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Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 00984-0910KE
01215-0910KE

Child's Name: H.D.

Date of Birth: [redacted]

Dates of Hearing: 7/7/10, 7/19/10, 8/20/10,
8/25/10, 12/14/10

CLOSED HEARING

Parties to the Hearing:

Parents
Parent[s]

School District
Central Bucks
16 Weldon Drive
Doylestown, PA 18901-2359

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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April 14, 2011

April 29, 2011

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

This decision encompasses two cases for the same Student and School District with intertwined issues. The primary substantive issue underlying both due process complaints is the appropriateness of the District's proposal to change the educational placement of Student from itinerant learning support services at Student's home school to itinerant emotional support services at another elementary school in the District for the 2010/2011 school year.

The first due process complaint involved in this controversy was filed by the District in April 2010 to support the appropriateness of its Functional Behavioral Assessment (FBA) in response to Parents' request for an independent FBA. After Parents' motion to dismiss the District's complaint was denied, Parents filed a due process complaint in June 2010 to challenge the District's proposed IEP for the 2010/2011 school year. Four sessions of the consolidated hearing were held between July 7 and August 25, 2010, followed by an interim decision permitting the District to implement its proposed IEP for the beginning of the 2010/2011 school year.

After several discussions via conference call and e-mail during the fall of 2010/winter of 2011 concerning the need for additional evidence, and one more hearing session held in December 2010, the parties submitted written closing arguments for a final decision on the procedural and substantive issues originally raised in both complaints. Based upon a thorough review of the entire record and the applicable legal standards, as well as the conclusions reached in the August 27, 2010 interim decision, incorporated into this final decision and attached as an Appendix, the District's refusal of Parents' request for an independent FBA and its proposed change of Student's placement were appropriate. Parents' claims and contentions in these matters are, therefore, denied.

ISSUES

1. Should the School District have funded an Independent Functional Behavioral Assessment (FBA) of Student at any time from March 2010 through the date of Parents' independent educational evaluation in October 2011?
2. Was it proper to permit the District's due process complaint to support its FBA to proceed although the District's complaint was filed before Parents responded to the District's NOREP refusing their request for an independent FBA?
3. Did the School District offer Student an appropriate educational program and placement in the least restrictive environment the 2010/2011 school year?

FINDINGS OF FACT

1. Student is [a preteen-aged] child, born [redacted]. [Student] is a resident of the School District and is eligible for special education services. (Stipulation, N.T. p. 11)
2. Student has a current diagnosis of Other Health Impairment (OHI) due to Attention Deficit Hyperactivity Disorder (ADHD) in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(9); 22 Pa. Code §14.102 (2)(ii). (N.T. p. 934; S-5, p. 16)
3. Student was first evaluated for IDEA eligibility near the end of the first marking period during the 2008/2009 school year. Parents and the District considered Student's educational needs to be primarily in the area of behavior, including inappropriate interactions with adults and peers, inability to control angry reactions to frustration, refusal to follow classroom routines and policies, as well as inattention, independent task completion and organization. (N.T. p. 932; S-4, pp. 3—5, 18, 19)
4. Based upon school functioning and behavior rating scales completed by Parents and teachers, Student was experiencing behavioral, social and emotional difficulties both at home and at school. The rating scales indicated that Student was at high risk for emotional disturbance, with a significant degree of need for behavioral/social/emotional support. (S-4, pp. 5, 9—14)
5. Student's standardized test scores indicated achievement in reading and math that was 1 to 2 years above grade level, consistent with a full scale IQ score in the high average range. Despite the achievement test scores and Student's above average report card grades for the first marking period, academic concerns were identified in the areas of answering questions thoroughly in reading and careless errors in math. (N.T. pp. ; S-4, pp. 5—7)
6. Student earned a grade of "C" in written language/spelling for the first marking period. On the TOWL-3 (Test of Written Language-Third Edition) Spontaneous Writing Section, Student scored in the average range on all but one subtest and obtained an average overall

- score, indicating adequate writing skills. Needs in writing were identified in the areas of focus, organization and mechanics. (S-4, pp. 5—8)
7. Student's need for support in all academic areas was described as low. (S-4, pp. 5, 6)
 8. Although the District evaluator determined that Student had a disability, ADHD, he also concluded that specially designed instruction was not required to address Student's needs, and, therefore, that Student was not IDEA eligible. Close monitoring of Student's behaviors was recommended. (N.T. p. 935; S-4, p. 18)
 9. Behavior interventions had been initiated by Student's teachers from the beginning of the 2008/2009 school year, and appeared to be succeeding at the time the initial evaluation report (ER) was issued on November 18, 2008. (S-4, pp. 2, 3, 19)
 10. At Parents' request, the District issued a permission to reevaluate (PTRE) in late February 2009 due to continuing behavior concerns in school resulting in repeated suspensions. Behaviors of concern included disrespect/verbal aggression toward staff and verbal and physical aggression toward peers. Although those behaviors had considerably decreased between the beginning of the school year to the date of the first ER, the behaviors increased again by the time the second report was issued near the end of March. (N.T. p. 935; S-4, pp. 14, 15, S-5, pp. 1, 12, 13)
 11. In the March 23, 2009 reevaluation report (RE), Student was identified as IDEA eligible in the OHI category due to ADHD. Student's need for academic support was again identified as low, with significant behavior/social and emotional needs identified in the areas of following rules, attention, social skills, work habits, independent task completion, transition, organization, impulsivity/off task behaviors, dealing appropriately with anger and frustration. (N.T. p. 936; S-5, p. 15)
 12. In the first IEP, dated April 7, 2009, goals were identified in the areas of self awareness of behaviors and choosing coping strategies for dealing with Student or teacher-identified high levels of frustration. (S-6, pp. 12, 13)
 13. Specially designed instruction (SDI) included preferential seating; non-verbal prompting to attend to instruction; verbal prompts to remain on task; weekly small group pull-out instruction in anger management, frustration tolerance and social skills; small group or one to one academic instruction within the classroom when Student was frustrated or had difficulty attending to task and a positive behavior support plan. (S-6, p. 14)
 14. The behavior support plan included: 1) prevention strategies (creating opportunities for positive interactions with staff and peers, opportunities for classroom leadership, responsibilities; conferencing with school psychologist; reviewing blueprints for positive interactions during unstructured time; planned ignoring of minor behaviors); 2) replacement strategies based upon the IEP goal for developing coping strategies; 3) positive reinforcement, such as verbal praise, award of points based on the IEP self-awareness goal and tangible rewards based on a menu of reinforcers selected by Student;

