implemented in a Supplemental Autistic Support program, and the May 2009 IEP and NOREP confirm that placement as still appropriate.

The IDEA statute and regulations further provide that an eligible child is entitled to be educated in the least restrictive environment (hereinafter “LRE”) appropriate for the student, *i.e.*, one in which the student is, to the maximum extent appropriate, educated with children who are not disabled. 34 C.F.R. §300.114(a)(2)(i). In order for a proposed placement to meet LRE requirements, school districts must, at a minimum, assure that placement decisions are “made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options” §300.116(a)(1); are “determined at least annually” §300.116(b)(1); are “based upon the child’s IEP” §300.116(b)(2). In addition, unless an eligible child “requires some other arrangement, the child [must be] educated in the school he or she would attend if not disabled.” §300.116(c). Although a placement decision is not and does not need to be a determination a specific classroom within the designated school or other facility or specific teachers.; other factors may be considered including, the category of significant of the child’s disability, the availability of special education and

related services, configuration of the service delivery system, availability of space, or administrative convenience. In this case, it is these other factors which must be carefully considered.

Here, there is no dispute between the Parent or the District that Student's behavioral and educational needs are substantial and can only be appropriately addressed in a very customized school environment, including but not limited to a crisis intervention team, highly trained staff, a PCA and two certified special educational teachers in order to effectively intervene, both proactively and reactively in order to keep Student, the other students and staff safe at all times.

Moreover, in the present case, a review of the evidence reveals that the supplemental autistic support program at High School will not only provide Student with a safe, structured school environment where "student" will be able to access academic instruction and social skills, but will also permit Student to be educated to the greatest extent possible with regular education peers. Although Student will receive direct instruction with "student's" special education peer in the major academic areas, "student" will also be included in the regular education setting with a modified program in specialty areas.

A further review of the evidence reveals that Parent is requesting placement in Student's "home" school but the fact of the matter, is that Student has not been in his home school which was [Redacted] because "student" required a very specialized placement which was offered in the supplemental autistic support program at the Middle School, which then became Student's LRE. Therefore, Parent's contention that the proposed placement is in violation of the least restrictive environment requirements

because it is not located closer to Student's home is flawed. As indicated below, there is no requirement that Student be placed in an inappropriate placement where "student's" educational needs and IEP cannot be appropriately implemented just because it's located in a school closer to "student's" home.

The United States Court of Appeals for the Third Circuit provided additional guidance for applying LRE requirements in *Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993). In accordance with *Oberti*, the first step in evaluating a program and placement to determine whether it meets LRE criteria is an assessment of whether the student can be educated satisfactorily in the regular classroom with supplementary aids and services. *Greenwood v. Wissahickon School District*, 571 F.Supp.2d 654 (E.D. Pa. 2008). In making that determination, a school district is required to consider the full range of aids and services available, with the goal of placing the student with a disability in the regular classroom as much as possible. Consideration must also be given to the unique benefits that a student with a disability will derive from placement in a regular classroom, and those benefits must be compared to the benefits likely to be derived from a more segregated setting. Finally, the district must determine whether there are likely to be any negative effects upon the education of the other children from placement of a particular student with a disability in the regular classroom.

Second, if education outside of the regular classroom for all or part of the school day is found necessary, the proposed placement must be evaluated to determine whether it provides for contact with non-disabled peers to the greatest extent appropriate. In *Oberti*, the court noted that the continuum of placements mandated by the IDEA statute and regulations is designed to assure that a school district does not take an "all or

nothing” approach to the placement of a student with a disability, but considers using a range of placement options to assure that the unique needs of each child are met. A school district’s obligation to place an eligible student in the least restrictive environment does not diminish its responsibility to educate an eligible student appropriately. *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 390 (3<sup>rd</sup> Cir. 2006).

In the present case, the record shows that the District and the IEP team carefully considered the least restrictive environment which would allow Student to make meaningful educational progress and still maintain “student’s” safety and the safety of the other students and staff. To that end, the IEP team determined that the Autistic Support program at [Redacted] [second district high school] was not appropriate for a number of reasons including but not limited to the fact that it was geared for lower functioning students, most of whom were non-verbal and required a functional life skills curriculum and not an academic and prevocational program which was appropriate for Student. Additionally, the supplementary autistic support program at High School more closely mirrored the program Student made progress in at Middle School, it includes academic instruction using the many of the same materials and methodologies which Student benefited from during the 2008-2009 when “student” was in the ninth grade at Middle School and it allowed for “student’s” participation in the general education environment during portions of the school day. The High School program further includes students with learning profiles similar to Students, as well as pro-vocational activities and work-based learning. Most importantly, the High School program is staffed with highly trained teachers, an experienced crisis intervention team and a PCA all of whom can maintain a safe school environment.

## **CONCLUSION**

Parent has not borne “parent’s” burden of proof. Accordingly, Student’s placement in the supplemental autistic support program at High School is appropriate.

## **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that:

The Supplemental Autistic Support program/placement at the [Redacted] High School is appropriate as it is a nearly identical program to the Supplemental Autistic Support program at the Middle School where Student demonstrated meaningful educational progress, both academically and behaviorally, and showed improvement in self regulation and social skills. The Supplemental Autistic Support Program at High School is also appropriate in that it allows Student to be educated to the greatest extent possible with regular education peers while receiving extensive special education supports and services implemented through his IEP. Furthermore, Student’s transition to the Supplemental Autistic Support program at High School does not constitute a change in educational placement and the additional distance between Student’s home and High

School is negligible; whatever effect it may or may not have on the Student's learning experience is insignificant.

Accordingly, Parent's claim is DENIED.

*Deborah G. DeLauro*

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Deborah G. DeLauro, Esq.  
HEARING OFFICER

October 7, 2009