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: B.T.

Date of Birth: [redacted]

Date of Hearing: August 24, 2015

OPEN HEARING

ODR Cases # 16631-15-16 KE

Parties to the Hearing:	Representative:
Parent[s]	Pro Se
Pennridge School District 1200 N. 5th Street Perkasie, Pa 18944	Thomas Warner, Esquire Sweet, Stevens, Katz & Williams, LLP 331 Butler Avenue New Britain PA 18901
Date Record Closed:	August 24, 2015
Date of Decision:	August 28, 2015
Hearing Officer:	Charles W. Jelley, Esquire LL.M.

INTRODUCTION

The Student (hereafter Student)[1] is [a preteen-aged] 6th grade elementary student in the Pennridge School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA). (SD-1)[2] The Parties agree the Student is a person who is Deaf, Autistic, Visually Impaired, and is also diagnosed with Attention Deficit Hyperactivity Disorder (Due Process Complaint Notice; SD-1). The Student also has a Cochlear Implant (N.T.p.18).

A. PROCEDURAL HISTORY

On or about August 4th 2015, the Office for Dispute Resolution (ODR) assigned this action to Hearing Officer Brian Ford, Esq. Hearing Officer Ford, on or about August 10 2015, transferred jurisdiction to this Hearing Officer. This Hearing Officer, by email that date, contacted the Parties to set a date and time for a pre-hearing conference call. The call was initially set for Thursday, August 13 2015, the call was subsequently rescheduled as the Student had a previously scheduled medical appointment at [an area hospital for children] on the date. The call was then set for Friday, August 14 2015; although the conference call took place, mother was not

[1] In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. Gender-neutral pronouns will be utilized throughout the decision to protect the student's confidentiality.

[2] 20 U.S.C. §§ 1400-1482. All references to school district exhibits will be marked as SD-#. Similarly, references to the transcript will be marked as N.T.p.. It is this hearing officer's preference at times, to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818 and the companion state regulations found at 24 PA Code §§14.101-14.162.
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available. The Hearing Officer immediately sent the mother an email to learn her position and discover why she did not participate. On Saturday 15 2015, at 6:23 am, Mother acknowledge receipt of the email, missing the call and referenced that she was collaborating with the District about a potential resolution. On Monday, August 17 2015 the Hearing Officer was again advised by the Parties of a possible resolution.

B. THE STAY PUT CONTROVERSY

On August 18th 2015, some 6 days before the hearing, in an email the District's counsel stated:

> The issue of pendency is also of import here. If we begin a hearing on Monday, [August 24] we will not have a final decision by the District's first day of school on Monday, August 31. While the District does not dispute that the December 17, 2014 IEP (not the June 23, 2015 IEP recommended by the District) describes the last agreed-upon program and placement, it does not believe that the term "placement" in any way pertains to any particular named school *building*. Accordingly, it is the District's position that the December 17, 2014 IEP (which places [Student] in Autistic Support) is pendent, but that it should be implemented in a 6th grade setting. As the District does not operate a middle school Autistic Support program for students at [Student]'s level of functioning, it would implement the proposed IEP in an IU-run classroom at [a] Middle School in the neighboring [Redacted] School District (with District-provided transportation). (Email on file with the Hearing Officer and in the possession of the Parties)

While, the District acknowledges the December IEP is the pendent IEP describing a host of direct, related, supplemental aids and services, the type and level of intervention, they contend however, that advancement from grade to grade is the natural progression, they further contend the child should be promoted to a 6th grade as these proceedings take place (N.T.pp.24; 86). To address the proposed change in

the "status quo" during the proceedings, the District suggested two solutions. First, the District offers to implement the December Autistic Support IEP in a 6th grade IU Autistic Support class, in neighboring school district. (N.T. p.24). Second, in the alternative it suggests, that the Hearing Officer substitute Learning Support for Autistic Support (N.T.p.23). The 5th grade IEP would then be implemented in the very same 6th grade Learning Support class mother rejected in a different building (N.T.p.24).

On August 19, 2015, the Hearing Officer notified District counsel that he would make email, telephone and text message contact with the Mother. Later that day, mother returned the call and stated that she was conferring with District counsel about a resolution. This Hearing Officer advised counsel of the call. Mother further stated that she would advise the Hearing Officer on August 20, 2015, if resolution was reached.

