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

ODR No. 13373-1213 AS

Child's Name: I.W.

Date of Birth: [redacted]

Dates of Hearing: 2/11/13, 3/5/13, 3/28/13

CLOSED HEARING

Parties to the Hearing:	Representative
Parents Parents	Parent Attorney Judith Gran, Esquire Reisman Carolla Gran 19 Chestnut Street Haddonfield, NJ 08033-1810
School District Penn-Delco 2821 Concord Road Aston, PA 19014	School District Attorney Gabrielle Sereni, Esquire Raffaele & Puppio 19 West Third Street Media, PA 19063
Date Record Closed:	April 18, 2013
Date of Decision:	May 4, 2013
Hearing Officer:	Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Although Student has only been enrolled in the District since the beginning of the current school year, after transitioning from pre-school to school-age special education services, the due process complaint from which this decision arose is one of four complaints initiated by either Parents or the District during that time. The first complaint, filed by Parents, was withdrawn after a decision on the second complaint, filed by the District, which permitted a 45 day interim alternative educational placement in the District's multiple disabilities support (MDS) class due to aggressive behaviors that the hearing officer found dangerous to peers.

The current (3rd) complaint was filed by the District after Parents renewed their request for an independent functional behavior assessment in December 2012. A subsequent complaint, filed by the District after Parents refused permission for a comprehensive District reevaluation, was consolidated for hearing with this case but dismissed at the third hearing session after the parties reached an agreement.

Just prior to the first hearing session in this case, Parents filed a motion for summary judgment, contending that the District's "unnecessary delay" in filing a due process complaint to support the appropriateness of its FBA constituted a procedural IDEA violation and provides a sufficient basis for ordering an independent FBA without considering substantive issues relating to the District's FBA. The motion was partially denied in an order dated March 24, 2013. (attached as an Appendix to this decision), but Parents were permitted to produce evidence of an adverse substantive effect on Student arising from the District's delay in filing the complaint.

The hearing on the District's due process complaint to support its FBA was held over three sessions from mid-February through the end of March. For the reasons described below,

and after full consideration of the District's FBA and all relevant circumstances concerning Student and the relationship between the parties, an independent FBA will be ordered.

ISSUES

1. Did the School District violate IDEA requirements by unnecessarily delaying its process complaint after Parents requested an independent FBA?

2. Is the functional behavioral assessment (FBA) conducted by the District appropriate?

3. Are Parents entitled to an independent FBA based upon either an unnecessary delay by the District in filing a due process complaint or inappropriateness of the District FBA?

FINDINGS OF FACT

1. Student, [an elementary school-aged] child born [redacted], is a resident of the School District and eligible for special education services. (Stipulation, N.T. pp. 17, 19)

2. Student was identified as eligible for pre-school services due to developmental delay, considered an autism spectrum disorder with respect to eligibility for IDEA school-age services. Currently, the District considers Student's IDEA eligibility to be based upon the multiple disabilities category, but Parents disagree. (34 C.F.R. §300.8(a)(1), (c)(1), (7); 22 Pa. Code §14.102 (2)(ii); (N.T. p. 18)

3. Student began the school year in a District kindergarten class co-taught by a regular and special education teacher, where Student was initially expected to be fully included with typical peers and receive itinerant learning support services. (N.T. pp. 56—58)

4. Student was removed from the originally assigned regular education classroom beginning October 2, 2012 and taught alone in the OT/PT and reading specialist's classroom, which the District considered a regular education classroom. (N.T. pp. 146, 147)

5. After a due process hearing and decision on a prior District complaint, the District was permitted to place Student in a multiple disabilities support (MDS) class as an interim alternative educational placement. The hearing officer concluded that "maintaining Student's last agreed-upon placement is substantially likely to result in injury to the child or others." (N.T. pp. 58, 59, 147; S-1, S-9, *In Re: I.W.*, ODR # 13158-1213 AS at p. 11 (October 29, 2012; Valentini)

6. The MDS class is located in the District elementary school in which Student began the school year. Student is one of three children assigned to the MDS class, which also includes three adults for most of the school day. (N.T. pp. 158, 159)

7. Although Parents do not agree that the MDS class is an appropriate placement for Student, contending that it is too restrictive, the District has continued to implement Student's IEP in the MDS class, since Parents did not file a due process complaint or request mediation after rejecting the NOREP continuing the MDS placement after the 45 day interim placement ended. (N.T. pp. 59, 467—471)

8. Under the direction of its supervisor of special education, who is a BCBAD,[1] the District began implementing positive behavior supports beginning in mid-September 2012. The supervisor began observing Student and collecting behavior data on the first day of the school year, completed a functional behavior assessment (FBA) and issued a report on October 2, 2012. (N.T. pp. 52, 59, 60, 62, 63, 68; S-2, S-6)

9. An FBA is an assessment process designed to identify the functions and environmental variables related to behaviors of concern based upon the underlying premise that all behaviors serve a purpose. After identifying the targeted behaviors, the antecedents (circumstances or events that immediately preceded and presumably triggered the behaviors) and consequences (the immediate aftermath of the behaviors), a hypothesis is formed concerning the purpose of the unacceptable behaviors in terms of how the behaviors are reinforcing to the child. An FBA also identifies "setting events," environmental circumstances that may be related to triggering the behaviors but do not precede the behaviors as immediately and directly as antecedents. (N.T. pp. 108, 109, 111, 113, 115, 116, 413, 420, 421, 429, 430; P-15 pp. 10, 11, P-26 pp. 2—4, 6)

10. An FBA is expected to provide the basis for developing a positive behavior support plan to prevent the behaviors with strategies for structuring the environment to reduce or eliminate triggering events and/or teaching acceptable behaviors that serve the same function and become more valuable to the child than the negative behaviors. (N.T. pp. 122, 123; P-15 p. 10, 11, P-26 pp. 2, 6)

11. Data is collected in an FBA for the purpose of identifying patterns and relationships among setting events, antecedents and consequences of behaviors in order to predict the likelihood of specific behaviors occurring under various circumstances. Data collection should not only enable identification of patterns but also identify the frequency of patterns related to behaviors and the relationship among patterns for the ultimate purpose of developing strategies and then making decisions based on the data and the child's progress. (P-15 p. 10, P-26 p. 3)

12. To determine the potentially different functions of various kinds of maladaptive behaviors, the behaviors should be described very specifically. (N.T. pp. 433, 434)

13. Functional behavioral assessments are conducted in natural settings such as schools, where data can be collected concerning time/circumstances when behaviors occur, but where variables cannot readily be controlled. Conducting a functional behavioral analysis is reserved to clinical settings and differs from a functional behavioral

[1] **B**oard **C**ertified **B**ehavior **A**nalyst **D**octorate

assessment in that the clinical setting allows for manipulating the environment to determine behavior responses. (N.T. pp. 71, 72, 169)

14. Data on Student's behaviors was collected and summarized for each day Student was in school beginning on September 5, 2012. The school day was divided into activity periods.[2] The staff observing Student, including the special education supervisor, Student's teacher(s) and Student's 1:1 aide(s), used behavior data sheets, an A-B-C (Antecedent-Behavior-Consequence) Maladaptive Behavior Card and an interventions list to record incidences of several classes of behavior: physical aggression toward peers and adults, verbal aggression, elopement, non-compliance and social skills (spontaneous peer interactions). The A-B-C Cards are also used to identify antecedents and consequences of the behaviors during timed intervals. (N.T. pp. 68—74, 80—87, 235, 236; S-2, S-3, P-11)

