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: J.K.

Date of Birth: [redacted]

ODR No. 01134-0910 KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Frederick M. Stanczak, Esquire 179 N. Broad Street, 2d Floor Doylestown, PA 18901
Council Rock School District 30 North Chancellor Street Newtown, PA 18940	Grace M. Deon, Esquire Eastburn and Gray P.C. 60 East Court Street P.O. Box 1389 Doylestown, PA 18901-0137
Date of Resolution Meeting:	July 7, 2010
Dates of Hearing	August 12, 2010; October 13, 2010; October 29, 2010
Record Closed:	November 1, 2010
Date of Decision:	November 16, 2010
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is a [teenaged] eligible resident of the Council Rock School District (District). (NT 8-10 to 18, 9-9 to 18.) The Student is identified with Specific Learning Disability and Speech or Language Impairment under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 8-10 to 18, 9-9 to 18.) [Student's Parents] (Parents) request due process, seeking tuition reimbursement for a unilateral placement at a private school. Both parties requested that the hearing officer construe and enforce a settlement agreement by which the parties had agreed to a pendent placement during the time that is relevant to this matter, and according to which the parents assert entitlement to tuition reimbursement. Parents allege that the District failed to offer or provide a free appropriate public education (FAPE) to the Student, by reason of its breach of the time lines in the settlement agreement, and due to various deficiencies in the program and placement offered prior to the unilateral placement. The District asserts that it offered a FAPE and that the private placement is inappropriate.

The hearing was conducted and concluded in three sessions and the record closed upon receipt of the final transcript.

ISSUES

1. Should the hearing officer enforce the Settlement Agreement and Release executed by the parties as of September 17, 2009?

2. Was the placement offered by the District for the 2010-2011 school year the pendent placement at commencement of this matter?

3. Did the District fail to offer to Parents appropriate special educational services with regard to the Student's communication and social needs, and with regard to the Student's needs for supports for the offered transition to a District school, especially considering the potential for anxiety, such that

the District failed to offer a FAPE through an appropriate program and placement for the 2010-2011 school year?

4. Were the Parents prevented from participating in educational planning for the Student to the extent that the District denied the Student a FAPE?

5. Was the [Private] School an appropriate placement for the Student for the 2010-2011 school year?

6. Should the hearing officer order the District to pay the cost of tuition and transportation of the Student at the [Private] School for the 2010-2011 school year?

FINDINGS OF FACT

1. In January 2009, the district produced a re-evaluation report summarizing the numerous previous evaluations and re-evaluations of the Student and identifying the Student's educational needs. The re-evaluation identified the Student with Specific Learning Disability. It noted a significant impairment in receptive and expressive language skills. It recommended speech – language therapy and social skills training. (S-4.)

2. On March 23, 2009, the District offered an IEP with placement in supplemental learning support for reading, writing, mathematics, science and social studies. The placement was located at [redacted], a private school. The IEP offered goals regarding reading, writing, mathematics, on task behavior, organization, verbal reasoning, following complex instructions and social skills. Specially designed instruction addressed the above needs as well as social skills, oral expression, intonation, processing speed, and working memory. Related services included speech and language therapy and weekly meetings with District social work services. The IEP also offered ESY programming. (NT 353-18 to 354-9, 615-15 to 616-25; S-6.)

3. The IEP addressed the educational needs identified in the prior evaluation report and set forth in the present levels section of the IEP. (NT 662-3 to 24, 677-15 to 25; S-4, S-6.)

4. District personnel explained the services offered in the March 2009 IEP. (NT 582-4 to 586-8, 618-3 to 623-13, 637-6 to 638-14.)

5. In an IEP meeting in March 2009, the District offered the Parents two choices of location for the IEP services, to enable the Student to transition from the [redacted] School to the District's program: the District offered to provide the IEP program, either at the Middle School for a one year transition period, or at the High School. In both locations, the placement would be located in the District's

Intensive Learning Support program. The District offered support from a Board Certified Behavior Analyst as needed. (NT 57-7 to 19, 157-23 to 161-24; S-6 p. 25.)