On August 20, 2015 confirmation arrived that discussions had broken down. Also, on August 20, 2015, the District's counsel advised the Hearing Officer, for the first time, that the District would seek to bar testimony, exhibits and documents from the Family. The District contended that they did not comply with the IDEA's 5 business day disclosure rule at 34 CFR 300.512(a)(3). The 5 day disclosure period and the ongoing post resolution session discussions talks overlapped (N.T. pp.26-29). Mother concedes she did not comply with the 5 day rule (N.T.p.9).

On Friday, August 21, 2015, I emailed the Parties informing each that with school beginning in a week's time, the testimony at the Monday, August 25 2015 due process hearing would be limited to the single issue of deciding the Student's "stay put" placement. I then bifurcated the hearing issues separating the "stay put" decision from the past denial of FAPE claim. Additional dates and times will be scheduled to complete the denial of FAPE hearing in a timely fashion.

On Monday, August 24th 2015, after a lengthy prehearing conference I granted in part and denied in part the District's Motion to limit the Family's introduction of testimony and exhibits. I granted the District's Motion to prohibit testimony by third parties and exhibits, however, the District conceded that Mother as the complaining party could testify on the limited issue of the "stay put - pendent placement" (N.T.p.10).

In closing arguments, the District offered two out of state administrative decisions and two out of state district court cases in support of what I will call its "changing circumstances" "stay put" theory. After hearing the arguments, I asked both Parties to provide a brief position statement as to the applicability of the *Drinker v. Colonial Sch. Dist.,* 78 F.3d 859, 864 (3d Cir. 1996) decision to the instant action. Both Parties submitted a writing on August 25, 2015. On that same date I received the transcript of the proceedings. Having reviewed the evidence, the testimony and the Parties' statements I am now prepared to decide the "stay put" issue.

STATEMENT OF THE ISSUES AND QUESTIONS PRESENTED

1. What is the Student's then functioning pendent IEP and placement?
2. Should the last agreed upon 5th grade Autistic Support IEP be changed while the due process action proceeds?

For the following reasons I find the last agreed upon December 2014 IEP is the pendent IEP. This IEP describes the level of intervention, type of intervention, goals, objectives, progress monitoring, specially designed instruction (SDIs) and modifications the Student received in the 2014-2015 school year. I further find, at this point in time, after careful and thoughtful consideration of the testimony, after reviewing the two IEP exhibits totaling 142 pages, the District's case law, along with the Parties' August 25th 2015 post hearing submissions the Student should remain in the 5th grade Autistic Support class, at [Redacted] Elementary. Until a final decision on the merits, this is the location of the "stay put" placement where the last agreed upon pendent December 2014 IEP should be implemented.

I also find that to move the Student one business day before the opening of school would likely affect in some significant way the child's learning experience. A promotion to the next grade level, at this time, would also be a fundamental change that is likely to have some impact on the child's learning experience in violation of Section 1415(j) of the IDEA. A change of this magnitude, at this late hour, would more likely than not cause the child, the teacher and the Family undue anxiety, fear and confusion. The first day of school for children, teachers and parents should be

filled with joy, excitement and hope. Under these facts, I believe that the pressure to prepare for a child with so many unique overlapping needs would create a highly pressurized situation that would place a deaf autistic child, with a Cochlear Implant, with limited verbal skills, and a visual impairment, who is prone to regression and recoupment difficulties, and [Student's] teacher at an extreme disadvantage. This is not to say, that after the record is fully developed, and after an opportunity to hear, in full, from each Party in detail about this child's FAPE needs, that I may in the future decide otherwise. While I understand the District's well intentioned position, under these unique facts, I find that either of the District's options may have "some significant impact on learning" as expected from the "then current" IEP. The likely "impact" on learning would affect the child, the IEP team and the Mother in violation of 20 U.S.C. Section 1415(j) otherwise known as the "stay put" or "pendency" provision of the Act.

I now write only for the Parties.

II. FINDINGS OF FACT

1. In December of 2014, the Parties created a sixty nine (69) page Individual Education Program (IEP) (SD-1).
2. The Parties agreed the December IEP would be implemented in an Autistic Support Class, operated by the [local] Intermediate Unit (IU), located at [Redacted] Elementary School in the district (SD-1).

