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.T.

Date of Birth: [redacted]

Date of Hearing: September 24, 2010

CLOSED HEARING

ODR Case # 01547-1011JS

Parties to the Hearing:	Representative:
Parent[s]	Frederick Stanczak, Esq. 175 North Broad Street 2nd Floor Doylestown, PA 18901
Denise Higgins Perkiomen Valley School District 3 Iron Bridge Drive Collegeville, PA 19426	Mark Fitzgerald, Esq. Fox Rothschild 10 Sentry Parkway Suite 200/P.O. Box 3001 Blue Bell, PA 19422-3001
Date Record Closed:	September 29, 2010
Date of Decision:	October 13, 2010
Hearing Officer:	Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is [an early elementary school-aged] student who is eligible for special education under the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEA")[1] as a student with autism. The student resides in the Perkiomen Valley School District ("District"). The parents filed a complaint at a different file number (01402-1011JS) asserting that the District denied the student a free appropriate public education ("FAPE") under the IDEIA. The parties disputed the pendent placement of the student—the educational programming to be provided to the student pending the outcome of the dispute at 01402-1011JS.

The District filed a pre-hearing motion regarding the pendent program for the student, and the student's parents filed a response to the motion. Because the question of the student's pendent program required fact-finding, a one day hearing was held under the instant file number to resolve the question of pendency.

For the reasons set forth below, I find in favor of the parents.

ISSUES

What should the student's pendent program and placement be until the underlying dispute between the parties is resolved?

[1] It is this hearing officer's preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818.

FINDINGS OF FACT

1. The student has been identified as a student with pervasive developmental disorder/not otherwise specified and is eligible under the IDEIA as a student with autism. (School District Exhibit ["S"]-1, S-27; Notes of Testimony ["NT"] at 261-262).
2. The student received autism support services through the [local] Intermediate Unit ("IU"). The last of these services to be provided by the IU was in early intervention programming in the 2008-2009 school year. (S-18, S-27; NT at 42-46).
3. In January 2009, the District completed a re-evaluation of the student, finding that the student continued to be eligible under IDEA as a student with autism and speech and language impairment. (S-27).
4. In the summer and fall of 2009, the District and the student's parents worked on transitioning the student to the District for kindergarten in the 2009-2010 school year. The student began attending the District's half-day kindergarten in September 2009, and the District implemented the early intervention program that the student attended at the IU. (Parents' Exhibit ["P"]-21, P-23, S-18; NT at 46-47, 51-52, 103-104, 263-274).
5. In October 2009, the District issued a notice of recommended educational placement ("NOREP") for the implementation of the

student's individualized education plan ("IEP") in a supplemental autism support setting at a District elementary school. (S-70, S-80; NT at 46-47, 263-264).

6. In early November 2009, parents rejected the NOREP and indicated that they would be filing for due process. (S-80).
7. In December 2009, a due process complaint was filed by parents, and the parties entered into a resolution process. (S-1; NT at 47-48).
8. The student stopped regularly attending the District kindergarten in January 2010, attending intermittently one day per week and receiving an almost exclusively a home-based education program from January 2010 onwards through the date of the hearing. (P-6 at pages 6-14, S-137 at pages 6-14, S-140; NT at 56-57, 110-111, 280-281).
9. The parties continued to engage in settlement negotiations throughout the spring of 2010. In April 2010, the parties were still engaged in settlement negotiations and communicated that fact to the hearing officer assigned to handle parents' December 2009 complaint. The parties never signed a settlement agreement as a resolution to the December 2009 complaint. (S-115, S-122; NT at 48-51, 60-61, 301-303).
10. As indicated in findings of fact #4, the District implemented the early intervention IEP from September through December

2009. This early intervention IEP called for, among other services, 30 hours of applied behavioral analysis/verbal behavior instruction, between the home and the half-day kindergarten program, to be delivered by a trained personal care assistant as well as four hours per week, between the home and the school, of behavioral supervision/consultation by a behavior analyst. (S-18, S-108; NT at 104-109, 113-115, 190, 192-196, 238).

11. As indicated in finding of fact #8, from January 2010 onwards through the date of the hearing, the student received an exclusively home-based program. Aside from the location of the delivery of services, the home-based program is roughly equivalent to the school-based program from the fall of 2009. In addition to other services, the student receives 30 hours per week of applied behavioral analysis/verbal behavior instruction from a personal care assistant, with sixteen hours per month of supervision/consultation by a behavior analyst. The behavior analyst is based in Florida and monitors the program through phone and email consultation with the family, twice-monthly visits to the home, and review of videotaped sessions. (P-16, S-107; NT at 233-235, 238, 255-256, 275-276, 280-284).