- 4) Consequences such as losing points, corrective feedback, loss of activity—removal for engaging in target behaviors and implementation of a crisis plan if behavior escalates, including suspension for engaging in target behaviors. (S-6, pp. 22, 23)
15. Parents approved the NOREP to initiate special education services as outlined in the IEP. Student was to spend most of each school day in the neighborhood school regular education classroom and receive itinerant learning support services for social skills and learning to learn skills. (N.T. pp. 938, 939; S-6, pp. 24, 25)
 16. On June 18, 2009, the District convened another IEP meeting. Behavior data collected between the end of April and the end of the school year in June indicated that on self-ratings, Student successfully matched teacher ratings and earned 99% of available points between April and June. Student used appropriate coping strategies 23% of the time during that period, and was averaging 1.2 disrespectful behaviors toward adults, 2.1 disrespectful behaviors toward peers and 1.9 aggressive physical behaviors daily. (S-7, pp. 1)
 17. The two goals from the April IEP were retained, with baseline data and expected levels of achievement added. A third goal was proposed, including baselines, short term objectives and expected levels of achievement, for keeping hands and feet to self, staying in assigned area, showing respect for others, following directions, completing assignments and raising hand. (S-7, pp. 13)
 18. The items of SDI in the April IEP were retained and 1 45 minute session of specific social skills training was added, along with periodic consultation with the Emotional Support (ES) Team and the related service of a weekly 45 minute session of group counseling. (S-7, pp. 15)
 19. The positive behavior support plan in the proposed IEP considerably changed the prevention strategies and was much more detailed than the April IEP with respect to replacement strategies, consequences for engaging in the targeted behaviors and the crisis plan. (S-7, pp. 23, 24)
 20. The District also proposed to change Student's placement from itinerant learning support to full-time emotional support services, and to implement the IEP at another elementary school within the District for the 2009/2010 school year. (N.T. pp. 856, 943; S-7, pp. 19, 20)
 21. The District provides an elementary ES program at Student's age level (grades 3—6) that is intensively focused on changing behaviors and staffed by teachers specially trained to provide ES services. The District offers that program at a District elementary school near Student's home, but not at Student's neighborhood school. (N.T. pp. 845—847, 858—860, 863, 864)
 22. Parents disagreed with the District's proposal for ES services, disapproved the NOREP and filed a due process complaint. (N.T. p. 944; S-7, p. 26, S-8)

23. Subsequently, the District and the family resolved their dispute for the 2009/2010 school year. In August 2009, Student's IEP team met and developed a new IEP, adding several more detailed goals for appropriate behavior and adjusted the expected levels of achievement for all goals. (N.T. pp. 948; S-10, pp. 12—16)
24. In addition to the SDI retained from the April IEP, pull-out small group academic support services were added in the form of 2 30 min. periods/week for small group or 1:1 instruction in goal re-direction and feed-back, support for organization and the writing process. Additional writing and organizational supports were also to be provided in the regular education classroom, and brief daily counseling with the school psychologist was added as a related service. The behavior plan from the April IEP was restored in the August 2009 IEP. Parents approved the accompanying NOREP, which returned Student to itinerant learning support in the neighborhood school. (N.T. p. 950; S-6, pp. 22, 23, S-10, pp. 17, 21, 25, 26, 29)
25. Student's IEP team met again in mid-October 2009 to review Student's behavior progress. Parents reported that Student continued to rush through school work, as well as express frustration and anger. The IEP goals from the August IEP remained, along with the SDI and related services. Eleven more SDI items were added for implementation in the regular and special education classrooms. The new SDIs were directed toward supporting Student's organization and writing and toward assisting Student in preparing for and taking tests/assessments and in completing assignments. (N.T. pp. ; S-11, pp. 17, 18)
26. The IEP was revised again in early November 2009 to reduce to one per day the number of assignments Student needed to complete, with the number of assignments to increase as Student demonstrated increased competence. (N.T. pp. ; S-13, p. 6)
27. The parties agreed to a reevaluation in the form of a Functional Behavioral Assessment (FBA) to be conducted by a Board Certified Associate Behavior Analyst (BCABA) through an agency under contract with the Intermediate Unit (IU) in which the District is located. (N.T. pp. 643, 645, 949; S-12, p. 1, S-38)
28. For the FBA, the BCABA reviewed prior IEPs, spoke to Student's teachers and Parents and observed Student in several school settings. (N.T. pp. 655, 667, 669—671)
29. To complete the FBA, the evaluator counted instances of 4 targeted behaviors at 2 minute intervals over a 3 day period: (1) On task behaviors (2) non-completion of requested tasks (NPRT); (3) inappropriate verbal behavior (IV); (4) inappropriate physical contact (IPC). (N.T. p. 669; S-16, p. 3)
30. The BCABA identified and described a number of antecedents to the targeted behaviors, including low adult attention and greater distance from adult, unstructured time and either no demand for response, or high demand in a difficult and/or non-preferred activity. Positive behaviors were associated with adult attention, short, concise, low difficulty