3. The IEP notes that the type of intervention is Supplemental. (SD -1).
4. Supplemental Intervention provides the Student with special education supports and services from special education personnel for more than 20% but less than 80 % of the school day. 22 Pa Code. 14.105(c)(1)(iii).
5. The staff to student caseload for a Supplemental Autistic Support class is 1 teacher to 8 students. 22 Pa Code 14.105(c)(2). The applicable regulations describe Autistic Support as special education and support services focused on "….. the verbal and nonverbal communication needs of the child; social interaction skills and proficiencies; the child's response to sensory experiences and changes in the environment, daily routine and schedules; and, the need for positive behavior supports or behavioral interventions." 22 Pa Code. 14.131(a)(1)(i).
6. In addition to the Autistic Support, the Student also receives door to door transportation, Deaf/Hearing Support from a teacher, Speech and Language therapy, daily support from a language facilitator, Audiological Support, and Blind and Visually Impaired Support (SD-1 p.47).
7. The Student is included in regular education, at all other times, with [Student's] peers, with support from the Hearing Impaired Staff (SD-1).
8. The IEP team receives ongoing support from a Behavior Consultant, Vision Support along with support from an Occupational Therapist

(SD-1 p.59).

9. The December 2014 IEP provides upwards of 35 different forms of specially designed instruction (SDI) and modification (SD-1 pp.51-57). Examples of the SDI include, "Daily functional checks of cochlear implant", the "use of cochlear implant/personal FM system", "use of the hearing support staff for language/communication facilitation", "daily functional checks of the Cochlear Implant Ling 6 Sounds" and a "positive behavior support plan" (SD-1 pp.51-57).
10. The IEP list Special Factors like, "communication needs", "assistive technology needs" and provides for a positive behavior support plan to address behaviors that impede learning (SD-1 p.5).
11. To address [Student's] Autistic Support needs the IEP includes a "positive behavior support plan", "prompting cueing", "social skills training" "speech and language services" (SD-1 pp.51-57).
12. The Student's Autistic support academic needs are addressed by an autistic support teacher who provides direct one-on-one instruction for up to 120 minutes a day, in three targeted content areas, in a classroom of 8 rather than 20 students (SD-1 p.1).
13. The IEP team receives ongoing support from a Behavior Consultant, an Audiologist, Speech and Language Therapist, Hearing Support and an Occupational Therapist (SD-1p.58). These supports and SDIs must be

done each and every day (SD-1; SD-3).

14. On or about June 23, 2015, at an IEP conference, the District offered a seventy three (73) page IEP that proposed the Student move from the 5th grade [Redacted] Elementary School Autistic Support class to a 6th grade Learning Support Class at the middle school in the District (SD-3).

15. Learning Support services are for students with a disability who require services primarily in the areas of reading, writing, mathematics, or speaking or listening skills related to academic performance. 22 Pa code. 14.131(a)(1)(i).

16. The staff to student caseload for a Supplemental Learning Support class is 1 teacher to 20 students. 22 Pa Code. 14.105(c)(2).

17. Like the December IEP**,** the June IEP identified upwards of 36 different forms of specially designed instruction (SDI) and modification (SD-3 pp.52-57).

18. The June IEP updated several of the SDIs and modifications, while at the same time adding three new related services, like an Audiological assessment of the 6th grade classroom and a full time educational interpreter. The June IEP increased the December 2014 Hearing Support Services from 2 times per day for 30 minutes, totaling 300 minutes a week, to 720 minutes per week of Itinerant Hearing

Support/Teacher of the Deaf services (SD-3 p.59).

19. Without explanation in the body of the IEP, the June 2015 IEP changes the type of intervention from Supplemental Autistic Support to Supplemental Learning Support (SD-3).
20. On or about June 24, 2015, recognizing the above changes to the then functioning December IEP the District, provided the Mother with Prior Written Notice of the proposed changes (District August 2015, Response to Student's Due Process Complaint Notice).
21. On July 24, 2015, the Mother (hereinafter "Mother" "Parent" "Family") filed a pro se due process complaint. Mother disagreed with the proposed changes outlined in the NOREP (Due Process Complaint).
22. Mother contends that due to a lack of progress, the Student should be retained in the 5th grade (Due Process Complaint).
23. Mother further contends, that the NOREP changes will cause the child anxiety, disrupt [Student's] routine, eating, cause emotional issues, sleep problems, and lead to an increase in behavioral issues (N.T. pp. 17-18). Finally, she contends that the proposed NOREP changes will either inhibit learning or cause emotional issues as transition from bus driver to bus driver, school to school and teacher to teacher is a problem (N.T. pp. 17-18.)
24. The Student is otherwise eligible for Extended School Year (ESY)

therefore it is axiomatic that [Student] is prone to regression and recoupment difficulties (SD-1 p.60 and SD-3 p.61).