15. The data was evaluated by the special education supervisor in consultation with other staff, primarily the speech/language therapist, since the goal of the data collection was to determine how to decrease the negative behaviors by increasing Student's functional communication skills. The goal was based on the premise that lack of functional communication is directly related to maladaptive behavior. The VB-MAPP[3] completed by District staff in mid-September, which placed Student's language functioning at the 17-19 month range, confirmed the special education supervisor's belief that Student's functional communication was significantly impaired in the school setting. (N.T. pp. 87—90, 99—101, 116, 117; S-5)

16. At the beginning of the school year, Student's receptive language skills were much stronger than expressive language, but at present, District staff considers Student's expressive and receptive language skills to be on the same level. The special education supervisor believes that Student's aggressive behaviors have decreased as Student's language skills have improved. She also believes that Student's aggression toward peers is directed particularly at those more verbal than Student. (N.T. pp. 208, 254, 255, 278)

17. According to the District staff's evaluation of behavior data, Student's aggressive behaviors have "significantly" decreased in frequency, duration and severity since the change of placement to the MDS class, but still occur. Parents believe that the District's reports of aggressive incidents are exaggerated. (N.T. pp. 125—128, 158, , 304, 575, 576)

18. The District compiled a summary of the combined number of aggressive behaviors directed toward adults and peers that occurred each day, their duration and the percentage of time Student was on task from the beginning of September through the end of January 2013. The summary shows considerable variation in the number and duration of

---

[2] Arrival, Morning Meeting, Math, 3 separate Language Arts periods (whole group, small group and individual); Kid Writing, Library

[3] **V**erbal **B**ehavior-**M**ilestones **A**ssessment **P**rotocol

aggressive incidents from September through December. The District did not attempt to rate and record the severity of the aggressive behaviors as part of the data collection. The lowest combined number and duration of aggressive incidents over the longest period was recorded in January 2013. Data available from mid-February through the end of March shows another increase in number and duration of behavior incidents during that period. (S-2 pp. 1—3, P-18 pp. 2, 3)

19. Initially, the number of incidents and duration of Student's aggressive behaviors markedly decreased after ABA strategies were implemented beginning September 13. (NT p. 125; S-2 p.1)

Dates	Incidents	Duration (Minutes)	# of Days of Data Reported
9/5—9/12-	255	168	6
9/13—9/28	39	50	7 (9/27 not reported)
Totals:	294	218	13

20. From October 2, when Student was removed from peer contact for 1:1 instruction, through the end of October, aggressive behaviors, presumably directed toward adults, were variable but generally decreased in number and duration at the beginning of the month and began increasing toward the end of the month. (N.T. p. 125; S-2 p.1)

Dates	Incidents	Duration	# of Days of Data Reported
10/1—10/5			0
10/8—10/12:	8	40	3 (10/10, 10/11 not reported)
10/15—10/31	171	270	9 (10/24, 10/29, 10/30 not reported)
Totals:	179	310	12

21. During November, after Student was placed in the MDS classroom, there was an overall increase in the number and duration of aggressive behaviors, but the behaviors were variable throughout the month. The District supervisor of special education described that period as beginning with an escalation of aggressive behaviors followed by a decrease. The District's data summary discloses a considerable increase in aggressive behaviors between 11/9 and 11/16. (N.T. pp. 125, 126; S-2, pp. 1, 2)

Dates	Incidents	Duration	# of Days of Data Reported
11/1—11/8	41	116	5 (11/6 ns--no school)
11/9—11/16	166	220	6
11/19—11/23			(11/19—11/21 Not Reported)(11/22,23—ns)
11/26—11/30	89	130	5
Totals:	296	466	16

22. The special education supervisor noted a "small" increase in behaviors that she termed an "extinction burst" when Student's special education teacher returned from maternity leave. She characterized the increase as "a little spike" in maladaptive behaviors. Review of the District's summary sheet, however, shows a significant increase in the number of aggressive behaviors for the 10 days that data was reported in December, with only 3 days of fewer than 20 incidents. (N.T. pp. 126, 127, 255, 271; S-2 p. 2)

Dates	Incidents	Duration	# of Days of Data Reported
12/3—12/7			(12/3, 4—not reported)(12/5, 6, 7—½ days)
12/10—12/14	282	209	5
12/17—12/21	125	174	5
Total:	407	383	10

23. The final period for which the District provided a summary of aggressive incidents and duration was January 2013. Although the number of aggressive incidents was high for the 3 days immediately after returning from winter break, with some fluctuation, the number and duration of incidents generally decreased during January. (S-2 pp. 2, 3)

Dates	Incidents	Duration	# of Days of Data Reported
1/2--1/4/13	135	57	3
1/7—1/18	146	101	10
1/21—1/30	51	28	7 (1/21, 1/23, 1/31 not reported)
Totals:	332	186	20

24. After an incident when District staff restrained Student in December 2012, the District updated its FBA with a report dated January 25, 2013. (N.T. pp. 145, 146; S-3, S-19)

25. Student has fallen asleep during the school day since beginning to attend a full school day after September 2012. The frequency with which Student falls asleep and the amount of time Student remains asleep without responding to staff attempts at arousal increased in February 2013, a time when Student had several illnesses. The reason for Student's persistent sleepiness in the afternoons has not been determined or successfully resolved. Parents and District staff disagree with respect to how explicitly and thoroughly the District made Parents aware of the sleeping issue. (N.T. pp. 198—201, 205, 228, 229, 231, 233, 234, 238, 239, 272, 273, 291—293, 568—571; P-11, P-15 p. 17)

26. Student has also developed different maladaptive behaviors from time to time that were not noted at the beginning of the school year, such as [redacted]. More recently, [other behavior] has occurred. (N.T. pp. 127, 271; P-20 pp. 14—19, 24—29, 35)

27. Student continues to have very inconsistent behaviors. At the time the District's FBA was completed in October and continuing to the present, District staff could not and cannot reliably predict Student's aggressive behaviors, identify behavior control strategies that are consistently successful or prevent aggression toward peers. At present, Student often verbalizes "hit" before attempting to make contact with a peer. In the smaller setting of the MDS class and with the verbal cue, District staff has generally been more successful in blocking Student from completing physical contact with peers during aggressive incidents, but has not been able to prevent it entirely. (N.T. pp. 161, 191, 192, 194, 195, 230—232, 253, 254, 284, 287; S-26)

28. In late September 2012, the District hired a consultant to observe Student in order to get another perspective and advise the District on additional data collection, as well as methods of analyzing the data to improve behavior support outcomes. The consultant report was issued on October 1, 2012. (N.T. pp. 184—186, 193, 194; P-15 pp. 10—26)

29. In completing its FBA in October 2012, the District did not follow all recommendations of the consultants for recording and analyzing data. District staff did not, *e.g.*, analyze the relationship between task variability and pace of instruction to behaviors because Student was not yet under instructional control. The updated FBA from January 2013 did not add that information. (N.T. pp. 188—190; P-15 p. 18, S-6, S-19)

30. At Parents' request, an independent evaluator with extensive experience in developing positive behavior support guidelines, consulting with school districts concerning behavior supports and in training behavior specialist students to conduct FBAs observed Student in the MDS classroom on March 4, 2013 and provided a report dated March 21. (N.T. pp. 386—400; P-21, P-26)

31. Parents' expert witness did not conduct a full FBA, for which she would observe Student over three school days and interview key staff, including Student's early intervention team, as well as analyze the behavior observation data. (N.T. pp. 404, 405)

32. On the day the witness observed, Student did not demonstrate significant behaviors of concern. She attributed the low incidence of difficult behaviors to the high reinforcement and prompting levels Student received, which she termed external controls, and expressed concern that Student may have difficulty transitioning to less reinforcing environments. (N.T. pp. 456—461)

33. Parents' expert witness agrees with the recommendations of the District's consultant with respect to the behavior data that should be compiled and analyzed to conduct an appropriate FBA of Student. (N.T. pp. 436—438)

DISCUSSION AND CONCLUSIONS OF LAW

Before turning to consideration of the substantive issues, it is helpful to describe briefly the general legal principles that guide consideration of the facts and the parties' contentions in this matter.