- demands, structured activities and varied instructional techniques. (N.T. p. 76; S-16, pp. 4—6)
31. Based on consequence analysis, the functions of Student's maladaptive behaviors were escaping/avoiding demands and attention-seeking. Consequences for positive behaviors, such as earning good grades and avoiding discipline were minimally effective in encouraging adaptive behaviors. (N.T. pp. 75, 77; S-16, pp. 5, 6)
 32. The evaluator identified skill deficits in self-awareness, regulation, control, social interactions, communicating needs and wants appropriately. (N.T. p. 97; S-16, pp. 7)
 33. In early December 2009, Student's IEP team met to review a revised IEP, including a detailed behavior plan to address the 4 targeted behaviors identified in the recently completed FBA: Off-task, NPRT (non-completion of requested tasks), IV (inappropriate verbal behavior) and IPC (inappropriate physical contact). (S-17, pp. 25—31)
 34. The December 2009 IEP included goals directed toward reducing three of the four behaviors targeted in the FBA: NPRT, IVB and IPC. The new behavior goals replaced the goals in Student's August, October and November 2009 IEPs. (N.T. p. 246; S-10, pp. 12—16, S-11, pp. 12—16, S-13, pp. 10—14, S-17, pp. 12—14)
 35. The extensive SDIs from the October and November 2009 IEPs continued in the December IEP, with two exceptions: the two 30 min./week pull-out sessions in the learning support classroom for 1:1 or small group instruction and use of a study log and long-term assignment log with daily teacher check-in were eliminated. (S-10, pp.17, 18, S-13 pp. 15, 16, S-17, pp. 15, 16)
 36. The December 2009 behavior plan described a number of prevention strategies including: 1) pre-teaching difficult content concepts; 2) strategies for delivering instructions for academic tasks, such as pairing verbal with visual information and a description of and instructions for using multi-level verbal and non-verbal prompts; 3) antecedent manipulations, including daily academic and behavioral goal-setting, dividing and chunking academic tasks, offering choice in sequencing of activities, direct social skills training, strategies for managing group instruction/activities/projects and for transitions between activities. (S-17, pp. 25—27)
 37. The behavior plan also included instructions to assist Student in developing replacement behaviors, including 1) earning breaks to engage in preferred activities; 2) using break cards to escape from difficult classroom situations; 3) learning appropriate coping skills via a social/emotional curriculum. (N.T. pp. 238, 239, 269; S-17, pp. 27, 28)
 38. The behavior plan provided a description of and instructions for implementing positive consequences for engaging in appropriate and replacement behaviors, primarily contingent access to preferred activities based on points earned. Student could earn points for accurate self-monitoring of adaptive behaviors, as well as for engaging in

appropriate behaviors in the targeted areas, Off task, NPRT, IV and IPC). (N.T. pp. 238—242, 246-250; S-17, p. 28)

39. Consequences for engaging in the targeted behaviors in various situations and strategies for interrupting those behaviors were extensively described for each targeted behavior. Strategies for addressing the targeted behaviors included enforcement of task completion, with assistance of necessary; temporary lessening of demands; ignoring; re-direction; corrective feedback; modeling appropriate behaviors; prompts to use appropriate replacement behaviors; loss of privileges. The consequences included a sequential crisis plan for IPC and/or unsafe behaviors that put the Student at risk for injury, culminating in removing of Student from the setting, seeking additional staff support and notifying Parents if Student's behaviors could not be controlled by calming/de-escalating strategies. (N.T. p. 78; S-17, pp. 29—31)
40. Parents approved the December 16, 2009 IEP via a NOREP signed on December 22. (S-17, p.34)
41. In a telephone conference on January 12, 2010 Parents agreed to add to the SDI a two week trial period in which Student would see the school psychologist at the beginning of the day 3 times/week to review behavior and goal setting, and see the special education teacher for 30 min. on 1 day each week and additional times as necessary. Parents supported the proposal, which was made to address Student's increasing reluctance to meet with the school psychologist daily. (N.T. pp. 293—296; S-18, p. 16)
42. On February 3, 2010 Student's IEP team met again and produced an updated IEP, including present levels of academic and functional performance. (N.T. pp. 297, 298; S-19, pp. 8—10)
43. The goals from the December 2009 were also updated with baselines and specific percentage reductions for the targeted behaviors, providing for reducing NPRT behavior to less than 7% of observed intervals from a baseline of 12%; reducing IV behaviors to less than 10% from a baseline of 23% and reducing IPC to less than 7% from a baseline of 13%. (S-19, pp. 12—14)¹
44. The SDIs from the December 2009 IEP and the January 12, 2010 IEP revision were maintained, with one exception: the daily 30 minute period for individual support from the special education teacher in the special education classroom for organization, studying for tests, and follow-up on tasks such as homework completion and long-term projects was changed to a minimum of 30 minutes/week, to increase as needed based upon academic performance or behavioral needs. (N.T. p. 220, 231; S-17, pp. 15, 16, S-18, pp. 15, 16, S-19, pp. 16, 17)
45. The behavior plan included in the February 2010 IEP provided for discipline in accordance with the District's code of rights, responsibility and student conduct, and for convening an IEP team meeting within 5 days of implementing the crisis plan if Parents

¹ S-19 p. 15 appears to be a duplicate of the goal stated on p. 14.

or District requested it. In all other respects, the December 2009 and February 2010 behavior plans were the same. (S-17, pp. 25-31. S-19, pp. 26—32)