25. The District concedes the December IEP is the pendent IEP describing the host of services, type and level of intervention, they contend however, that advancement from grade to grade is the natural progression. They further contend the child's promotion to a 6th grade is a change in circumstances and therefore falls outside the traditional "stay put" "status quo" requirements at 20 U.S.C. Section 1415(j) (N.T. pp 24-26; 86).

26. To address the change in circumstance brought on by the 6th grade promotion, during the proceedings, the District suggested two solutions. First, the District offers to implement the December 2014 Autistic Support IEP in a 6th grade Intermediate Unit (IU) Autistic Support class, in neighboring school district. (N.T. p.24). Second, in the alternative it suggests, that the Hearing Officer substitute Learning Support for Autistic Support in the same 6th grade Learning Support class mother rejected in a different building (N.T.24).

27. Although, Mother otherwise agrees to much of the instructional content, modifications, related services and SDIs in the June IEP, she still contends the child's lack of progress, the advancement, classroom and building changes will cause the child to suffer, in essence fall

further behind, believing that [Student] will be overwhelmed in the new school (N.T.p.17-18).

28. Mother asks that two (2) of the new related services, in the June IEP, namely the educational interpreter/full time and the 720 minutes per week of Iterant Hearing Support/ Teacher of the Deaf services be implemented in the 5th grade Autistic Support class pending a final decision on the merits (N.T.pp.52-57).

29. The 6th grade June IEP also included a third related service. The IEP provides that an audiologist should conduct an assessment of the environment to determine communication barriers (SD-3p.59).

30. The Mother, as did two administrators, Ms. P., the District secondary special education supervisor who oversee IEPs for students moving from the elementary to the middle school and Ms. M., the IU Autistic Support Supervisor who oversees the 5th and 6th grade Autistic Support classes testified at the hearing. (N.T.pp.16-89).

31. The District proffered two exhibits, the first is the last agreed upon 69 page December 2014 IEP, and the second is the proposed 73 page June 2014 IEP (SD-1 and SD-3). Two other exhibits were withdrawn by the District (N.T. 95).

32. When Ms. P., the District secondary education supervisor of special education, was asked about her personal knowledge of the Student and

the pendent IEP, she responded that she "had not met or observed" the Student (N.T. 46-47). Similarly she could not address the Student's purported anxiety or deaf education issues (N.T.46- 47). Later when Ms. P., the supervisor, testified about the Learning Support class she could not speak to the teacher's background with deaf students or if the Audiological assessment of the classroom was completed (N.T. 46-50).

33. Ms. P. also testified that if the child remained in the 5th grade Autistic support class the 2 new related services, in the June IEP, could be provided in the 5th grade (N.T. 53-54).

34. When the IU Autistic Support supervisor, Ms. M., testified about the out of District 6th grade Autistic Support class she disclosed that none of the other children were deaf and none of the Student's current 5th grade peers would be present in the IU classroom (N.T. 72). She also testified that she did not know if the proposed teacher had any experience with deaf education (N.T. 71-75).

ANALYSIS DISCUSSION AND CONCLUSIONS OF LAW

A. THE STAY PUT REQUIREMENT OF SECTION 1415(j)

The stay-put provision of the IDEA provides that "during the pendency of any proceedings" conducted pursuant to 20 U.S.C. §1415 et seq, "unless the local

educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child." 20 U.S.C. § 1415(j). "Stay-put orders are designed to maintain the status quo during the course of proceedings. "*J.O. ex rel. C.O. v. Orange Tp. Bd. of Educ.,* 287 F.3d 267, 272 (3d Cir. 2002). Stay put "function[s], in essence as an automatic preliminary injunction." *J.O.,* 287 F.3d at 272 *(quoting Drinker v. Colonial Sch. Dist.,* 78 F.3d 859, 864 (3d Cir. 1996) (describing the stay-put provision as "an absolute rule" to maintain the current educational placement "regardless" of the merits of the case).