Independent Educational Evaluations

The IDEA provides that Parents have the right to obtain an independent educational evaluation (IEE) and, if the private evaluation meets the standards of the local education agency (LEA), and parents share it with the LEA, to have the evaluation considered in making decisions concerning the provision of FAPE to a child. 34 C.F.R. §300.502(a), (b)(3), (c)(1).

Parents can obtain an IEE at public expense if they disagree with an evaluation obtained by the LEA and it either agrees to fund the independent evaluation or the LEA evaluation is found inappropriate by the decision of a hearing officer after an administrative due process hearing. 34 C.F.R. §300.502(b)(1), (2)(ii). Once a parent has requested an IEE, the LEA "must, without unnecessary delay," file a due process complaint to show that its evaluation is appropriate or assure that the IEE is provided. 34 C.F.R. §300.502(b)(2)(i), (ii).

An IEE is defined in the IDEA regulations as "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.F.R. §300.502(a)(3)(i),

Burden of Proof in Due Process Hearings

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the U.S. Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion, one of the two components of the burden of proof, which also includes the burden of production or going forward with the evidence. The burden of persuasion is the more important of the two burden of proof elements, since it determines which party bears the risk of failing to convince the finder of fact that the party has produced sufficient evidence to obtain a favorable decision.

The burden of proof analysis is the deciding factor in the outcome of a due process hearing, however, only in that rare situation when the evidence is in "equipoise," *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position. *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). When the evidence on one side has greater weight, it is preponderant in favor of that party, which prevails. When the evidence is equally balanced, the party with the burden of persuasion has produced insufficient persuasive evidence to meet its

obligation and, therefore, cannot obtain a favorable decision. In that event, the opposing party prevails.

In this case, because the District filed the due process complaint to support the appropriateness of its FBA and justify its denial of Parents' request or an independent FBA, the District had the burden of persuasion with respect to whether the FBA it completed is appropriate. Parents, however, filed a motion for summary judgment, contending that a decision on the appropriateness of the District FBA is unnecessary because they are entitled to judgment in their favor and an independent FBA based upon the District's "unnecessary delay" in responding to Parents' IEE request and filing its complaint. Parents object to allocating the burden of persuasion to them on that issue, asserting that because the District filed the due process complaint, it should bear the burden of persuasion on all issues that lead to the determination whether the District should be ordered to fund an independent FBA.

That position is unsupportable under the Supreme Court's *Schaffer* decision explicitly allocating the burden of persuasion to the party seeking relief, which the Court otherwise described as determining which party bears "the risk of failing to prove their claims." 546 U.S. at p. 56. Via their motion for summary judgment, Parents substantively asserted a "claim," *i.e.*, that the District's "unnecessary delay" constituted a serious and dispositive breach of its IDEA obligation to file a due process complaint if it denies a parent request for a publicly funded IEE such that the District should not even be given the opportunity to persuade the fact-finder that an IEE is unnecessary because it has provided an appropriate evaluation. Parents are the petitioners on the question of "unnecessary delay," just as the District is the petitioner on the question of the appropriateness of its FBA. Moreover, as the Court noted in *Schaffer*, the "default" rule for allocating the burden of persuasion is subject to exceptions that shift the burden of persuasion to

the opposing party on some issues, notably elements of a claim that "can fairly be characterized as affirmative defenses or exemptions." 546 U.S. at p. 57. Parents' assertion of "unnecessary delay" by the District in filing a claim to defend its FBA could certainly be characterized as an affirmative defense to the District's claim that its FBA is appropriate even in the absence of a motion for summary judgment. No matter how that issue or Parents' relationship to it is characterized, Parents bear the risk of non-persuasion with respect to "unnecessary delay" since they raised that issue in this case. For a number of reasons, some initially explained in the March 24 preliminary ruling on Parents' summary judgment motion and more fully discussed below, Parents' position that they should prevail on the issue of unnecessary delay without considering the appropriateness of the District's FBA was unpersuasive.

The District's position on the appropriateness of its FBA was, however, ultimately unpersuasive as explained below, since there is an obvious need for an updated FBA more extensive and detailed than the District's FBA. Parents, therefore, prevail on their request for an independent FBA.

Student's Behavior Needs/Relationship Between the Parties

Under the circumstances presented by this case, including the persistence of Student's aggressive behaviors and the difficult, mistrustful relationship between the parties, the specific reasons that an IEE might be ordered, *i.e.*, whether there was an unnecessary delay between the date of Parents' request for an independent FBA and the date the District filed its due process complaint, and whether the District's evaluation meets appropriate standards, are almost beside the point. The situation presented by this case is unique on several levels.

Ordinarily, an evaluation is, and should be, a comprehensive "snapshot" of a child's cognitive ability, academic achievement, emotional functioning, language, motor skills, etc., or

any combination of factors that comprise the child's current functioning and needs. In this case, however, the request for an IEE is limited to an independent assessment of Student's maladaptive school behaviors in the form of an FBA to determine the reasons such behaviors occur, leading to a positive behavior support plan to improve the behaviors and Student's educational and social outcomes. (FF 9, 10, 11)

Ordinarily, an evaluation and its results can be examined to determine whether it includes all necessary components required by the IDEA statute and regulations, whether it presents an accurate picture of the child, whether it sufficiently identifies the child's needs and suggests the kinds of IEP goals, specially designed instruction and services that are reasonably likely to meet the child's needs such that the child has an opportunity to make meaningful educational progress. Here, however, the issues concerning the District's FBA and Parents' request for an independent FBA are not nearly as straightforward as usual in cases initiated to establish whether a school district evaluation is appropriate. Based on the record of this case, a "snapshot" of Student's behavior, particularly related to aggressive behaviors, is inadequate, whether taken by the District via its FBA, or by Parents' preferred evaluator via an independent FBA. The evidence in this case, as well as the prior hearing decision, suggests a continuing need to update and assess behavioral data on Student periodically, and at relatively short intervals, in terms of setting events, antecedents, consequences, perceived function, and especially, the effectiveness of various behavior control strategies, including teaching replacement behaviors. Whether Student's aggressive behaviors were less severe from the beginning of the school year than the District has represented, as Parents contend, or are on a decreasing trend based upon the District's program/placement, as the District now contends, is not as important as eliminating the aggressive behaviors. (FF 5, 6, 17) The aggressive behaviors must be brought under much

better control if Student is to have a reasonable opportunity to make meaningful academic and social progress, including significant participation in classes with typically developing peers. Although there is evidence that Student's behaviors have improved, Student's aggressive behaviors have been, and continue to be, unevenly controlled at best. (FF 16, 17, 18, 19, 20, 21, 22, 23, 24, 27) Far too frequently, Student continues to exhibit the kinds of behaviors that Hearing Officer Valentini concluded are likely to cause injury to peers, and Student has developed additional behaviors that interfere with the education of both Student and peers. (FF 5, 25, 26) Incremental reduction of aggressive behaviors directed toward both staff and peers, based on the expectation that Student's behaviors will improve as communication skills improve and instructional control is better established is not sufficient or acceptable. (FF 16) Although there certainly can be no guarantee that all aggressive behaviors will entirely cease in every educational setting and never recur, there must, at least, be sufficient confidence that such behaviors are more unlikely than likely in order for Student to have an opportunity for regular contact with a variety of peers. Developing a positive behavior support plan with the goal of assuring that Student can successfully participate in educational settings with typical peers, which necessarily includes a much greater reduction of aggressive behaviors than the District has been able to accomplish to date is, perhaps, the most important current purpose of an FBA. Student's history during this school year suggests that an FBA must be updated and refined periodically until such time as that goal is realized.