46. Although Parents did not entirely agree with all aspects of the IEP, such as permanently reducing the daily check-ins with the school psychologist to three times per week and sessions with the learning support teacher, they signed the NOREP approving the IEP on February 10. (S-19, p. 35)
47. On January 29 and March 17, 2010, Parents were notified that Student was required to serve a two day out of school suspension for physical aggression toward a student on the first occasion and for physical aggression toward two students and uncooperative behavior toward an adult on the second occasion. (S-20, pp. 1, 2)
48. In general, Student's response to the behavior interventions was inconsistent. Agitated, impulsive behaviors increased during the winter and spring of 2010, while the ability of the staff to interrupt the behaviors and re-direct Student decreased. (N.T. pp. 73, 258—264, 269—272, 306, 307; P-24, pp. 24—31, 34—36, 38, 42)
49. At the beginning of February, the District added an aide to supervise recess, because behaviors during unstructured time had also increased, raising safety concerns. (N.T. pp. 265, 266; S-21, p. 13)
50. On March 11, 2010 Parents were invited to an IEP meeting held on March 18 at which the District proposed a revised IEP. The new IEP maintained the NPRT and IV goals from the February IEP at the same levels using the same baselines, but revised the original IPC goal to reduce that behavior from a baseline of 1 per day as of 1/25/10 (13% of the school day) to zero. The proposed IEP also added 3 more behavior goals directed primarily toward reducing IPC: initiating positive peer interactions, respecting personal space boundaries and increasing use of the break card when frustrated (N.T. p. 150; S-21, pp. 20—23)
51. Verbal on-task prompting, non-verbal cues and testing accommodations, including scheduled extended time and test/assessment modifications, were removed from the SDI section of the proposed IEP. Several new SDIs were added: daily use of common language to reinforce impulse control, behavioral strategies and social exchanges; daily priming of positive behavioral expectations before transitions, unstructured time and schedule changes; chunking by skill on math assessments; checkpoints for long-term assignments; application of social skills training in a “lunch bunch” group 3 times per month; pairing verbal information with visual representation during daily instruction. The focus of the 30 min./week instruction with the special education teacher was changed from studying and review of academic material to instruction on behavioral expectations and goal setting linked to a self-monitoring system. (N.T. pp. 220, 221, 233; S-19, pp. 15, 16; S-21, pp. 24, 25)
52. Daily academic support from the special education teacher had been reduced beginning with the February 2010 IEP and the reduction was continued in the March IEP proposal

because Student was meeting grade level academic standards in the regular education curriculum and classroom, with a “B” grade in all academic areas during the second marking period. In addition, Student resisted interventions that in Student’s perception, made Student look different from peers. (N.T. pp. 121, 122, 134, 161, 231, 232, 234—237, 285—287, 317—325; P-24, p. 29, S-19, p. 8, S-21, p. 9)

53. The behavior plan included in the March 2010 IEP differs in some particulars from the February 2010 behavior plan, most notably in dropping off task as a targeted behavior. Other changes included eliminating pre-teaching strategies for difficult concepts in content areas; dividing long-term assignments and non-preferred activities into smaller sections rather than dividing all work into smaller sections; eliminating choices in sequencing activities; eliminating access to pre-approved manipulatives such as stress balls; removing explicit directions for including Student in group instruction; removing lessening of demands immediately after Student returned from a break or was recovering from being upset. Some strategies listed in both the behavior plan and as part of SDI, such as using graphic organizers, were eliminated from the behavior plan. (S-19, pp. 26—32, S-21, pp. 34—39)
54. The ability to earn homework passes and additional breaks/positive reinforcement for using the break card were added to the behavior plan. Consequences/contingencies were added for IPC that occurred during group leisure activities, specifically playing games at outdoor or indoor recess. Also added were emergency procedures for eloping. (S-19, pp. 26—32, S-21, pp. 34—39)
55. Otherwise, the March 2010 behavior plan included the same content as the February behavior plan without redundancy and with less detail. (S-17, pp. 25—31, S-21, pp. 34—39)
56. The changes proposed for the behavior plan and other aspects of the IEP were based upon Student’s behaviors and responses to the intervention and supports provided in the previous IEP. (N.T. p. 303; S-37, pp. 1—3)
57. The most significant change in the March 18 IEP was the District’s proposal to change Student’s placement from itinerant learning support at Student’s neighborhood school to itinerant emotional support services at the same school proposed at the end of the 2008/2009 school year. Parents did not approve the change of placement/location of services, indicating on the NOREP that they requested an informal meeting to discuss the recommendation. Parents neither disapproved the recommendation nor requested a due process hearing or mediation. (N.T. pp. 110, 111; S-21, pp. 30, 31, 41, 42)
58. The District’s proposals for revising Student’s IEP and changing Student’s placement were based upon insufficient improvement in the incidents of IV and IPC behaviors after the detailed behavior plan was implemented beginning in January 2010. Limited reduction in those behaviors contributed to Student’s difficulties with peers. (N.T. pp. 128—131, 150, 160, 277—279; S-21, pp. 12, 13, 15; S-37, pp. 1—3)

59. The District viewed a new peer group in the proposed ES placement as necessary for Student to improve social skills as well as make better progress toward behavior goals. In addition, because the District's elementary level ES classroom and services were located at the elementary school where the District proposed to implement Student's program and placement, the entire staff, as well as the student body, was trained to better respond to maladaptive behaviors. (N.T. pp. 146, 841, 842)
60. After the March 18 IEP meeting, Parents requested an independent FBA. By letter dated April 21, the District rejected Parents' request and simultaneously filed a due process complaint. (N.T. pp. 103, 1118; S-22, S-23, S-36, pp. 5, 9)
61. On May 27, 2010, the District invited Parents to another IEP meeting, scheduled for June 3, 2010. The day before the IEP meeting, Parents notified the District that they would not attend due to a scheduling conflict with counsel. Parents attended the re-scheduled IEP meeting on June 8, 2010 and were provided with a copy of the proposed IEP on June 9. (N.T. pp. 64, 65; P-1, p. 3, P-24, pp. 47—50; S-25, S-26)
62. On June 7, 2010, Parents filed a due process complaint challenging the appropriateness of the March 18 IEP, and thereafter asserted that it was procedurally improper to consider the contents of the June IEP proposal because it was offered after the due process complaint was submitted. (N.T. pp. 65, 1126, 1127; P-3)
63. The behavior plan in the June 2010 IEP proposal included more detail about the functions of the targeted behaviors and re-defined IPC to include attempts to make physical contact even if blocked by staff or avoided by the peer. The behavior plan also proposed to increase the value and frequency of reinforcement for engaging in replacement behaviors and non-preferred activities. The behavior plan more specifically defined eloping to include leaving a room without permission/using proper procedures or not going to a permitted area and provided for disciplinary consequences in accordance with the District code of conduct. Finally, a provision was added for contacting Parents to remove Student from school in the event Student could not de-escalate from unsafe behaviors. (S-26, pp. 16, 39, 42, 44)
64. Other than the behavior plan revisions and updated information concerning present levels of performance, the March 18 and June 8 IEP proposals were the same. (S-21, S-26)
65. After 4 hearing sessions between early July and late August 2010, an order was issued before the first day of the 2010/2011 school year permitting the District to conditionally change Student's placement as proposed in the March and June 2010 IEP proposals. (Appendix—8/27/10 Interim Decision/Order, pp. 10, 11)
66. The interim decision contemplated reviewing Student's progress, including behavioral data, to determine whether the ES placement was meeting Student's needs and to assess academic, social and behavioral progress after the first several months of the 2010/2011 school year, leaving open the questions whether a new FBA and/or a different placement