6. The Parents disagreed with and did not accept the offered program. The Parents concluded that the program location at the middle school would discourage the Student because the Student would interpret it as a retention. The Parents were not satisfied with the high school location, among other things, because they concluded that it would require one-to-one attendance by an educational aide, thus reducing the Student's independence and constituting a less restrictive environment than a private school with a student body consisting entirely of children with learning differences. Parents concluded that the Student would be unable to navigate in a large high school setting without an attendant. They indicated a lack of confidence that the District could differentiate teaching throughout the day sufficient to implement the specially designed instruction offered in the IEP. They expressed a preference for a "self contained" setting for the Student. (NT 182-3 to 183-23, 191-13 to 193-10, 275-10 to 276-16; S-7 p. 6 to 7, S-8 p. 14 to 15.)

7. The Parents knew that the goal for teaching the Student to navigate the high school building included fading of support as much as possible consistent with safety and academic progress. (NT 223-1 to 232-5, 664-13 to 665-4; S-8 p. 15.)

8. The Parents observed classes in both settings. Parents were familiar with both settings because the Student's siblings had attended both settings. District personnel explained the kinds of educational needs that are typically addressed in the ILS programs in both locations, and many of these were similar to those that the Student presented as described in the present levels of the IEP. (NT 163-7 to 166-8, 170-3 to 181-9; S-26 p. 26.)

9. The District personnel and Parents had a practice of working out disagreements in IEP meetings. District personnel were available to meet at parent request. The District was ready to revise the IEP as needed. (NT 168-3 to 12, 207-14 to 208-1, 348-5 to 349-2, 649-4 to 13; P-10.)

10. The [Private] School did not provide in writing any more specific information about how it would individualize the Student's programming than was provided in writing by the District. (NT 199-7 to 202-14, 334-17 to 347-5; P-9.)

11. In June 2009 the Parents enrolled the Student in the [Private] School. (NT 187-22 to 188-10.)

12. On July 15, 2009, the parties participated in a resolution meeting as part of a due process proceeding commenced in June 2009. During the meeting, the parties reached an agreement to settle the issues raised in the due process complaint. The

agreement reached at the resolution meeting was reduced to writing and executed in September 2009. (NT 63-3 to 22; S-8, P-1.)

13. The executed settlement agreement provided that the District did not agree to a pendent placement outside the District, and that that the pendent placement would be deemed to be the last program and placement proposed by the District. (P-1 p. 5.)

14. From December 2009 to April 2010, the Parents received repeated requests from the [Private] School that they declare whether or not they intended to re-enroll the Student at the [Private] School. The school indicated that it could not hold a placement for the Student after the end of April. (NT 85-1 to 7, 120-3 to 4, 86-9 to 14; P-9 p. 9 to 10.)

15. The Parents and District met in January 2010 to begin planning for the next school year. At that meeting, it was arranged for the Parents to see the High School Intensive Learning Support (ILS) program with the Student in attendance. Also at that meeting, the District requested permission to evaluate the Student's cognitive functioning to rule out mental retardation. The District evaluator expressed the belief that the previous District evaluations were incorrect. (NT 81-1 to 83-7, 86-22 to 88-10.)

16. In February 2010, the Student attended the District's Intensive Learning Support classes in the High School on Wednesday afternoons while still attending the [Private] School. This was for the purpose of beginning a transition to the District's high school. (NT 70-24 to 72-17; P-1 p. 4, P-10 p. 5.)

17. While the Student attended the high school on Wednesdays, District personnel observed Student's behavior and recorded their observations. District personnel noted that the Student required assistance at first to navigate the building, that support was being faded, and that the Student made some progress in navigating. District personnel also reported that the Student was able to engage in friendly social interactions. (NT 183-24 to 186-20; S-16 p. 10 to 11.)