Unfortunately, the evidence also suggests that it will be extraordinarily difficult for the parties to cooperatively engage in that process. In less than a single school year, Student's first year in the District, there have already been four due process complaints, two of them concerning Parents' requests for independent evaluations. The litigation history between the parties alone

demonstrates that Parents deeply mistrust that the District can and will appropriately evaluate Student. Moreover, Parents made it very clear that they believe the District's reports of the frequency and seriousness of Student's aggressive behaviors are exaggerated. (FF 7) Regardless of the objective accuracy of that belief, no discussion of the facts, and no order of a hearing officer reflecting the District's position is likely to dissuade Parents from their deeply held beliefs, *i.e.,* 1) that from the first contact with Student and the family, the District has attempted to segregate Student from typical peers for reasons unrelated to aggressive behaviors that the District has documented; 2) District staff is unable to effectively deal with Student's complex needs, and, therefore, exaggerated the challenging behaviors to justify less effort than would be needed to assure meaningful progress in a more inclusive setting.

Given the difficult history between the parties and the need to frequently update the FBA, it is important to interrupt, to the extent possible, the cycle of mistrust and litigation in order for the parties to build a better working relationship for Student's benefit. As discussed below, the evidence the record of this case does not support the appropriateness of the District's FBA. But even if the District's existing FBA was appropriate when completed in early October, 2012, when Student was new to the District, now, more than 6 months later, an updated and more comprehensive FBA is needed. The specific analysis of the parties' claims and respective positions was undertaken with these considerations underlying the issues.

Unnecessary Delay

The first issue Parents raised in support of their position that they are entitled to an independent FBA under the circumstances of this case is the question whether the District's delay in requesting a due process hearing after Parents requested an independent FBA is sufficient to support an IEE order.

Since the parties were provided with a preliminary ruling that set forth the legal standards this hearing officer believes are applicable to the "unnecessary delay" issue, little additional discussion is needed concerning Parents' motion for summary judgment requesting that the issue of the appropriateness of the District's FBA not be considered because they are entitled to an independent FBA based solely upon the passage of time between Parents' initial request for an independent FBA and the date the District filed its complaint in this case. The summary judgment ruling also determined when the relevant period began, *i.e.*, on October 31, 2012. (Appendix, p. 4) Since the factual underpinnings of the ruling were based upon the evidence, including both testimony and exhibits, adduced by the end of the second hearing session, those matters do not need to be re-visited here. There are, however, three points that should be further discussed based upon the additional argument Parents presented in their final closing statement.

1. In arguing that they are entitled to an IEE due to the District's "unnecessary delay" in filing a due process complaint after they requested an independent FBA, and basing the "unnecessary" determination entirely upon the passage of time, Parents relied primarily upon the hearing officer decision in *Avon Grove School District v. C.L.*, ODR # 13201-1213 AS (Culleton, Jan. 16, 2013). As noted in the summary judgment ruling, that decision cited significant evidence concerning the need for a speech/language evaluation and the school district's failure to either conduct a truly comprehensive speech/language evaluation or include it in the IEE, even after apparently agreeing to do so. Moreover, even if that evidence and discussion was not an integral part of the hearing officer's "unnecessary delay" conclusion, the amount of time that elapsed in that case was greater than the period involved in this case.

2. Parents' counsel also argued that the OSEP letters cited in the ruling were misinterpreted and suggested that district court decisions from a different jurisdictions also persuasively support

the proposition that the passage of time alone can constitute "unnecessary delay" that requires an IEE regardless of the appropriateness of the school district's evaluation. Notably absent from Parents' argument, however, is any reference to *L.S.* v. *Abington School District,* U.S. Dist. LEXIS 73047 (E.D. Pa. 2007) at *3, *10; *Reconsideration Denied*, 2008 U.S. Dist. LEXIS 29236 (E.D. Pa. 2008), in which the district court concluded that even if an "unnecessary delay" constitutes an IDEA procedural violation, relief is available only if parents can establish an adverse effect arising from the delay. The analysis and conclusion in that decision is at least equally as persuasive as the cases cited by Parents, and supports looking to the substantive effect, if any, attributable to the amount of time that passed between a parent request for an IEE and a school district due process complaint.

3. Upon further reflection on the meaning of the term "unnecessary delay" in light of the various sources that guide application of the term to specific circumstances, it appears that it is most reasonable to consider and balance three factors in determining whether a school district has unreasonably delayed filing a due process complaint after a parent IEE request: 1) The amount of time that passed; 2) the reason for the delay; 3) the substantive effect, if any, attributable to the delay. It is obvious that the specific circumstances of each case might give greater weight to one or more of the factors. In many cases, passage of time alone is much too arbitrary a basis for determining whether a delay is "unnecessary." That is well-illustrated with respect to this case by considering the amount of time that passed here in comparison to the *Avon Grove* decision, in which 6 months was found to be too long and the *Abington School District* court decision in which three months was within the "window" of an acceptable amount of time. Here, despite the findings of fact and conclusion in the summary judgment decision that the first 30 days should be excepted from the period of "delay," Parents still considered the delay to be 5

months, presumably close enough to the 6 month period in *Avon Grove* to constitute an "unnecessary delay." Using October 31, 2012 as the date on which the District's obligation to file a complaint accrued, however, the delay was only two months, less than the amount of time found acceptable in the *Abington School District* decision.

Obviously, because the obligation of a school district after denying a parent IEE request is to file a complaint without "unnecessary delay," the amount of time is an important consideration. No doubt there are circumstances in which an inordinate delay would support a presumption of an adverse effect. Conversely, an obvious detriment to an eligible child based arising from a failure to respond to an IEE request quickly would support a conclusion that parents can obtain an IEE based upon the passage of a shorter amount of time. Whether a school district has a good reason for the delay, such as *e.g.*, a good faith belief that parents had withdrawn the IEE request, is another factor that needs to be assessed in determining whether there was an unnecessary delay in filing. Balancing those three considerations is far more likely to result in a reasoned decision than selecting an amount of time such as three months or six months and calculating how far the date of the complaint was from the benchmark. Although not explicitly stated, prior decisions concerning "unnecessary delay" fit easily into balancing those three factors.

In the *Avon Grove* decision, the hearing officer explicitly relied on the passage of time, yet the facts included in the decision strongly suggest that the lack of a good reason for the delay and the substantive effect of the absence of a comprehensive speech/language evaluation also strongly supported a finding of unnecessary delay. In the *Abington School District* decision, the court determined, in effect, that all three factors suggested that the time between the request and the school district's complaint did not support an "unnecessary delay" conclusion, since the court referred to a "window" of time for a complaint established by the court of appeals, noted that the

school district was attempting to settle the issue in the period between the request and the date the complaint was filed, and concluded that parents had not demonstrated an adverse substantive effect arising from the delay.