should be ordered if Student appeared to be making less than meaningful progress in the new placement. (N.T. p. 1544; Appendix at pp. 4—6, 8, 10, 11)

67. Circumstance prevented completing the plan to take additional evidence to determine whether Student's current placement should continue for the remainder of the school year, or an additional evaluation or mid-year change of placement should be ordered. Just before the first of two mid-December hearing sessions scheduled to compile a record for a final decision on placement for the 2010/2011 school year, an emotional crisis precipitated Student's hospitalization. (N.T. pp. 1546—1551)
68. Additional evidence, however, was taken from Parents' expert school neuro-psychologist, who evaluated Student in September and October 2010 and observed Student in the new placement.² The psychologist testified concerning his evaluation results and Student's needs, recommending that Student remain in the school where Student began the 2010/2011 school year (N.T. pp. 1558—1745; P-25, pp. 30—37)
69. Parents' expert concluded that Student had made a good adjustment to the school and regular education classroom, reporting greater happiness in the new school due to more friends/positive peer relationships. (P-25, p. 27)
70. The expert noted the possibility that other neurologically based disorders in addition to ADHD might be contributing to Student's behavior issues and poor social skills, reserved judgment as to whether Student fits into the ED eligibility category as well as OHI, and found no clear indication of a specific learning disability in reading math or writing. The psychologist also observed that Student's performance on attention testing was markedly different on and off prescribed medication, with little to no evidence of ADHD when tested with the medication. (P-25, pp. 22—25, 27—29)

DISCUSSION AND CONCLUSIONS OF LAW

Although the substance of the parties' disputes in these cases centered on the change of placement question, *i.e.*, whether the District's proposal to change both the nature and location of Student's educational placement was justified, Parents also raised a number of procedural issues connected to the change of placement proposal, specifically, the timing of the District's

² In accordance with general legal standards applicable in Pennsylvania, use of Parents' expert report concerning the possible existence of other disabilities, as well as Student's progress in the ES placement from the beginning of the school year until the date of the classroom observation and the evaluator's conversation with Student, is limited to assessing the reasonableness of the District's program/placement at the time it was offered. *See Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 761 (3d Cir.1995): "The court should only use evidence acquired subsequently to the creation of an IEP to evaluate the reasonableness of the school district's decisions at the time that they were made."

Moreover, the Parents' psychologist's comments concerning the itinerant ES placement support the appropriateness of the placement only to the date his evaluation of Student was completed.

complaint, the proposed IEP that constitutes the District's final offer of FAPE for the 2010/2011 school year, and whether evidence concerning Student's educational progress from March—June 2010 could properly be considered in determining whether the District's program/placement proposal was appropriate.

Parents also raised a substantive claim in their own right, contending that the District's offer of a new IEP in March 2010 abridged their right to participate in developing a program and placement for Student, constituting an IDEA violation.

Procedural Issues

Much of Parents' defense of the District's due process complaint and part of the basis for their own claims rests upon the alleged procedural violation of proceeding with the District's due process complaint and Parents' objection to consideration of evidence concerning Student's behavioral issues that occurred after the District's March 18, 2010 IEP offer, as well as any consideration of the District's subsequent IEP offer in June 2010.

The procedural issues must be addressed before discussing the substantive matters relating to the District's program/placement proposal for the 2010/2011 school year, since resolution of those issues affected the scope of the claims, defenses and evidence considered in making the final substantive decisions.

Parents' Motion to Dismiss The District's Due Process Complaint

Soon after the District's April 21, 2010 due process complaint was filed, Parents submitted a motion to dismiss the complaint, which was denied by the hearing officer originally assigned to that case. (S-1, S-2) Parents filed their due process complaint in June (S-3) and continued to maintain throughout the proceedings that the District's due process complaint should have been dismissed as untimely. Parents argued that the District was required to await

their response to the NOREP formally denying their IEE request before filing a due process complaint, but provided no legal support for that assertion by reference to the IDEA statute or regulations or to a court decision.

In accordance with 34 C.F.R. §300.502(b)(2)(i) and (ii), when a parent requests an IEE a school district is required to either provide it or “without undue delay” file a due process complaint to support the appropriateness of the evaluation with which Parents disagree. Although the term “undue delay” is not defined, there is no support for the notion that a District’s complaint should be dismissed on the basis of “undue haste” because the District did not await a further response from Parents.

In the case of a district’s IEE complaint, the issue is substantively joined when the district denies parents’ request for a publicly funded IEE, and the district is required to take the next procedural step by filing a complaint. There is little, if anything, more to discuss once the district’s formal denial is made, and that is particularly true in this case. Parents first made a written request for an IEE via an e-mail message dated March 25, 2010. (FF 60; P-17, p. 12) Subsequently, the parties participated in an informal meeting that Parents requested to discuss their disagreement with the District’s proposal to change Student’s placement for the 2010/2011 school year. (N.T. pp. 1122, 1123; S-22) Although the District’s NOREP formally denying the IEE request was issued on the same day the due process complaint was filed, (FF 60) there had been ample time between the March 18 IEP meeting and the date of the NOREP and due process complaint, more than a month later, to continue discussing the entire dispute, including the need for another evaluation.