12. The District collected attendance for the student throughout the 2009-2010 school year, recording unexcused absences for

every school day from January 25, 2010 through the end of the school year. (S-142).

13. From January 2010 onwards, the District paid for the student's home-based program, reimbursing the student's parents for the cost of the daily instruction by personal care assistants and the services of the behavior analyst. (NT at 279-280).

14. In June 2010, the student's IEP team met to discuss the student's education program for the 2010-2011 school year. (P-6, S-137).

15. The proposed IEP and NOREP calls for the student to receive full-time autism support in 1st grade, over a full instructional day, in a District elementary school. (P-6, P-7, S-137, Hearing Officer Exhibit ["HO"]-1; NT at 105-106).

16. Parents did not agree with the District's recommended placement and filed for due process on July 30, 2010. (P-4, P-7).

17. On September 2, 2010, the District filed a motion to determine the pendent placement for the student. On September 8, 2010, the parents responded with their arguments on pendency. (HO-1, HO-2).

18. The District, in its motion and closing argument for this hearing, argues that the June 2010 IEP, implemented by District personnel, should be the pendent placement. (S-137, HO-1).

19. The parents, in their motion and closing argument, argue that the half-time kindergarten program and half-time home-based program being implemented by the District beginning in the 2009-2010 school year should be the pendent placement. (S-18, HO-2).

DISCUSSION AND CONCLUSIONS OF LAW

Whenever a student is involved in a due process hearing, "during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing,…unless the (school district) and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement."[2] This provision is commonly referred as to the "stay-put" provision. Both parties presented legal arguments on how maintaining the statutorily required "current educational placement" supports their view of the student's pendency. More persuasive were the arguments presented by parents, particularly as found in *Drinker v. Colonial School District*, 78 F.3d 859 (3d Cir. 1996).

In *Drinker*, the Court held that a student's "current educational placement" refers to "the operative placement actually functioning at the time the dispute first arises. If an IEP has been implemented, then that program's placement will be the one subject to the stay-put provision.

[2] 34 C.F.R. §300.518(a).

And where…the dispute arises before any IEP has been implemented, the 'current educational placement' will be the operative placement under which the child is actually receiving instruction at the time the dispute arises." *Drinker* at 867, quoting *Thomas v. Cincinnati Board of Education*, 918 F.2d 618, 625-626 (6th Cir. 1990).[3]

In this case, the record supports the conclusion that, under the construction of "current educational placement" as outlined in *Drinker*, the operative placement actually functioning at the time the parties' dispute arose is that supported by parents. Here, the IEP created by the IU was adopted and implemented by the District as the student transitioned to the District. (FF 2, 4). This program was in effect and being implemented when the parents filed for due process in December 2009. (FF 4, 7, 10). Even though the student did not regularly attend the District after January 2010, the District still funded largely the same program to the student that the District had been providing. (FF 8, 10, 11, 13).

Whether one views the dispute as having arisen in December 2009 with the first, and unresolved, complaint filed by parents (FF 6, 7, 9), or in July 2010 with the second complaint (FF 16), the operative placement actually functioning at the time the dispute arose is the half-time kindergarten program and half-time home-based program being

[3] The holding in *Drinker* regarding a student's current educational placement for stay-put purposes was recently reiterated by the Third Circuit in a slip opinion in *L.Y. v. Bayonne Bd. of Educ.*, 2010 WL 2340176, (3d Cir. 2010). And, *see generally, Honig v. Doe*, 484 U.S. 305 (1988).

implemented by the District beginning in the 2009-2010 school year. (FF 10, 11, 19). This is not to say that the District has argued ineffectively that the student might be well-served with the program recommended by the District in June 2010. (FF 15, 18). And nothing in this decision goes toward answering the questions presented in the complaint at 01402-1011JS regarding the District's provision, or non-provision, of FAPE to the student. But under the clear statutory language of IDEA and the holdings of the Third Circuit regarding pendency, the student's pendent placement must be the program as implemented and/or funded by the District in the 2009-2010 school year.

CONCLUSION

The student's program and placement pending a final decision in the case at 01402-1011JS are the program and placement implemented and/or funded by the District in the 2009-2010 school year.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student's pendent program and placement until the complaint at 01402-1011JS is resolved

shall be the program implemented and/or funded by the District over the course of the 2009-2010 school year.

Any claim by the parties not specifically addressed by this decision and order is denied.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

October 13, 2010