Here, returning to Parents' contention that the entire period from October 2, 2012 until the December 26 complaint should be considered in determining an unnecessary delay, the months between Parents' first request for an independent FBA and the District's due process complaint was divided into two periods, from October 2 to October 30, 2012 and from October 31 to the date the complaint was filed. During the first period, the parties were engaged in two due process hearings and settlement negotiations. Because the IEE request was intertwined with a potential settlement involving an out of district placement, there was no reason for the District to consider a complaint based upon the IEE request. As noted in the summary judgment ruling, however, that changed on October 31, when the District clearly understood that Parents were requesting an independent FBA. (Appendix p. 5) Although the District waited two months to file its complaint without any good reason, the amount of time that passed was not inordinately long. Neither the amount of time that passed before the complaint nor the District's lack of a good reason for waiting eight weeks rather than filing a complaint earlier gives either party a strong basis for prevailing on the question of "unreasonable delay." Consequently, the determining factor in this case on the question of whether there was an "unnecessary delay" turned most strongly in the issue whether the delay had an adverse substantive effect on Student.

Despite the invitation to Parents to present evidence of a substantive effect arising from the passage of time between the independent FBA request and the District's complaint, Parents primarily maintained the legal position that establishing a substantive effect should not be a part of the analysis of whether there was an "unnecessary delay." Although, as discussed below,

Parents' counsel indicated during the questioning of Parents' expert that opinions sought concerning the appropriateness of the MDS classroom were relevant to establishing a substantive effect, Parents' closing argument did explicitly address Student's placement in the MDS class in terms of establishing an adverse substantive effect on Student's educational progress arising from the time between Parents' IEE request and the District's due process complaint.

Multiple Disabilities Support Classroom

A significant part of Parents' closing argument was devoted to explaining Parents' position and views concerning their disagreement with Student's placement in the multiple disabilities class. Parents' reason(s) for pursuing that argument in this case is not, however, entirely clear. The issues, listed on p. 2 above, were stated on the record after opening statements, and both parties agreed on the record that the issues identified by the hearing officer were the matters to be decided based upon the hearing record that would be compiled. (N.T. pp. 46, 47) Nothing in the statement of the issues suggests that the appropriateness of Student's current placement is an independent issue to be decided in this case.

The District was permitted to change Student's placement to the multiple disabilities class after a due process hearing in which Parents presumably had the opportunity to prospectively make the same or similar arguments. To the extent such arguments were made, they were rejected by the hearing officer who ordered the MDS placement. The first hearing decision, however, was not expected to determine a permanent placement. Rather, the placement order was limited to 45 school days pursuant to 34 C.F.R. §§300.530(g)(3), 532(a). The record in this case established that Student has remained in the MDS class on a full-time basis since the end of the 45 day placement, since Parents took no steps to prevent the District from continuing to implement that placement, despite rejecting the District's NOREP to continue that placement.

(FF 7) Nothing in the record of this case suggests that the appropriateness of the MDS placement in terms of either LRE concerns or effectiveness for Student's educational progress is a matter to be considered independently, as a basis for the decision in this case.

Because Parents were on notice prior to the third hearing session that the issue whether Parents could prevail on the basis of the District's "unnecessary delay" in requesting the due process hearing after Parents' request for an independent FBA could only be established if there was an adverse substantive effect on Student, Parents' disagreement with the appropriateness of the MDS classroom could have been used as a basis for that claim. As noted above, however, Parents continued to maintain the legal position that an adverse substantive effect is not necessary in considering whether there was an unnecessary delay by the District, and that it should not be their burden to prove that issue. Parents have neither argued that the continuation of the MDS placement is due to the lack of an independent FBA, nor produced evidence, other than the opinion of their expert witness based upon a brief observation and surmise, that the MDS placement does not provide Student with the opportunity to make reasonable educational progress. If Parents' inclusion of argument concerning the appropriateness of the MDS class was intended to establish that substantive harm from the District's delay in filing a due process complaint arose from continuation of the MDS placement while they were waiting to hear whether the District would fund an independent FBA, and then during the due process hearing, they did not provide relevant evidence to support such a contention.

First, the initial 45 school days of Student's placement in the MDS class came about via a hearing officer decision and order, and, therefore, cannot be attributed to the timing of the District's due process complaint after receiving Parents' IEE request on October 30. The District was entitled to maintain Student's placement in the MDS class for 45 school days in accordance

with the order. Second, the District issued a NOREP to maintain the MDS placement once the 45 school days ended. At that point, after rejecting the NOREP, Parents could have initiated a due process complaint to prevent implementation of the NOREP, which would have returned Student to the original regular education placement unless the District filed an additional due process complaint to maintain the MDS placement, but Parents did not take such action. Consequently, regardless of the appropriateness of the MDS class, continuation of that placement cannot be attributed to the District's delay in filing a due process complaint after Parents' request for an independent FBA.

Because there was no direct issue in this case concerning Student's placement in the MDS class, and no indirect issue, based upon Parents' legal arguments relating to establishing "unnecessary delay" and the lack of sufficient evidence to establish an adverse substantive effect on Student arising from the MDS placement, this decision includes no findings of fact relating to the MDS class and no further discussion of that placement.

Appropriateness of the District FBA

The primary purpose of engaging in the process of developing an FBA is to compile data concerning behaviors of concern from close observation of a student, evaluate the data to identify patterns in the student's behaviors of concern, and discern relationships among setting events, antecedents and consequences in order to specifically describe when and where behaviors occur and develop hypotheses concerning the reasons a student engages in those behaviors. (FF 9, 11, 12) The goal of an FBA is to develop a positive behavior support plan that will prevent the situations/circumstances that lead to the behaviors interrupt the sequence of events likely to lead to unacceptable behaviors, if possible, and ultimately provide the student with acceptable alternatives to the unacceptable behaviors that better serve the same function(s) as the

maladaptive behaviors. (FF 10) In order to be substantively appropriate, an FBA should be reasonably likely to reach those goals.

In this case, the District has been unable to identify patterns in Student's behaviors and reliably predict or prevent occurrences of Student's unacceptable behaviors, particularly the most concerning behavior, aggression directed against peers and adults. The District explains this failure of its October 2, 2012 FBA to provide more information to inform responses and strategies to the continuing need to establish better "instructional control" of Student. An important part of the continuing difficulties with Student's behaviors, however, is the inability of District staff to consistently maintain instructional control of Student. The intermittent lack of instructional control occurs because Student's difficult behaviors have continued from the date the FBA was completed through the date of the last due process hearing in late March 2013. The FBA, therefore, has not effectively provided a framework for enabling the District to improve instructional control.

Although there was evidence that Student's behaviors have improved, the record provided little, if any indication that the FBA provided much, if any, assistance to District staff in terms of providing a basis for developing better strategies that will prevent or interrupt the aggressive behaviors, in particular. The District's position left the impression that the FBA should be assessed in terms of whether it included all necessary parts rather than in terms of its effectiveness as an organizing tool for making sense of the extensive data the District continues to compile. The record does not support the usefulness of the District's FBA as an evaluation that can—or has—provided a basis for developing effective strategies for realizing more significant and consistent improvement to Student's aggressive behaviors, in particular.

The District may be largely correct in its position that the behavior support plan in place has been working, that Student's behavior is slowly improving and that Student will be able to gain control of aggressive behaviors after a time with continued implementation of the behavior plan and improved communication skills. (FF 15, 16, 17) There is, however, no reason to conclude that whatever success the District has experienced in improving Student's behaviors can be attributed to the current FBA. Moreover, the school year is nearly over and the District has, at best, been only incrementally successful at extinguishing aggressive behaviors toward peers and adult staff, which must be brought under much better control in order to assure that Student can at some point be introduced to a less restrictive placement.

Moreover, as discussed above, the record in this case leaves no doubt that the situation with this Student would benefit from a "fresh eye," beginning with data collection by one or more individuals who are not simultaneously engaged in trying to implement instruction, implement the behavior strategies and prevent aggressive behaviors in order to protect peers. Evaluation of the data will also benefit from an independent view.