In addition to the lack of any legal/procedural basis for dismissing the District’s complaint at the outset, later circumstances removed any possibility that allowing the complaint

to proceed had an adverse substantive effect on Parents' claims. No hearing sessions were held on the District's complaint before Parents filed their complaint in early June, and when the District's case was reassigned, the parties' entire controversy was pending before the same hearing officer. Since the essential substantive issue underlying both complaints was the appropriate placement and nature of the services Student should receive during the 2010/2011 school year and most, if not all, of the same witnesses would testify on all matters in dispute, the evidence relevant to both cases was heard at the same time. Even if the District had not filed a due process complaint, the question whether the District had sufficient information to develop an appropriate IEP, including an adequate and successful behavior intervention plan, would necessarily have been an important part of the hearing on Parents' complaint. Given the significance of the District's FBA to the program/placement issues in dispute, it is difficult to discern the substantive significance of permitting those issues to be heard under the District's due process complaint in the same hearing sessions, along with Parents' claims.³

³ . Parents suggested throughout the due process hearing that they were disadvantaged in presenting evidence in support of their contention that the District's proposal to change Student's placement from LS to ES services in a different District elementary school was not an offer of FAPE for Student. Parents noted that much of the evidence compiled over the first 3 hearing sessions was presented by the District, leaving Parents only one extraordinarily long day to present their evidence, and requiring an interim placement decision rather than a final decision on all issues before the current school year began. *See, e.g.*, Parents' Closing Argument, p. 4.

Because the District's complaint was filed first, the District took the lead in presenting evidence at the consolidated hearing, although the primary issue in dispute was the appropriateness of the District's program/placement proposal for the 2010 school year. It appeared, therefore, that Parents' complaints about the length of the testimony at the hearing was intertwined with their contention that the District's complaint should have been dismissed, in that Parents would have assumed the burden of going forward with the evidence had theirs been the only complaint at issue, permitting Parents rather than the District to control the production of testimony and other evidence. Although in *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings the party seeking relief bears the burden of persuasion, the Court explicitly did not allocate the burden of going forward with the evidence. It is customary, however, for the filing party to proceed first.

In Parents' complaint, however, they contended that because the District was proposing a change of placement, it should bear the burden of production. (S-3, p. 9 ¶27) Since that is precisely what occurred, it is difficult to understand Parents' suggestion that they were disadvantaged by the manner in which the record developed.

Scope of the Claims/Evidence

Parents adamantly insisted throughout the hearing that the evidence admitted into the record, including both testimony and documents, should be limited to the period before the March 18, 2010 IEP proposed by the District, and that the decision as to whether the District offered an appropriate program and placement should, therefore, be based only upon the period prior to the March 18, 2010 IEP meeting. Parents argued that a due process hearing should be limited to matters raised in the complaint, and, therefore, that the June 2010 IEP proposal and evidence concerning Student's behaviors between March 18 and the end of the school year could not properly be considered as part of the hearing in this matter. The evidence which Parents sought to preclude was taken subject to their continuing objection, which is now overruled.

Contrary to Parents' suggestion, the IDEA regulations do not prevent consideration of matters that occurred subsequent to the filing of a due process complaint. Rather, 34 C.F.R. §300.511(d) prevents "the **party requesting** the due process hearing" from raising issues at the due process hearing "that were not raised in the complaint...unless the other party agrees otherwise." (Emphasis added) Here, it was the District that sought to include evidence subsequent to the March 18, 2010 IEP offer in response to Parents' contention that the change of placement was inappropriate for Student. In this case, the District's argument that all such evidence should be considered was entirely reasonable. Although Parents' complaint was limited to the March 18, 2010 IEP proposal, it was filed after most, if not all of the information they sought to preclude had been developed. Moreover, the due process hearing began approximately 30 days after Parents' complaint was filed, giving both parties ample opportunity to prepare for the issues implicated by the information developed between March and June 2010.

In addition, the program and placement issues in dispute were in large part, precipitated by Student's inconsistent response to behavior interventions the District was implementing and concerned the reasonableness of the District's efforts to provide an appropriate behavior plan that could successfully be implemented in a learning support setting in Student's home school, as well as the effect of Student's behaviors on peers, including safety issues. (FF 58, 59)

Precluding evidence that bears directly on those issues based upon an arbitrary event extraneous to the ongoing and continuous concerns of the District over what was happening in Student's classroom for the entire school year would be an irresponsible exalting of form over substance under the circumstances presented by this case.

Finally, the specific circumstances surrounding the timing of Parents' due process complaint illustrates why focusing solely on procedures might lead to flawed or insufficient consideration of serious substantive issues based upon a lack of evidence in the record. Here, there was a nearly three month gap between the date the District offered the IEP Parents challenged, during which Student's serious behavior issues continued to escalate. (FF 47, 48, 49, 58, 63; S-37; Appendix p. 5) On May 27, the District invited Parents to an IEP meeting to be held a week later. (FF 61) The day before the scheduled IEP meeting, Parents notified the District that they would not attend, so the District re-scheduled the meeting for the following week. (FF 61) In the interim, Parents filed their due process complaint (FF 52) and then sought to preclude evidence that post-dated the District's IEP offer in March.

In light of the chronology, it is impossible to avoid the inference that Parents were consciously attempting to use procedural maneuvering to create a more favorable record, believing that the events that occurred between March and June would strengthen the District's position with respect to the change of placement issue. For obvious and understandable reasons,

Parents sought to shape the record in order to assure that Student remained in the placement they continue to believe was best. Although cutting off the evidence as of March 18, 2010 might have obscured the full extent of the escalation in Student's behaviors that supported the increasingly obvious need for an ES placement, it would not have changed the reality of those circumstances. There is no justification for turning a blind eye to Student's continuing struggle with troublesome behaviors that actually increased in severity as the school year ended. (S-37)

Parents' objection to consideration of the District's June 2010 IEP proposal is also overruled. The most significant substantive issue in this matter was whether the District's proposal to change Student's placement from LS to ES services was appropriate based on events that occurred during the 2009/2010 school year. Neither that issue nor the basis for changing Student's placement is altered whether the March or June IEP is considered the District's final program/placement order for the 2010/2011 school year. A thorough review and comparison of the documents confirms that there is no substantive difference between the March and June IEPs. (FF 64) The June IEP included updated information about academic performance and behaviors, and the revisions to the behavior plan were in response behavior issues that emerged or increased after the March IEP. (FF 63) In short, there is no true substantive basis for the importance Parents placed on determining whether the March or June IEP was the District's "final" offer of FAPE for the 2010/2011 school year, and, therefore no reason to exclude the June 2010 IEP from the record.

Substantive Issues

Parent Participation in Program/Placement Issues

The evidentiary record establishes that Parents participated in all IEP meetings where placement was discussed. (S-6, S-7, S-10, S-11, S-17, S-19, S-26) In fact, virtually the same

scenario that led to Parents' due process complaint in 2010 had occurred one year earlier, between March and June 2009. (FF 20, 22) At that time, the District agreed to retain Student in the LS placement Parents wanted and developed an IEP that reflected Parents' belief that Student's behaviors could best be addressed by providing more intensive academic services for Student's ADHD. (FF 23)

Contrary to Parents' suggestion that academic/ADHD supportive services were removed from Student's IEP in February 2010 within weeks of putting them in place, the daily 30 minute period with a special education teacher to address academic issues began in September 2009 IEP and remained in place through the end of January, half of the 2009/2020 school year. (FF 24, 44) The time out of the classroom was decreased and the focus changed to behavior support at Student's request and only after District staff determined that Student was making good academic progress in the regular education curriculum and classroom. (FF 52)

When the District again proposed a change of placement to ES in March 2010, since the LS special education teacher was providing those kinds of services and the District had a program available with teachers specifically trained to provide ES in another elementary school (FF 21, 51), Parents again argued that more intensive academic services should be provided. Not surprisingly, the District rejected that suggestion since it had already been tried without success.

Although the IDEA provides for parent participation in placement decisions, it requires only that parents are given the opportunity to take an active and meaningful role in the IEP team discussions, not that the district must accede to all parent requests and suggestions for program and placement. *J.E. v. Boyertown ASD*, 2011 WL 476537 (E.D. Pa. 2011); *J.C. v. New Fairfield Bd. of Educ.* 2011 WL 1322563 at *16 (D.Conn. 2011); *Rosinsky v. Green Bay Area School Dist.*, 667 F.Supp.2d 964, 984 (E.D.Wis. 2009) The District in this case provided Parents with

ample opportunity to participate meaningfully in the placement decision, indeed, and followed Parents' suggestion for maintaining Student in an LS placement for an entire year after the District first made that proposal, making an extraordinary effort to keep a child whose needs have always been for ES services in an LS setting. *See, generally*, FF 24—45.

Least Restrictive Environment

Parents' claims that the District's change of placement proposal for the 2010/2011 school year did not constitute an offer of FAPE rest, in part, upon the contention that the District violated the IDEA requirement that an eligible student's program is to be delivered in the least restrictive environment ("LRE") appropriate for the student, *i.e.*, one in which the student is educated with children who are not disabled to the maximum extent appropriate. 34 C.F.R. §300.114(a)(2)(i).

In order for a proposed placement to meet LRE requirements, school districts must 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) and that "unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school he or she would attend if nondisabled." §300.116(c). In this case, Parents' LRE claim is based primarily upon §300.116(c), since the District's proposal for the 2010/2011 school year provided the same level of service, itinerant support, provided during the 2009/2010 school year. In fact, the District's proposed ES placement provided for more time in the regular education classroom than Parents requested. *See* Appendix, p. 2.

Parents’ argument that the District did not provide sufficient justification for removing Student from the neighborhood school and thereby violated the LRE requirement was discussed in the interim decision in terms of whether the LRE standards place primary importance on the amount of time spent in the regular classroom or upon educating Student in the neighborhood school. The conclusion that the neighborhood school is, at most, a secondary LRE consideration has been confirmed in a recent court decision, *J. L. v. North Penn School District*, 2011 WL 601621 at * 9, 10 (E.D. Pa. 2011). The court cited a number of other decisions in concluding that the IDEA statute and regulations express a preference for the neighborhood school, which must be considered in determining placement, but it is not dispositive, noting that, “Geographical proximity is a factor that districts must consider, but they have ‘significant authority to select the school site, as long as it is educationally appropriate.’ *White [v. Ascension Parish Sch. Bd.]*, 343 F.3d [373] at 382 [(5th Cir.2003)]; *see A.W. v. Fairfax County Sch. Bd.*, 372 F.3d 674 (4th Cir.2004); *McLaughlin*, 320 F.3d at 672 (6th Cir.2003); *see also T.Y. v. N.Y. City Dep’t of Educ.*, 584 F.3d 412, 420 (2d Cir.2009).”

Parents’ claim that the District’s proposal to move Student to another District elementary school in order to provide ES services constitutes an LRE violation solely because Student could no longer attend the neighborhood school is, therefore, denied, as it was in the interim decision.

To the extent that Parents’ LRE claim also relies upon the requirement in §300.116(a)(1) that the group of “persons knowledgeable about the child” who makes placement decisions did not sufficiently include Parents’ input, that claim is also denied based upon the discussion of the facts and legal standards discussed above in connection with the conclusion that the District provided Parents with sufficient opportunity to participate in making decisions about Student’s placement.

The only remaining LRE issue, therefore, is whether the District's proposal to provide itinerant ES services during the 2010/2011 school year rather than LS services was appropriate for Student at the time the placement was offered during the 2009/2020 school year.

Appropriateness of District's Program/Placement

The far more extensive review of the evidence undertaken for this final decision did not change the conclusion that the record supports the reasonableness of the District's proposal to provide Student with ES services during the 2010/2011 school year on at least a trial basis. To the contrary, the opportunity to more carefully review the testimony, and particularly the documents, confirms that the District offered a program and placement in accordance with IDEA requirements, *i.e.*, in accordance with an IEP that was "reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress." *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3rd 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 (3RD Cir. 1999).

In the first instance, it must be noted that from the time Student was first evaluated for IDEA eligibility through the end of the 2008/2009 and during the 2009/2010 school year, when controlling Student's behaviors required a constant and significant commitment of District staff time and effort, Student made academic progress in the general education curriculum, and, therefore was provided with FAPE. *See* FF 5, 6, 52. The IDEA regulations place access to the general education curriculum in a regular classroom setting at the center of a school district's obligations to an eligible Student. *See, e.g.*, the definitions of IEP and Specially Designed Instruction—

34 C.F.R. §300.320:

(a) General. As used in this part, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§ 300.320 through 300.324, and that must include —

(1) A statement of the child’s present levels of academic achievement and functional performance, including —

(i) **How the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children);** or (ii) For preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities;

(2)(i) A statement of measurable annual goals, including academic and functional goals designed to —

(A) Meet the child’s needs that result from the child’s disability to **enable the child to be involved in and make progress in the general education curriculum;** and

(B) Meet each of the child’s other educational needs that result from the child’s disability; (Emphasis Added)

34 C.F.R. §300.39(b)(3):

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction —

- (i) To address the unique needs of the child that result from the child’s disability; and
- (ii) **To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.** (Emphasis added)

Interpreting the *Rowley* “meaningful benefit” standard, the Court of Appeals noted that

[T]he Supreme Court has indicated that a special education student who “is being educated in the regular classrooms of a public school system” and is performing well enough to advance from grade to grade generally will be considered to be receiving a meaningful educational benefit under the IDEA.

D.S. v. Bayonne Bd. Of Education, 602 F.3d 553, 567(3rd Cir. 2010).

Although the District met the essential academic standards for providing an appropriate education for Student, it is nevertheless required to meet the Student’s “other educational needs,” specifically, in this case, controlling negative behaviors and social skills development. As noted above and well illustrated by the IEP and behavior plan revisions described in detail in the Findings of Fact, the District made extraordinary and extensive efforts not only to meet Student’s

non-academic needs, but to do so in the setting Parents preferred. *See, e.g.*, FF 33—49. By March 2010, however, it became obvious that the results of the IEPs and behavior plan, in terms of bringing about consistent improvement in Student’s behaviors, did not justify the effort of keeping Student in an LS setting.

It is important to note further, however, that it was not the District’s obligation to justify its decision to move Student to an ES placement. Unless the evidence supports the conclusion that the change in placement was not reasonably calculated to meet Student’s needs, the District can make the final decision concerning the type and location of services that it is able and willing to provide.

Finally, the subsequent evaluation and observation of Student in the ES placement by an independent psychologist hired by Parents confirmed that the District’s program/placement proposals in March and June 2010 were reasonable the time they were offered and remained appropriate, at least through the date of the independent psychologist’s evaluation and observation. (FF 68—70)

Need for an Independent FBA

The conclusion that the District proposed an appropriate program and placement for Student in the March and June 2010 IEPs establishes that the District did not need additional information in the form of an independent FBA in order to develop an appropriate program and placement for Student. Nevertheless, it is worthwhile to note that the FBA in question was completed by a board certified associate behavior analyst who observed Student over several school environments, and gathered additional information about Student from District staff and Parents. (FF 28—32) The FBA identified the most significant behaviors of concern to address, as well as the antecedents and functions of the maladaptive behaviors. (FF 30, 31, 32) After the

FBA was completed, the BCABA continued to consult with staff to encourage Student's development of appropriate placement behaviors, including revising and updating incentives/rewards and strategies. *See, e.g.,* S-37. In addition, both the BCABA and the District staff made reasonable changes to the behavior plan as Student's responses changed in an effort to make it function effectively. (FF 41, 49, 51) Although the behavior plan based upon the FBA yielded inconsistent results, despite frequent revision, there is nothing in the record to support the conclusion that the FBA was flawed. Rather, as noted above, through the second half of the 2009/2010 school year, it became increasingly obvious that an LS placement could not meet Student's significant behavior and socialization needs, confirming that the District's proposal to change Student's placement from itinerant LS services to itinerant ES services was an offer of FAPE in the least restrictive environment.

CONCLUSION

Based upon the review and discussion of the evidence and legal standards applicable to the issues in dispute in these consolidated cases as fully set forth above, there is no factual and legal basis for altering the interim decision concerning Student's initial placement for the 2010/2011 school year set forth in the Appendix attached to and incorporated into this decision. In addition, there is no basis for sustaining Parents' procedural objections or allowing their additional claims in this matter, whether procedural or substantive.

ORDER

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

- 1) had no obligation to provide Student with an independent educational evaluation in the form of an independent functional behavioral assessment at any time from March 25, 2010 through October 24, 2010;
- 2) offered an appropriate program and placement for [Student] for the 2010/2011 school year

It is **FURTHER ORDERED** that the claims asserted by Parents in opposition to the District's complaint at ODR # 00984-0910 KE and in Parents' complaint at ODR #01215-01215-1011KE are **DENIED**.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed with respect to ODR case number 0984-0910 KE and ODR case number 01215-1011KE.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

April 29, 2011