The parent can invoke the IDEA's stay-put provision when a district proposes "a fundamental change in, or elimination of, a basic element of the [then-current education placement]." *Lunceford v. Dist. of Columbia Bd. of Educ.,* 745 F.2d 1577, 1582 (D.C. Cir. 1984). To determine the "then current educational placement", courts look to the IEP "actually functioning when the 'stay put' is invoked." *Drinker,* 78 F.3d at 867*(citing Thomas v. Cincinnati Bd. of Educ.,* 918 F.2d 618, 625-26 (6th Cir. 1990).

A parent invoking a stay-put placement "must identify, at a minimum, a fundamental change in, or elimination of a basic element of the education program in order for the change to qualify as a change in educational placement." *Id.* "[T]he plain meaning of 'current educational placement' refers to the 'operative placement actually functioning at the time the dispute first arises.'" *Pardini v. Allegheny Intermediate Unit,* 420 F.3d 181, 192 (3d Cir. 2005) *(quoting Thomas v. Cincinnati Bd. of Educ.,* 918

F.2d 618, 625-626 (6th Cir. 1990).

Although the IDEA does not define the term "then-current educational placement," the meaning of the term "falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP." *Bd. of Educ. of Cmty High Sch. Dist. No. 218 v. Ill. State Board of Educ.,* 103 F.3d 545, 548; *Spilsbury v. Dist. of Columbia,* 307 F. Supp. 2d 22, 26-27 (D.D.C. 2004) (explaining that "the IDEA clearly intends 'current educational placement' to encompass the whole range of services that a child needs" and that the term "cannot be read to only indicate which physical school building a child attends"). This pendency provision reflects Congress's conclusion that a child with a disability is best served by maintaining his educational "status quo" until the disagreement over the IEP is resolved, *Pardini,* 420 F.3d 190; *Drinker,* 78 F.3d at 864. In *Pardini,* 420 F.3d at 188 the court recognized that "Congress has already balanced the competing harms as well as the competing equities" in favor of the "then current educational placement" i.e. "status quo". *Zvi D. v. Ambach,* 694 F.2d 904, 906 (2d Cir. 1982) (the statute's "then current educational placement" plain language substitutes an absolute rule in favor of the "status quo").

Our Third Circuit provides guidance in this regard. In *DeLeon v. Susquehanna Community School District,* 747 F.2d 149 (3d Cir. 1984), the court discussed its understanding of what constitutes a "change in educational placement" in the context of a predecessor statute to the IDEA. The Court explained in that case, "[t]he

question of what constitutes a change in educational placement is, necessarily, fact specific" and thus, "in determining whether a given modification in a child's school day should be considered a 'change in educational placement,'" the "touchstone" is whether the modification **"is likely to affect in some significant way the child's learning experience."** *Id.* at 153(emphasis added).

B. THE "SOME SIGNIFICANT WAY" IMPACT TEST

The focal point of the "some significant way" test is on "only [those] matters that will significantly impact the child's learning should be considered a change in educational placement for the purposes of the IDEA." *J.S. v. Lenape Reg. High Sch. Dist. Bd. of Educ.,* 102 F. Supp. 2d 540 543-544 (D.N.J. 2000) *(quoting DeLeon v. Susquehanna Comm. Sch. Dist.,* 747 F.2d 149, 153 (3d Cir. 1984).

Accordingly, a fact specific determination of the current "stay put" disagreement begins with a determination of what positive or negative impact could occur if any changes to the types of the intervention, types of support, levels and time spent in each intervention, the disability related goals, objectives, related services, location of intervention (regular or special education classroom), the SDIs and modifications juxtaposed against the District's good faith proposal. *Union Beach Bd. of Educ.,* 2009 WL 4042715; *White v. Ascension Parrish Sch. Bd.,* 343 F.3d 373, 379 (5th Cir. 2003). The key inquiry is "whether the decision is likely to affect in some significant way the child's learning experience." *Id.*

C. THE THEN CURRENT EDUCTIONAL PLACEMENT

In this instance the Parties agree that "then current" IEP requires the District to provide Supplemental Autistic Support, Deaf - Hearing Support, Speech and Language Support, Audiological Support, and Blind and Visually Impaired Support. (SD-1). The 69 page IEP provides 35 different forms of specially designed instruction (SDI) and modification (SD-1 pp.51-57). The Student's SDI targeting [Student's] unique deaf education needs requires, among other tasks, "Daily functional checks of cochlear implant", the "use of cochlear implant/personal FM system" and a "teacher of the Hearing impaired" (SD-1 pp.51-57).

At the same time to address [Student's] Autistic Support needs the IEP includes a "positive behavior support plan", "prompting cueing", "social skills training" "speech and language services" (SD-1 pp.51-57). The Student's Autistic support academic needs are addressed by an autistic support teacher who provides direct one on one instruction for up to 120 minutes a day, in three targeted content areas, in a classroom of 8 rather than 20 students (SD-1 p.1). The IEP team receives ongoing support from a Behavior Consultant, an Audiologist, Speech and Language therapist, Hearing Support and an Occupational Therapist. (SD-1p.58). All of these supports must be done each and every day with fidelity.

D. THE PROPOPOSED OPTIONS MAY IMPACT LEARING

In an effort to modify the "status quo" the District makes two proposals. The

first option, is to change promote the child to the next grade and change the type of intervention from Autistic support to Learning Support (N.T. 26-27). The other option is a 6th grade Autistic Support class in another district. Each option contradicts the IDEA's automatic "status quo pendent placement" mandate. 20 USC 1415(j)

The District's argument misses the focal point, while it is true that a District can make minor adjustments to a student's program, here the changes are likely to have some significant impact on or change to the student's educational program. *J.R. and K.R. v. Mars Area Sch. Dist.*, 52 IDELR 91 (3d Cir. 2009, *unpublished*)

The District relies upon two out of state administrative decisions and two out of state District Court cases to support its permissive reading of the "stay put" clause. The District suggest that I adopt the "changing circumstances test". The "changing circumstances test" condones the child's advancement to the next grade as permissive exception to "stay put/pendency". This permissive form of statutory construction is premised upon the notion "stay put" is not affected if the child merely advances to the next grade with his or her peers. *Riverside Unified School District*, OAH Cases No. 201308398 (August 21, 2013); *Los Angeles Unified School District*, OAH 2010090436 (September 23, 2010). I decline to adopt this rationale.

Contrary to the District's assertion as to the applicability of the "changing circumstances test" the district court in *Van Scoy v. San Luis Costal Unified School District*, 353 F.Supp 2d 1083, 1086 (C.D. Ca 2005) did not apply the permissive test. Instead, the court found that the parties agreed that the child should be promoted to

the next grade. The court found the actual dispute was over whether the district's refusal to provide 120 minutes of behavioral services, a day out of the regular classroom, in the then functioning IEP was a "significant change" from the pendent IEP. First, the court found that the parents did not agree to a reduction of services when they agreed to promote the child. *Id* at 1086. The court, then citing *Drinker*, held that a program/placement that did not include the 120 minutes of instruction "would constitute a significant change in the stay put placement". *Id.* This decision aligns with *Drinker,* supporting an analysis that a "stay put" determination requires a factual review of what element(s), if any, in the District's proposal would constitute "a significant change in the stay put placement" or have "some significant impact on learning". *Drinker, Pardini, DeLeon, J.R. and K.R. J.S. and J.O.*

As for the two California administrative decisions, in each the hearing officers employed the permissive "changing circumstances test" rather than the *Van Scoy* and *Drinker* "significant change" or "some significant impact" test. *Riverside Unified School District*, OAH Cases No. 201308398 (August 21, 2013). The *Los Angeles Unified School District*, OAH 2010090436 (September 23, 2010) is totally inapposite. Unlike here, the parents in *Los Angeles Unified,* only contention was that the child was "not progressing" *id* at 3. Unlike, here, the Hearing Officer there found that the "parents offered no evidence that she would suffer detriment or that the status quo cannot be achieved" *id* at 3. Accordingly, I do not find either persuasive.

In this action Mother contends that child will suffer numerous harms

(N.T.pp.17-18). The District's proposal to take the child to either another district or to remain in the district, with a new teacher, with a different intervention, who may or may not, have experience with a deaf autistic child with a Cochlear Implant along with a host of other disabilities absent an Audiological assessment of the classroom is tantamount to either a "significant change".

In the alternative, I believe it will have "some significant impact" on the child's learning experience and the teacher .*Van Scoy* fn.3 at 1086.

Turning to *Beth B. v. Van Clay*, 126 F.Supp 2d 532, 534 (N.D. Ill. 2000) the District's other authority, the facts and the law are clearly distinguishable. In *Van Clay* court was asked to overturn the hearing officer's final decision that the change to the junior high school was a denial of a FAPE. The Court, with the benefit of a complete record, upheld the hearing officer finding that the change did not constitute a denial of FAPE. This decision does not advance the District's contention as the court was not called upon to determine either the "then current educational placement" or apply a factual analysis of the "change" or "impact" upon the program.

It is no curious coincidence that neither the District witness nor the IU supervisor mentioned the potential harmful effects or unintended consequences on Student's anxiety, focused upon the use of the cochlear personal FM wireless device, the positive behavior support plan, the need for an educational interpreter to assist with sign language, or how the other 35 plus modifications or SDIs in the December IEP would be delivered. When asked about her personal knowledge of the Student

and the pendent IEP the District supervisor, responded that she "had not met or observed" the Student (N.T. 46-47). Similarly she could not address the Student's purported anxiety or deaf education issues (N.T.46- 47). Latter when Ms. P., the supervisor, testified about the Learning Support class she could not speak to the teacher's background with deaf students or if the Audiological assessment of the classroom was completed (N.T. 46-50).

Ms. P. also testified that if the child remained in the 5th grade Autistic support class the 3 new related services, in the June IEP, could be provided in 5th grade (N.T. 53-54).

When the IU Autistic Support supervisor, Ms. M., testified about the out of District 6th grade Autistic Support class she reluctantly disclosed that none of the other children were deaf and none of [Student's] current 5th grade peers would be present (N.T. 72). She also testified that she did not know if the proposed teacher had any experience with deaf education or the cochlear FM wireless device (N.T. 71-75). Grade advancement at this time calls for a non-verbal, autistic, deaf child who uses sign language to travel to a new environment and begin to learn with a staff who may or may not be prepared.

A focused inquiry analyzing the proposed move to the 6th grade Learning Support class, leads me to believe that the placement is a significant change that is likely to have "some significantly impact" that may contribute to an increase in the

Student's anxiety, interfere with [Student's] ability to learn, an increase in behavioral issues, and may substantially affect [Student's] major life functions like learning, sleeping and eating. These factors, among others, leads to the conclusion that either of the proposed options, are likely to affect the Student's learning experience in some significant way.

Based upon the above, I decline the District's suggestion to change the Student's pendent Autistic Support IEP, type of intervention, program and place [Student] into the 6th grade Learning or Autistic Support class. Before a move like this is undertaken, in the future, this close to the start of the school year, for this unique child, the team is reminded that they are expected to consider harmful side effects of such a change. 34 CFR 300.116(d); see also, *Anthony C. by Linda C. and Lionel C. v. Department of Educ., State of Hawaii*, 62 IDELR 257 (D. Hawaii 2014). (IEP team is required to discuss the potential harmful effects and concerns at length and considered ways to mitigate the student's behavioral, social, and academic difficulties).

In *Joshua A. v. Rocklin Unified Sch. Dist.,* 559 F.3d 1036, 1040 (9th Cir. 2009) in a similar controversy, the court reminded the parties that "It is unlikely that Congress intended the protective measure to end suddenly and arbitrarily before the dispute is fully resolved."

Thus, the pendent program and placement pursuant to § 1415(j) remains in the

5th grade Autistic Support class, at [Redacted Elementary School], until the conclusion of the proceedings, and the school district's correlative obligation to provide a FAPE there also remains intact. *Drinker, Pardini, J.O., DeLeon*, *J.R. and K.R., J.S.*

The Parties are expected to make themselves available at the earliest possible date and time to conclude this matter within the existing decision due date timeline.

An Order reflecting these findings is attached hereto. By way of dicta, as the Parties seem to agree that the Student would benefit from the 2 new related services proposed in the June 2015 IEP, I remind each Party they are free to incorporate those services upon which they can agree into an IEP. An interim agreement, about the child's needs, may well be the starting point to reconciling their genuine good faith differences.

August 28, 2015

/s/ Charles W. Jelley Esq. LL.M.

Charles W. Jelley, Esq. LL.M.
Hearing Officer for the Office
for Dispute Resolution.

ORDER

In accord with the findings of fact and conclusions of law as set forth above:

The "stay put" then current pendent IEP and placement for the Student is the

5th Grade Autistic Support Class at [Redacted] Elementary School District in the School District as set forth in the agreed upon December 2014 IEP.

August 28, 2015

/s/ Charles W. Jelley
Charles W. Jelley, Esq. LL.M.
Hearing Officer Office for Dispute Resolution