Independent FBA

An independent FBA is clearly warranted based upon the entirety of the circumstances in this case. At this point, even if Parents were to consent to an updated FBA conducted only by the District, Parents would almost certainly disagree with the results if it did not include a recommendation for a change of placement from the MDS class. On the other hand, however, the same situation is very likely to occur if an independent FBA is ordered and Parents' expert witness who testified at the hearing is permitted to conduct it. Without data, on the basis of a very limited observation, Parents' expert was quick to opine on the limitations of the MDS class, both socially and educationally. Moreover, the expert concluded that Student's behaviors were

under control, but based upon external controls. (FF 31, 32) Within a week or two of the expert's observation, however, Student's behaviors escalated and new behaviors arose. (FF26).

One of the difficulties associated with conducting an FBA is the level of subjectivity necessarily involved in determining what to include in an observation and in determining the perceived functions of the behaviors, as well as in identifying antecedents and setting events related to behaviors of concern. It is not difficult to imagine that if an FBA by Parents' expert included the opinion that the MDS class is an antecedent or setting event that must be changed immediately in order to develop an appropriate and successful behavior support plan, the District would be inclined to reject that conclusion, given the opinions already expressed during testimony concerning the appropriateness of the MDS class for Student.

These comments are not meant to suggest that an FBA conducted by Parents' preferred expert would not be competently or objectively completed. It may be that based upon her experience, the witness can draw accurate conclusions with limited exposure to Student and the MDS class, or that data collected in an FBA, and the witness's analysis of the data, would be suspect if it supports the conclusions expressed during the expert's hearing testimony. The point is that no matter how rigorous the data collection or cogent the analysis, the District is unlikely to accept as accurate, and implement the recommendations of an FBA that supports views already expressed at the hearing, particularly concerning the role and effect of the MDS class on Student' current behavioral functioning.

To assure, to the extent possible, that both parties will approach a new FBA with open minds, the District will be ordered to fund an independent FBA, but not by Parents' expert witness. The IDEA regulations do not require or guarantee an unfettered choice of an independent evaluator when an IEE is ordered. As noted above, an evaluation is "independent"

as long as it is not conducted by the LEA responsible for the provision of FAPE to a student. 34 C.F.R. §300.502(a)(3) is "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." There are numerous public and private agencies in Pennsylvania that employ competent BCBAs who regularly conduct functional behavioral assessments. The District will be responsible for identifying at least 10 such agencies and/or individuals within agencies who can conduct an FBA. If Parents prefer that the public agency that was responsible for Student's pre-school programming also not be considered as a provider, they shall notify the District of that immediately, and that IU will not be part of the District's proposed list.

Any individual on the District's list of proposed evaluators must be a BCBA with at least 5 years experience in conducting FBAs. Any agency suggested by the District must have at least one person on staff with those qualifications. The District will be required to provide the list to Parents to choose an agency, or an individual, to conduct the FBA. Parents may conduct a similar investigation of Pennsylvania public or private evaluators/agencies and propose a list for the District to review, or wait to review the District's list. Parents and the District will agree upon an independent evaluator from the list(s). In the event the parties cannot agree within one week of exchanging list, or of Parents receiving the District's list, the evaluator with the most experience, determined by a combination of the number of years certified and the number of FBAs in the closest geographic proximity to the District will be the first choice. Specific experience conducting FBAs of children with very challenging behaviors, with a developmental delay/autism or intellectual disability diagnosis will be weighted more heavily in the event that several BCBAs fit the default criteria.

The FBA must include at least three all day observations of Student in the school setting, preferably not in the same week or on the same day of the week, as well as a review of records other than the District's FBA, which the evaluator shall not be permitted to review until after the independent FBA report is completed. The independent evaluator may have access to the District's underlying behavior data on Student from the beginning of the current school year to the date such request is made, but independent evaluator will not be provided with the District's data until after the independent evaluator's data collection is completed. The independent FBA report will be presented to both District and Parent simultaneously, and at least 5 days in advance of a meeting of Student's IEP team, including Parents, with the independent evaluator to review and discuss the FBA report. Parents may require the full 10 day review period prior to the meeting, but the review period may not be reduced to fewer than 5 days.

The parties may alter any of the foregoing terms and conditions of the FBA by agreement, but if the parties express a mutual desire to discuss and possibly revise any term, and the parties are unable to reach an agreement on any specific provision, the order will control as to that provision.

Because updated FBAs going forward are likely to be essential for at least the next school year, the District will permitted to update its FBA simultaneously, in order to have a full comparison with the independent FBA. If the District proceeds with its own FBA, it is not permitted to provide the independent evaluator with access to its current data, conclusions or full report until after the independent FBA report is provided to both parties. The District will provide its FBA to Parent at least 10 days before the IEP meeting to review the FBA report(s).

If it is not possible for the independent FBA data collection to be completed by the end of the current school year and complete the FBA report before August 15, 2013, additional data will

be collected for the independent FBA between the date school begins for the 2013/2014 school year through the first several weeks of school, but the final independent FBA report must be provided to the parties no later than September 30, 2013.

The District may update and revise its own FBA based upon new data collection, if the District considers it necessary during the 2013/2014 school year, and Parents may request another independent FBA, as provided in the IDEA regulations, no earlier than December 26, 2013, but only if the District has produced an update to the independent FBA and the District's simultaneous FBA, if any.

If an evaluator truly independent of both parties comes to the same conclusion as either the District or Parents' expert, or reaches conclusions somewhere in the middle of the parties' positions, the parties will have a better chance of putting aside their mutual suspicions and mistrust and find a way to work together more successfully, which can only benefit Student.

ORDER

1. In accordance with the foregoing findings of fact and conclusions of law, as well as the Memorandum and Order dated March 24, 2013 and attached hereto as the Appendix, it is **HEREBY ORDERED** that Parents' Motion for Summary Judgment is **DENIED** with respect to whether the time that elapsed between the Parents' request for an independent evaluation at public expense and the District's denial of that request and initiation of the due process complaint in this case constituted an "unnecessary delay" in violation of the IDEA statute and regulations.

2. In accordance with the foregoing findings of fact and conclusions of law concerning the appropriateness of the School District Functional Behavioral Assessment (FBA) and the need for

a publicly funded independent FBA, the School District is hereby **ORDERED** to take the following actions:

2.1 Within 10 days of this order, provide Parents with a list of no fewer than 10 public or private agencies and/or individuals in Pennsylvania competent to conduct a comprehensive FBA in accordance with the qualifications listed in the final section of the accompanying decision.

2.2 Assure that the terms and conditions described in the final section of the accompanying decision are fulfilled with respect to Parents' choice of an independent evaluator, including identifying an independent evaluator in the event Parents do not respond with their choice of an evaluator

2.3 Contract with an agency or individual to conduct an independent FBA no later than May 30, 2013 that, at a minimum, meets the standards described in the final section of the accompanying decision.

2.4 Assure that all other terms and conditions concerning an independent FBA described in the final section of the accompanying decision are fulfilled.

3. It is **FURTHER ORDERED** that the parties may alter any of the foregoing terms and conditions relating to the independent FBA by agreement, but if the parties are unable to reach an agreement on any specific provision, this order will control as to that provision.

4. It is **FURTHER ORDERED** that the District may update and revise its own FBA based upon new data collection, if the District considers it necessary, at the same time the independent FBA is being conducted and as the District considers necessary during the 2013/2014 school year.