18. District personnel provided oral feedback to the Parents on the Student's experience at the high school. (NT 190-14 to 18.)

19. The Student reported enjoying the time spent at the District's high school. (NT 190-19 to 191-12.)

20. In February, the Parents attempted to facilitate the provision of teacher response forms to the District for evaluation purposes; however, the [Private] School teachers did not respond quickly and the Parents tried to negotiate as to what data were needed in the District re-evaluation. The District received the [Private] School teachers' responses on April 9, 2010. (NT 108-21 to 110-17; P-10 p. 14 to 18, S-15 p. 8 to 25.)

21. The District observed the Student at [Private] School on February 25, 2010 and again in March. Due to the participation of [Private] School personnel, the observations did not yield sufficient data for District evaluation purposes as of the end of March 2010. (P-10 p. 23, 24, 35.)

22. The Parents contacted the District's director of special education on March 17, 2010, by telephone, and asked to move forward with IEP planning. After a series of email messages, which included recognition that a due process request through counsel was possible, the director responded on March 30 that the evaluation would proceed without cognitive testing and that the March 2009 IEP and placement would be the program and placement offered to the Parents for the 2010-2011 school year. This IEP included a placement in Intensive Learning Support. The director also forwarded a permission to evaluate form reflecting that cognitive testing would not be done. (NT 89-15 to 90-14, 282-13 to 283-17, 292-19 to 22, 650-13 to 21, 662-3 to 24; P-6, P-10.)

23. On April 8, 2010, the Parents' attorney gave the District notice that the Parents would re-enroll the Student at the [Private] School unless a satisfactory offer were provided; however, the Parents' attorney did not specify a ten day period for response from the District. The Parents did not receive a response to the April 8 letter. (NT 131-6 to 17, 659-3 to 662-2, 678-3 to 681-3; P-7.)

24. The Parents re-enrolled the Student at the [Private] School on April 26, 2010 by executing a binding contract to pay the full tuition. (NT 131-1 to 5, 196-10 to 17.)

25. In early May 2010, the Parents paid a deposit to the [Private] School to hold the Student's place for the next program year. In May and June 2010, the Parents paid in full in two more installments. (NT 195-15 to 196-9.)

26. On May 18, 2010, the Parents' attorney filed a request for due process reciting prior notice to the District of their intention to unilaterally enroll the Student at the [Private] School and seek tuition reimbursement from the District. (P-8.)

27. In June 2010, the District issued a re-evaluation report. (NT 125-7 to 9; S-16.)

28. On July 24, 2010, the District convened an IEP team meeting, with Parents in attendance. (NT 132-1 to S-17.)

29. The Parents were not satisfied with the IEP revisions offered in July 2010. One reason was their continued concern that the Student would not be able to navigate in the high school building. The Parents did not offer an alternative to the District plan to provide a one to one aide with fading of support as the Student would gain independence. (NT 223-1 to 228-24.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.[1] The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal. Thus, the moving party must produce a preponderance of evidence[2] that the District failed to fulfill its legal obligations as alleged in the due process Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

In Weast, the Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed "equipoise" – that is, where neither party has introduced a preponderance of evidence to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand,

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

[2] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

whenever the evidence is preponderant (i.e., there is greater evidence) in favor of one party, that party will prevail. Schaffer, above.

Based upon the above rules, the burden of proof, and more specifically the burden of persuasion in this case, rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent's claims, or if the evidence is in "equipoise", the Parent will not prevail.

HEARING OFFICER JURISDICTION TO ENFORCE SETTLEMENT AGREEMENT

Initially I must determine the jurisdiction of an administrative hearing officer under the IDEA to enforce a settlement agreement that was the result of a resolution meeting convened in a prior due process proceeding. The parties agree that I have jurisdiction to enforce the prevailing agreement, and both request that I do so. However, parties cannot vest a hearing officer with jurisdiction by agreement. The hearing officer has an independent duty and authority to raise any question of hearing officer jurisdiction when it arises.

The IDEA prescribes the authority of the hearing officer in several sections. It limits the nature of the due process complaint to matters relating to the identification, evaluation, placement or provision of a FAPE to a child with a disability. 20 U.S.C. §1415(b)(6)(A). Moreover, in a subsection entitled "Limitations on Hearing", the IDEA requires that the decision of a hearing officer "shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." 20 U.S.C. §1415(f)(3)(E)(i). Thus, the IDEA clearly limits the jurisdiction

of a hearing officer to matters involving whether or not the child was deprived of a FAPE.

Moreover, the IDEA specifically provides for appeals of settlement agreements, reached as a result of either mediation or resolution meetings, in state or federal court. 20 U.S.C. §1415(e)(2)(F)(iii), 20 U.S.C. §1415(f)(1)(B)(iii)(II). This language, by not including the administrative mechanism, clearly contemplates judicial, rather than administrative enforcement of such agreements. In the present matter, the parties ask that I enforce an agreement that was reached at a resolution meeting in 2009, though reduced to writing and executed thereafter. (FF 12.) I construe the statutory language to apply to this request, and to preclude administrative enforcement of the agreement at issue here.

The United States Court of Appeals for the Second Circuit has construed this language to deprive a hearing officer of jurisdiction to enforce a settlement agreement generated in response to a previous due process request – a case very similar to the matter before me. H.C. v. Colton-Pierrepont Central School District, 341 Fed. Appx. 687, 52 IDELR 278 (2d Cir. 2009). In H.C., the court held that the terms of the agreement at issue in that case – the provision of certain services within a specified timeframe – did not concern the identification, evaluation, placement or provision of a FAPE to the child and therefore were solely a matter of determining the obligations of the LEA under the settlement agreement. The Court noted that such a determination does not benefit from the discretion and educational expertise of state and local agencies - or from the full exploration of technical educational issues - that is provided by exhaustion of remedies through the administrative due process procedure. The court also noted that the administrative hearing officer does not have any independent power to enforce his or her

decisions. The court concluded that the administrative due process proceeding under the IDEA is not the appropriate vehicle for enforcing settlement agreements. But see, State of Missouri v. Missouri Dept. of Elementary and Secondary Education, 54 IDELR 124 (Mo. Ct. Appls 2010)(requiring exhaustion of administrative remedies based upon both state and federal law where informal agreement not reached at resolution meeting determined the nature of the educational services to be provided to child); see also, Linda P. v. State of Hawaii, Dept. of Education, 46 IDELR 73 (D. Hawaii 2006)(affirming hearing officer's determination that settlement agreement deprived hearing officer of jurisdiction by rendering matter moot.)

I find that the present matter falls within the holding of H.C. Here, the parties join issue with regard to the provisions of the settlement agreement that provide for pendency and that provide for a time frame within which the District is required to offer a FAPE for the 2010-2011 school year. Neither of these provisions constitutes a substantive basis for determining whether or not the Student has received an offer of a FAPE. 20 U.S.C. §1415(f)(3)(E)(i). Both are procedural in nature, and neither falls within the procedural findings which the hearing officer is authorized to make in order to determine the provision or denial of a FAPE. 20 U.S.C. §1415(f)(3)(E)(ii). While the H.C. ruling is not binding upon a hearing officer within the jurisdiction of the Third Circuit Court of Appeals, I find H.C. to be persuasive that I do not have jurisdiction to enforce the settlement agreement in this matter.

I find nothing in the state regulations that expands the hearing officer's jurisdiction beyond that vested by the IDEA. 22 Pa. Code §14.162(b), on the contrary, appears to assume that only the "substantive" matters specified in the IDEA are

cognizable in these proceedings. The regulation provides for due process complaints only where the parents "disagree with the [LEA's] identification, evaluation, … placement [or] provision of a free appropriate public education" to the child. There is no additional authority and the scope of due process under the regulation is no broader than this language.

The parents assert that two Third Circuit decisions recognize the authority of the administrative due process hearing officer to enforce settlement agreements. W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995); D.R. v. East Brunswick Bd. Of Education, 109 F.3d 896 (3d Cir. 1997). Neither of these cases directly reaches the issue presented in the present matter, and both are distinguishable.

In W.B. v. Matula, the Court seemed to take a view opposite to that for which Parents cite the case. The Court held that exhaustion of administrative remedies would be futile where the issue was precluded by the operation of a settlement agreement. The Court expressed doubt that the administrative tribunal could reach the merits of a FAPE claim due to the operation of the agreement. Moreover, Matula is distinguishable because administrative law judges in New Jersey have extensive powers vested in them by state statute that far exceed any authority vested by the IDEA or Pennsylvania regulations in special education hearing officers. N.J.S.A. 52: 14B-2(b),(c), 52:14b-9(A), 52:14b-10(C).

In D.R., the Third Circuit panel reversed a district court's order voiding a settlement agreement on grounds of change in circumstances. Although a New Jersey administrative law judge had enforced the agreement, the D.R. court had no occasion to reach the issue of that state officer's jurisdiction. Thus, the Court's apparent

acquiescence in the administrative exercise of jurisdiction does not resolve the issue in this circuit. As with Matula, also, the case is distinguishable due to the expanded powers of the New Jersey administrative law judge.

The Parents cite also the decision of a Special Education Appeals Panel, In re The Educational Assignment of B.B., Student of the West Chester Area School District, No. 1484 (May 10, 2004), which in dicta opined that the agreement before it fell within the sphere of enforceable agreements. Its opinion is not persuasive in the present matter, because it was based upon the D.R. case, which is not determinative, as discussed above.

In sum, I dismiss the Parents' first request for relief – the enforcement of the settlement agreement as a contract, for lack of hearing officer jurisdiction. In this matter, I will employ only the Burlington - Carter analysis discussed below as applied to the parents' request for tuition reimbursement. Nevertheless, to the extent that the provisions of the settlement agreement may be relevant to the Burlington -Carter analysis, or to the pendency analysis discussed below, I will consider them.

LEGAL STANDARD FOR TUITION REIMBURSEMENT

Although the parent is always free to decide upon the program and placement that he or she believes will best meet the student's needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court has established a three part test to determine whether or not a school district is obligated to fund such a private placement. Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). First, has the District offered to provide a free appropriate public education? Second, is the

parents' proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. See also, Florence County School District v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); Lauren W. v. DeFlaminis, 480 F.3d 259 (3rd Cir. 2007).

FAILURE TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION

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

"Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the

instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a "trivial" or "de minimis" educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

Under the Supreme Court's interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student's potential. Rather, an IEP must provide a "basic floor of opportunity" – it is not required to provide the "optimal level of services." Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520, (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district's offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

In the present matter, I find and conclude that the District offered an appropriate program and placement, and that the Parents are not entitled to equitable relief in the form of tuition reimbursement. In applying this equitable remedy, the timeliness of the

District's offer is relevant. I consider an offer timely if it is conveyed to the parents before any reasonable deadline to commit to the private school which they choose.

In this matter, that date was April 30, 2010. The Parent testified that the [Private] School requested payment for the 2010-2011 school year by February 2010. (FF 14.) However, I could not equitably enforce such a deadline for an offer of FAPE in this matter in light of either the typical planning cycle of school districts or the particular time frame contemplated by the parties as evidenced by the settlement agreement executed in September of 2009. (FF 14.) However, the Student's father testified that after many warnings, the [Private] School had indicated that a place would no longer be held for the Student after April 30, so he was able to delay payment until that date. (FF 14.) This was the true deadline under which the Parents were laboring to make their placement decision.

The District did offer a program and placement prior to April 30, 2010. On March 30, 2010, through its director of special education, the District offered the placement and IEP that had been offered previously in March 2009. (FF 1 to 5, 22.) This was the offer which the Parents had rejected shortly thereafter, and with regard to which the Parents had filed for due process. (FF 6 to 8, 11, 12.) It also was the outstanding offer at the time when the parties agreed to a settlement during the resolution meeting of July 15, 2009. (FF 12.)

Was this an offer of a FAPE as defined in the law? This question is answered neither by the history of a due process challenge to this offer in 2009, nor by the fact of an offer in settlement by the District thereafter. Rather, the question under the IDEA, as discussed above, is whether or not the March 2009 IEP, when offered again on March 30,

2010, was reasonably calculated to provide meaningful educational benefit to the Student in the 2010-2011 school year.

I find that the March 30, 2010 offer met this test. The Student had been evaluated numerous times and, while [Student's] cognitive and achievement tests showed some complexity, the many evaluations clearly identified and re-confirmed Student's educational needs. (FF 1 to 3.) These needs included learning disabilities in reading, mathematics and writing, attention and time on task needs, social skills deficits, daily living skills deficits and needs in expressive, receptive and pragmatic language. (FF 2.) In challenging the March 2009 IEP at the time it was first offered, the Parents did not assert that the IEP failed to address these needs, but doubted that the IEP could be implemented appropriately. (FF 6.) Upon review of the IEP, I conclude that it addresses the Student's educational needs with specially designed instruction that takes in to consideration the Student's cognitive functioning deficits. (FF 1 to 5, 7.) Thus, as one of the Parents allowed in the facilitated resolution meeting, the IEP "on paper" appears to be appropriate. (S-8 p. 13.)

By March 30, 2010, there was no new re-evaluation in place. (FF 15, 20 to 22.) There was some information from the Student's attendance at [Private] School. (FF 15, 20.) Moreover, the Student had attended the Intensive Learning Support class at the high school on Wednesday afternoons in February and March 2010, where the staff had the opportunity to observe the Student and record their observations. (FF 17.) Based upon the record in this matter, neither of these sources of information disclosed new educational needs that had not been addressed in the previous IEP, and that needed to be addressed in order to provide a program and placement that was reasonably calculated to

provide meaningful educational benefit. (FF 16 to 22.) The appropriateness of an offer of a FAPE must be determined as of the time it was made, and the reasonableness of the school district's offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010). Thus, the March 2009 IEP, along with the offered high school location, appropriately addressed the Student's special education needs as of March 2010, when it was re-offered to the Parents, based upon what was known in March 2010.

However, the Parents' primary concern in 2009 involved, not the adequacy of the services being offered in the IEP document, but that the Student's needs could not be met in the large setting of the District's high school, even if the Student were placed in its Intensive Learning Support program for all core academic subjects. (FF 6.) The District had offered another setting – the middle school – but this was rejected because the Student would interpret that setting as being left back and it would necessitate a subsequent transition to the high school in the next year. (FF 5.)

When the March 2009 IEP was offered again in March 2010, the Parents again raised the same issues, which they reiterated as the points of contention in this due process hearing: communication deficits, social skills deficits, and the risks to the Student's safety and psychological wellbeing that could be anticipated from the transition from a small private school. (FF 23, 24, 29.) The District responded in numerous meetings, telephone conversations and email communications that it stood ready and was fully able to address these concerns. (FF 4, 5, 7, 8, 9, 15, 16, 18, 27.) Its offer in 2010, as stated in the 2009 IEP, included speech and language classes, as well as social skills

training by the District's social work department. (FF 2.) Moreover, it described in detail how the Student's transition would be accomplished, and offered virtually any resource necessary to keep the Student safe and to attenuate any anxiety, while at the same time planning to fade supports as appropriate. (FF 5, 7, 9, 22.) I conclude that the District, in re-offering the 2009 IEP, appropriately addressed the Parents' concerns; thus, its offer was appropriately comprehensive and reasonably calculated to provide meaningful educational benefit to the Student.

Inferentially, the Parents' proofs suggest that the new IEP offered by the District in July 2010 shows what would have been needed to appropriately address the Student's needs and to make the March 2009 IEP appropriate. (FF 27 TO 29.) After reviewing both documents, I note that there are differences in the detail in which cognitive deficits are explained in light of the re-evaluation completed in June 2010, as well as additional goals and specially designed instruction that address reading, social skills and transition from private school. However, the fact that an IEP can be improved upon does not make it inappropriate. As discussed above, the District is required to offer an appropriate program, not the best possible program. Obviously, the July 2010 IEP is better drafted and more detailed. However, I find that the 2009 IEP sufficiently addressed the Student's educational needs and that it is appropriate and more than provides the "floor of opportunity" standard of the IDEA, as offered in 2010. Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251.

DENIAL OF PARENTAL RIGHT TO PARTICIPATE IN IEP PLANNING

The Parents argue strenuously that they were not given enough time to work cooperatively with the District as equal members of the IEP team, largely because the District violated the settlement agreement by failing to start educational planning in November 2009, and by insisting on an evaluation of cognitive functioning in order to discover if the Student could be classified as mentally retarded – an evaluation to which the Parents objected, and which the District's director of special education later deemed unnecessary to finalization of an IEP. (FF 13 to 15, 20, 21, 22, 29.) For the reasons discussed above, I do not reach the allegation of breach of the settlement agreement. As to the assertion that the Parents were deprived of an adequate and timely opportunity to participate in educational planning, I find to the contrary. While the Parents wanted to start planning in November, the District responded as soon as the Parents reminded the special education director in December. (FF 15 to 21.) While the cognitive functioning evaluation appears to have been an unnecessary detour that did delay formulation of a new IEP, I have found that the March 2009 IEP was appropriate, as discussed above, and this was offered before the Parents were required to make a choice by the private school that they had unilaterally chosen.

The record is replete with evidence of parental involvement in educational planning, through meetings and correspondence. (FF 8 to 10 15 to 21.) The director invited the Parents to call him whenever necessary – indeed, the director sought a telephone conversation when he determined that email communication was becoming dysfunctional for IEP team decision making. (FF 9.) The Student attended several classes in the high school, from which considerable data was gleaned that would give

District staff baseline information from which to plan more specific interventions. (FF 16 to 19.) They learned in particular that the Student seemed relaxed and happy in the high school, that the Student enjoyed social relationships while there, and the Student was able to make some progress in navigating the building during the few Wednesdays on which the Student attended the high school. (FF 16 to 19.) These findings supported the District's view that the proposed placement was appropriate.

In the absence of a new re-evaluation report, the director at one point indicated that the Parents knew as much as could be known about the plan for services, yet the Parents remained in need of more information in greater and greater detail. (FF 29.) The Parents' concerns remained the same: their concern was that the Student would be less safe and would fare more poorly in a large public high school, as contrasted with the small private school with which the Parents were comfortable. I conclude that the District offered and provided appropriate opportunity and time for parental participation within the requirements of the IDEA. Thus, I find no deprivation of a FAPE on this ground.

CREDIBILITY OF WITNESSES

In making the findings discussed above, I give credit to all of the testimony produced by the parties. I firmly believe that all of the witnesses were being truthful and that their assertions were reliable. Both parents impressed me with their demeanor of open candor, and by the fact that they appeared not to be defensive or to be trying too hard to convince me of the truth of their assertions. Their answers to questions took every opportunity to admit points raised against them when they agreed, and neither one

took the occasion to lob gratuitous or exaggerated charges at the School District. The same is true of the District witnesses. In particular, the director of special education, while firm in his position, notably vouched for the good faith of the Parents and admitted his own failures as well of those of the District in allowing delays in planning that exacerbated the relationship between the District and the Parents.[3] In so doing, this witness, like the Parents, evidenced a reasonable attitude that infused his testimony and rendered it both credible and reliable.

APPROPRIATENESS OF THE [PRIVATE] SCHOOL PROGRAM

Given the findings above, I need not reach this issue. No tuition reimbursement is due because the Parents have failed to bear their burden to persuade me that the District failed to offer an appropriate program and placement in a timely manner.

PENDENCY

The parties both request a determination as to what the pendent placement is for purposes of this litigation. I conclude that the pendent placement for the Student is Supplemental Learning Support in a public school setting. In reaching this conclusion, I rely upon judicial authority in the Third Circuit.

The IDEA provides that during the pendency of due process proceedings, and any subsequent appeal, the student "shall remain in the then current educational placement of the child … ." 20 U.S.C. §1415(j) and 34 C.F.R. §300.518(a). This is the rule unless the parents and the local educational agency agree otherwise. Ibid. The purpose of this

[3] That there were mistakes leading to delays does not diminish my finding that the District did make an appropriate offer within an equitably reasonable time. The law does not demand perfection – indeed, it allows much room for mistakes and less than perfect educational services, as discussed above.

requirement is to keep children in public placements during due process proceedings. Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988); Drinker v. Colonial School Dist., 78 F.3d 859 (3d Cir. 1996); Susquenita School Dist. v. Raelee S., 96 F.3d 78, 84 n. 6 (3d Cir. 1996). The Third Circuit's analysis in Drinker accords protection to placement by the public agency, not to a unilateral private placement. Drinker, 78 F.3d at 864 ("[i]mplicit … is the requirement that a school district continue to finance an educational placement made by the agency and consented to by the parent … .")

In Susquenita School District v. Raelee S. 96 F.2d 78 (3d Cir. 1996), the court held that, under 20 U.S.C. §1415(j) and 34 C.F.R. §300.518, the pendent placement is the placement that is in effect when the proceeding commences. Susquenita, 96 F.2d at 83; see generally, Drinker v. Colonial School Dist., 78 F.3d 859, 864 (3d Cir. 1996)(stating that pendency functions in effect as an automatic preliminary injunction). Ordinarily, this is the last agreed-upon placement in effect when the parent files for due process. Drinker, 78 F.3d at 865; George A. v. Wallingford Swarthmore School Dist., 655 F.Supp.2d 546, 549-550 (E.D. Pa. 2009); Susquenita School Dist., 96 F.3d at84 n. 6 (3d Cir. 1996)(where there is agreement, there is no need for further analysis.).

In the present matter, I find that the last agreed upon placement was set forth in the March 2009 IEP. (FF 2.) The last evidence of agreement on pendency is the settlement agreement executed in September 2009. (FF 13.) The agreement recites the parties' agreement that the pendent placement would be the last program and placement proposed by the parties. (FF 13.) This was the March 2009 IEP, which specifies supplemental learning support in a public facility. (FF 2.)

CONCLUSION

For the reasons set forth above, I rule that the hearing officer under IDEA lacks jurisdiction or authority to enforce the settlement agreement in this matter. I find that the District offered an appropriate program and placement to the Student. Therefore I decline to award the Parents tuition reimbursement for the placement in [Private] School in the 2010-2011 school year. In addition, I conclude that the pendent placement in this matter is supplemental learning support in a public school setting. Any claims not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The hearing officer lacks jurisdiction or authority to enforce the Settlement Agreement and Release executed by the parties as of September 17, 2009.

2. The placement offered by the District for the 2010-2011 school year, supplemental learning support in a public educational facility, was the pendent placement at commencement of this matter.

3. The District offered a FAPE in a timely manner through an appropriate program and placement for the 2010-2011 school year.

4. The Parents were not prevented from participating in educational planning for the Student to the extent of a denial of a FAPE.

5. The hearing officer will not order the District to pay the cost of tuition and transportation of the Student at the [Private] School for the 2010-2011 school year.

William F. Culleton, Jr. Esq.

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

November 16, 2010