5. It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

Anne L. Carroll

_____

Anne L. Carroll, Esq.
HEARING OFFICER

May 4, 2013

APPENDIX

Pennsylvania
Special Education Hearing Officer

ODR No. 13373-1213 AS

IN RE: THE EDUCATIONAL ASSIGNMENT OF

I.W.

A STUDENT IN THE
PENN-DELCO SCHOOL DISTRICT

DECISION OF THE HEARING OFFICER RE:
PARENTS' MOTION FOR SUMMARY JUDGMENT

Dated: March 24, 2013

Anne L. Carroll, Esq.
Hearing Officer

Introduction/Procedural History

The due process complaint in this matter was submitted by the School District on December 26, 2012 after it denied Parents' request for an independent functional behavioral assessment (FBA) in a NOREP dated 12/14/12 and Parent disapproved the NOREP. (S-13)

Before the first hearing session was convened, Parents moved for summary judgment, contending that because Parents had first requested an independent FBA at public expense in early October 2012, and the District neither provided it nor filed a due process complaint at that time, there was an "unnecessary delay" by the District in carrying out the responsibility imposed by the IDEA statute and regulations with respect to a parent request for a publicly funded IEE. In accordance with 34 C.F.R. §300.502(b), a school district "must, without unnecessary delay," either agree to provide the IEE or file a due process complaint to support the appropriateness of its evaluation.

Parents' motion was based upon a recent administrative hearing decision in which the hearing officer declined to consider the appropriateness of a school district evaluation after concluding that the time between parents' renewed request for an IEE in May 2012 and the district's November 2012 due process complaint constituted an "unnecessary delay." The hearing officer further concluded that such procedural violation warranted a decision in favor of parents without regard to the appropriateness of the evaluation with which parents disagreed. *In Re: Avon Grove School District v. C.L.*, ODR # 13201-1213 AS (Culleton, Jan. 16, 2013).

Although the parties were informed via an e-mail message and during the pre-hearing conference that the issue of unnecessary delay would be addressed in the final decision after a full record was compiled on all aspects of the parties' dispute, an evidentiary issue arose during

the second hearing session that requires initial consideration of Parents' delay argument prior to completion of the entire record.

To provide evidence in support of their contention that the District had unnecessarily delayed filing a due process complaint, Parents called their former attorney to testify to the circumstances surrounding her October 2012 request for an independent FBA on behalf of Parents. The District objected to the testimony, contending that it would necessarily involve the substance of settlement negotiations relating to two prior due process complaints between the same parties. In addition, counsel for the District contended that because she was involved in those events and might need to testify to the discussions between counsel concerning what occurred between counsel in October 2012, a different attorney for the District would be needed to cross examine Parent's prior attorney.

The District's objection to the testimony of Parents' prior attorney was overruled, but the question of the need for a different attorney to cross-examine Parents' attorney, and possibly examine the District's attorney concerning discussions between counsel that occurred in October 2012 was left open at the end of the last hearing session. Since the direct examination of the attorney ended just before the previously agreed time for adjourning the hearing session, and there were several weeks before the next scheduled session, circumstances permitted time for consideration of Parents' motion for summary judgment in light of the evidence they presented on the issue of unnecessary delay, including the testimony of the District's director of special education, as well as the testimony of Parents' prior attorney. Of greatest immediate importance is the question whether the District needs to cross-examine Parents' former attorney in order to effectively defend the claim of unnecessary delay.

Upon review of the record relating to the timing of the due process complaint in relation to Parents' request for a publicly funded independent FBA, and all circumstances relating to the independent FBA request, I conclude, initially, that there is sufficient evidence in the testimony and exhibits already in the record to establish the relevant facts concerning that issue for the period between October 2 and October 31, 2012. Additional testimony via cross-examination of Parents' former attorney is, therefore, unnecessary. Consequently, there is no need for the attorney to return for cross examination by an attorney for the District at the next hearing session.

In addition, consideration of the facts relating to the timing of the District's complaint in light of the somewhat sparse legal standards leads to the conclusion that there is no basis for finding a procedural violation by the District so serious that it supports a decision in favor of Parents based solely upon an "unnecessary delay" in filing the due process complaint, without considering the appropriateness of the FBA the District is defending. Parents are not, however, precluded from presenting evidence, or arguing, that the delay between Parents' request for an independent FBA at public expense and the due process complaint caused or contributed to a substantive IDEA violation, *i.e.*, an adverse effect upon the provision of a FAPE to Student based on the timing of the complaint, or substantially interfered with Parents' ability to obtain an independent FBA.

Facts Relating to Parents' Motion

Parents filed a complaint against the District in June 2012 on which an initial hearing session was held on September 21. (N.T. pp. 312, 315, 356, 357, 361) Before a second session convened, the District removed Student from the agreed placement and filed a complaint seeking approval of a 45 day interim alternative placement in its multiple disabilities classroom, which

the hearing officer ordered based upon her conclusion that "maintaining the Student's last agreed-upon placement is substantially likely to result in injury to the child or others." (N.T. pp. 314, 315, 364); *In Re: I.W.*, ODR #13158-1213 AS (Valentini, Oct. 29, 2012) at p. 11.

At an October 2 IEP meeting, the parties began a discussion of settlement of the Parents' case, as well as the issue of a 45 day placement which was to be the subject of the complaint the District was preparing to file. The negotiations centered on a proposal that the District would support a suitable private placement for Student to resolve the ongoing litigation. (N.T. pp. 317, 338, 363—365) In the context of those discussions, Parents' counsel also proposed that the District fund an independent FBA as part of an agreement to an out of District placement. (N.T. pp. 322, 323, 338, 339, 364, 365; S-24 p. 2)

In mid-October, Parents' counsel corresponded with District counsel inquiring as to the status of the independent FBA first discussed in early October, stating that the District had agreed to fund the FBA. (P-16 p. 11) By that time, the District had filed its complaint and the parties were in the midst of the hearing to determine whether the District would be permitted to implement the 45 day placement. In an e-mail message responding to the message from Parents' counsel, District counsel denied that there was an agreement for a publicly funded FBA. (P-16 p. 11, S-24 p. 2)

Ultimately, Parents determined that none of the potential out of District placements were suitable for Student. (N.T. pp. 366, 367) Settlement negotiations, therefore, were unsuccessful. Nevertheless, Parents withdrew their due process complaint the day after the decision on the District's complaint was issued. (S-22) The following day, October 31, Parents' Counsel sent another e-mail to District counsel asking whether the District had made a decision concerning the independent FBA request. (P-16 p. 13) At that point, the District understood that Parents were

requesting an independent FBA outside of the context of settling the matters in dispute. (N.T. pp. 330, 340) The District, however, did not take any further action on the request for an independent FBA until Parents renewed their request at an IEP meeting on December 6, 2012. (P-16 p. 15, S-13) After the IEP meeting, the District issued a NOREP denying Parents' request for an independent FBA at public expense and filed its due process complaint after Parent disapproved the NOREP on December 18. (S-13 p. 4).

Legal Standards

Although the IDEA regulations clearly expect that school districts will act decisively and expeditiously when parents request a publicly funded IEE, the regulations also contemplate that there are situations in which some delay is justified, since LEAs are commanded to respond with an agreement to fund the IEE or by filing a due process complaint without "unnecessary" delay. 34 C.F.R.§300.502(b)(2) The regulations, however, provide no guidance with respect to when—or whether in any circumstances—passage of time alone might be deemed an "unnecessary" delay, or factors that should be considered in determining whether an LEA failed to meet the required standard.

A district court that considered whether a 10 week delay between parents' initial request for an IEE and the school district's filing of a due process complaint amounted to a procedural IDEA violation base on the "unnecessary delay" provision of §502(b)(2) concluded that it did not. *L.S.* v. *Abington School District*, U.S. Dist. LEXIS 73047 (E.D. Pa. 2007) at *3, *10; *Reconsideration Denied*, 2008 U.S. Dist. LEXIS 29236 (E.D. Pa. 2008). The court noted that in *Holmes v. Millcreek Township Sch. Dist.*, 205 F.3d 583, 590 (3d Cir.2000), the Court of Appeals found that a 3 month delay in initiating a due process complaint was not an "unnecessary delay." The district court concluded that the district's due process complaint in the *Abington School*

District case was within the "window" established by the *Holmes* decision. *Id.* at *10. In addition, the court considered the school district's efforts to resolve the dispute in the period between parents' IEE request and the due process complaint a good reason for delaying its due process complaint. *Id.* Finally, the court concluded that even if the delay in filing a complaint were considered a procedural violation, no remedy was available unless parents demonstrated an adverse effect on the provision of FAPE to the child. *Id.*

Guidance from OSEP on the question of "unnecessary delay" also suggests that in determining whether a delay between receipt of an IEE request and a school district due process complaint is "unnecessary" the key inquiry is whether the passage of time adversely affected the child's access to a FAPE, and possibly to an independent evaluation. *See Letter to Saperstone*, 21 IDELR 1127 (OSEP 1994); *Letter to Anonymous*, 21 IDELR 1185 (OSEP 1994); *Letter to Anonymous*, 23 IDELR 719 (OSEP 1995).

Parents are correct that in the January 2013 administrative decision in the *Avon Grove* case, cited above, the hearing officer concluded that the passage of six months between parents' renewed IEE request and a district due process complaint constituted an "unnecessary" delay. Further, the hearing officer characterized the unnecessary delay as a procedural violation that supported a decision in favor of the parents on that basis alone, without considering the appropriateness of the district's evaluation.

It must be noted, however, that although not explicitly discussed as a basis for the outcome, the facts the hearing officer found in the *Avon Grove* decision established that the child's substantive right to a FAPE was very likely adversely affected by the district's delay in either funding a speech/language IEE or filing a due process complaint to test the adequacy of the district's speech/language evaluation. In *Avon Grove*, the District had agreed to fund a

private evaluation by a provider on a pre-approved list, which apparently did not include a speech/language pathologist, although parents had specifically requested an independent speech/language evaluation and the district had apparently agreed to provide it. (Decision at p. 3, FF. 11, 12, 13, 14, 15) After the independent evaluation was completed, the district refused to credit the conclusion of the approved evaluator, a neuropsychologist, that the student's difficulties with speech/language issues adversely impacted academic functioning, or the suggestion of a significant oral-motor condition, or the recommendation for speech/language services. (*See* Decision, p. 4, FF 19) Moreover, the district also did not suggest providing a comprehensive speech/language evaluation by either its own staff or an independent provider. Instead, it ignored parents' request for a speech/language IEE for six months before filing a due process complaint. (Decision at p. 10)

In light of the *Abington School District* decision, the OSEP letters, the factual circumstances presented by the *Avon Grove* case, and the requirements of 34 C.F.R. §300.513(a)(2), which provides that a procedural violation must lead to a denial of FAPE or denial of an educational benefit to support a remedy, I conclude that an "unnecessary delay" under §300.502 (b)(2) cannot be the sole basis for a decision in favor of parents on an IEE request unless they establish a substantive effect arising from the delay.

Did the Timing of the District's Due Process Complaint in Response to Parents' Request for an Independent FBA at Public Expense Constitute an "Unnecessary Delay" and Thereby Violate IDEA ?

In this case, the facts relating to the events that occurred between the beginning of October 2012, when the issue of an independent FBA was first raised by Parents' former attorney, and the December 26th due process complaint are well established by the record. The independent FBA request first arose in the context of a discussion of the resolution of all matters

in dispute at the time. Between that first discussion and October 18, Parents' counsel believed that the District had agreed to fund an independent FBA, even in the absence of a full settlement of the matters in dispute, but the District disputed that there was such an agreement. In addition, the parties were engaged in an ongoing due process hearing. The attorney representing Parents in that hearing forthrightly testified that on October 18, when the District first denied an agreement to fund the FBA, she was too engrossed in preparing for the hearing to follow up at that time.

Although there is no reason not to accept the attorney's testimony that she intended to request an independent FBA whether or not the parties reached an agreement on all issues, it was also not unreasonable for the District to believe that the issues of an FBA and an agreed alternative placement were intertwined, also not unreasonable for the District to disagree that there was an agreement for an independent FBA outside of a full settlement, and not unreasonable for the District to take no further action with respect to granting or denying an independent FBA during the remainder of October, when the hearing on the District's complaint was ongoing and while the parties were waiting for a decision. The record, therefore, does not support a conclusion that the time between the initial independent FBA request on October 2nd and the October 29 decision constituted an unreasonable delay in responding to Parents' request.

As the District's director of special education acknowledged, however, once Parents' counsel renewed the request for an independent FBA on October 31, the District understood that it was then required to either agree to fund the independent FBA or to file a due process complaint. (N.T. p. 330) The District, however, took no further action between October 31 and mid-December, when the District issued a NOREP rejecting the independent FBA request that Parent had renewed at the December 6th IEP meeting. There is nothing in the record explaining

why the District did not act sooner, but also nothing in the record, as yet, suggesting that there was an adverse effect on the provision of FAPE to Student arising solely from the District's delay in formally rejecting the IEE request via NOREP in mid-December and then filing a due process complaint in late December, after Parents disapproved the NOREP.

Consequently, there is no basis, at least at present, for determining that the District's inaction between October 31 and the late December due process complaint constituted an "unnecessary" delay. There is also no basis for determining that the time that passed between October 31 and December 26 supports a decision in Parents' favor, since there is no evidence that the delay alone had any substantive effect on the provision of FAPE to Student, or affected Parents' ability to obtain an independent FBA. Although Parents may certainly produce evidence on the question of an adverse substantive effect of any procedural violation that may have occurred, it is difficult to imagine how, in this case, the issue of an adverse effect based on the timing of the due process complaint can be separated from the ultimate issue of the appropriateness of the FBA. If the full record does not support the appropriateness of the District's FBA, Parents will be entitled to an independent FBA funded by the District regardless whether the District violated IDEA procedural requirements. If the record ultimately leads to the conclusion that the District's FBA is appropriate, it is difficult to conceive of evidence that would establish that Student was adversely impacted by the District's timing in filing the due process complaint. Parents, however, are certainly not precluded from arguing that point based upon the full record.

At this time, based upon the partial record, Parents' motion for summary judgment is **DENIED** in part, and a final decision is **RESERVED** in part.

The motion is **DENIED** insofar as Parents contend that the time between October 2nd and October 31st constitutes, or contributes to, an unnecessary delay in the District's filing of a due process complaint, and **DENIED** insofar as Parents contend that the passage of 8 weeks between the time the District explicitly understood that Parents were requesting an independent FBA and the District's due process complaint constitutes an "unnecessary delay" supporting a decision in favor of Parents without evidence of an adverse substantive effect on Student and without regard to the appropriateness of the District's FBA.

Decision on Parents' motion for summary judgment is **RESERVED** until completion of the entire hearing record insofar as Parents may contend, and produce evidence to establish, that the period between October 31 and the late December due process complaint was an "unnecessary delay" that had an adverse substantive impact on the provision of FAPE to Student or on Student's ability to obtain an independent FBA.

Dated: March 24, 2013

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER