

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: D. J.
Date of Birth: [redacted]

OPEN HEARING
ODR File No. 18683-1617KE

Parties to the Hearing:

Representative:

Parents
Parent[s]

Parent Attorney
None

Local Education Agency
Pocono Mountain School District
135 Pocono Mountain School Road
Swiftwater, PA 18370

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Dates of Hearing:

March 3, 2017; March 24, 2017;
March 31, 2017

Date of Decision:

April 12, 2017

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION

The student (hereafter Student)¹ is a mid-teenaged student in the Pocono Mountain School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² As relates to this decision, Student's Parents filed a Due Process Complaint against the District in late December 2016 asserting claims relating to the 2016-17 school year: specifically, that it denied Student a free, appropriate public education (FAPE); and that it retaliated and discriminated against Student on the basis of Student's disability. The District filed a Counterclaim seeking permission to conduct a Functional Behavioral Assessment (FBA), and approval of the District's fall 2016 Reevaluation Report (RR) and December 2016 proposed Individualized Education Program (IEP) and placement for Student. Two related disciplinary issues involving the parties have already been decided, with only the remaining non-expedited issues remaining. Those claims were heard together over three hearing sessions.³

PROCEDURAL HISTORY

- A. The Parents' Due Process Complaint was filed on December 21, 2016 and included certain disciplinary issues, which were bifurcated and heard in a separate hearing with a decision under the expedited timelines in February 2017. (*D.J. v. Pocono Mountain School District*, ODR No. 18588-1617KE (Skidmore, February 5, 2017) (hereafter February 5, 2017 Decision)); HO-5)
- B. The Parents' Due Process Complaint included issues that were non-disciplinary

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. The identifying information appearing on the cover page of and elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ Citations to the record will be as follows: Notes of Testimony (N.T.); Parent Exhibits (P-) followed by the exhibit number; School District Exhibits (S-) followed by the exhibit number; and Hearing Officer Exhibits (HO-) followed by the exhibit number. Citations to the various transcripts will include the date of hearing.

and would proceed under the standard IDEA timelines. The parties were advised of all applicable timelines. (HO-1)

- C. Following the decision on the discipline matter raised in the Parents' Complaint, the District was directed to convene another meeting of the manifestation determination team to include the Parents. (February 5, 2017 Decision at 13).
- D. The Parents and counsel for the District participated in a conference call on February 21, 2017, at which time this hearing officer was advised that other disciplinary incidents had occurred that resulted in a 45-day placement in an alternative education setting (AES), and that a manifestation determination meeting had convened regarding that matter at the same time as the team met pursuant to the February 5, 2017 Decision. (HO-6)
- E. The parties agreed to proceed on this new disciplinary matter at the same time as the issues that remained following bifurcation of the original Complaint. Written confirmation of the parties' agreement was provided on February 26, 2017, and the District filed a formal Complaint that was assigned ODR File No. 18869-1617KE (HO-6)
- F. The expedited issue at ODR No. 18869-1617KE was formally consolidated with the current issues at ODR No. 18683-1617KE by order of March 7, 2017. (HO-9)
- G. Hearing sessions were scheduled for March 3 and March 15, 2017. The March 3, 2017 hearing session convened to address the issue of the manifestation determination for the 45-day AES placement; one witness was not available to testify on that date (*see* N.T. 3/3/17 at 195, 240-42). Due to inclement weather, the District closed its schools for five of six school days from March 10 through March 17, 2017. (N.T. 3/3/17 at 1-244; N.T. 3/24/17 at 310-11; HO-8)
- H. The Parents and counsel for the District participated in another conference call on March 14, 2017 to discuss rescheduling the March 15, 2017 session. (HO-10)
- I. Evidence on the disciplinary issue at ODR No. 18869-1617KE was presented at the March 3 and 24, 2017 hearing sessions, with a final decision on that matter earlier this month. (N.T. 3/3/17 at 1-243; N.T. 3/24/17 at 249-369; *D.J. v. Pocono Mountain School District*, ODR No. 18869-1617KE (Skidmore, April 7, 2017) (hereafter April 7, 2017 Decision))
- J. Evidence on the denial of FAPE claims was presented at the March 31, 2017 hearing session. (N.T. 3/31/17 at 377-748)
- K. The transcripts from all hearing sessions involving this Student (at ODR Nos. 18588-1617KE, 18683-1617KE, and 18869-1617KE) were incorporated into the record for consideration of the issues addressed in this decision. However, the parties were advised that the exhibits introduced at the January 25, 2017 hearing on ODR No. 18588-1617KE were not made part of the record for purposes of the

decisions in ODR Nos. 18683-1617KE and 18869-1617KE unless introduced and admitted again. (N.T. 3/3/17 at 20-22; HO-6 p. 2)

- L. The exhibits admitted to the record this matter at ODR File No. 18683-1617KE were: P-1 through P-10; S-1 through S-21 and S-26 and S-27; and HO-1 through HO-10. (N.T. 3/31/17 at 744-46)
- M. The District's request to conduct an FBA in this matter is moot with an independent FBA ordered as part of the second disciplinary proceeding. (April 7, 2017 Decision)
- N. This decision is issued within the timelines established by the parties' requests to extend the decision due date as permitted by 34 C.F.R. § 300.515(c). (HO-5, HO-10)

ISSUES⁴

1. Whether the District denied FAPE to Student during the 2016-17 school year;
2. Whether the District has discriminated and/or retaliated against Student on the basis of Student's disability during the 2016-17 school year;
3. Whether the District's RR and proposed IEP should be approved; and
4. Whether the District's proposed placement should be approved?

FINDINGS OF FACT

1. Student is a mid-teenaged student who is a resident of the District and is eligible for special education under the IDEA. (N.T. 1/25/17 at 32-33)
2. Student was first enrolled in the District at the start of the 2016-17 school year, having previously attended school in another state. The District did not have Student's IEP from the other state until after the school year started, but the Parents did provide progress monitoring information at the time of enrollment. (N.T. 1/25/17 at 82, 215, 311-12; N.T. 3/3/17 at 158-59, 171, 221; N.T. 3/24/17 at 309, 313-16; N.T. 3/31/17 at 480-81, 687, 711; S-4, S-6)

⁴ The District's FBA issue is omitted. *See* Procedural History above.

3. The District sought and obtained education records from the prior school in the other state and received those several weeks after Student was enrolled. (N.T. 3/3/17 at 159-61, 222; N.T. 3/31/17 at 688, 694, 700-01, 703; S-3)
4. Student's IEP from the other state was part of the records received. That IEP provided for a highly structured, therapeutic learning environment addressing academic and behavioral needs, with weekly counseling for social skills, self-esteem, and managing emotions. Student's academic achievement and functional performance, together with learning characteristics, were summarized, noting Student's then-current English/Language Arts, Mathematics, Science, and Social Studies classwork. Strengths in artistic, computer/technology, and athletics abilities were noted, as were needs regarding social/emotional/behavioral functioning as well as reading and mathematics skills. (P-9; S-5 pp. 7-19)
5. Annual goals in the prior state's IEP addressed reading decoding and comprehension, written expression, mathematics, and social/emotional needs. There was no behavior plan, but the IEP explained that behaviors were addressed through the structured environment of the non-public special education school in the other state. Counseling was included as a related service. (P-9; S-5)
6. The other state had conducted an FBA from 2012, which examined Student's failure to complete non-preferred tasks and other noncompliant behaviors when not provided with individualized (one on one) attention. The hypothesized functions of the behaviors were to escape from difficult or non-preferred tasks and gain attention. (S-1 p. 1)
7. The other state provided the results of the Kaufman Test of Educational Achievement – Third Edition, with very low to low scores on the Reading Composite and its subtests, and below average scores on the Mathematics Composite and its subtests. Prior statewide assessment and achievement test scores were also reported. (S-1 pp. 18-26)
8. The other state provided mental health diagnoses of Attention-Deficit/Hyperactivity Disorder (ADHD), Disruptive Behavior Disorder, and Oppositional Defiant Disorder, together with a treatment plan from the spring of 2012. (S-1 pp. 2-3)
9. The other state provided a psychoeducational evaluation report with a social history update, both from the spring of 2012. Student at that time was identified as eligible for special education on the basis of an emotional disturbance; Student's placement in a specialized school with a low student to teacher ratio was not sufficiently meeting Student's needs. At that time, Student was exhibiting problematic behavior (refusing to complete work, engaging in physical aggression, eloping from the classroom, and noncompliance with adult direction). Student reportedly had a one-on-one paraprofessional. (S-1 pp. 7-8)
10. Cognitive assessment (Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV)) reflected a full scale IQ of 66 with composite scores in the extremely low range with the exception of Perceptual Reasoning in the low average range. Thus, nonverbal

reasoning ability was better developed than verbal reasoning ability; and, relative strengths and weaknesses were reflected in the subtest scores. (S-1 pp. 9-11)

11. Academic Achievement reported based on the Woodcock-Johnson Tests of Achievement – Third Edition reflected well below expectations in Reading but average range scores in Mathematics. (S-1 p. 11)
12. In the other state, Student had been placed in a non-public special education school for children with emotional and behavioral difficulties. (N.T. 3/31/17 at 480, 485, 487; P-1, P-8)
13. Progress monitoring reporting from the other state indicated that Student had not met, or was making inconsistent progress on, most annual IEP goals; the report on a few goals reflected gradual but less than anticipated progress. Although the goals on the progress monitoring sheets do not align exactly with the goals in the other state’s IEP, both sets of goals were similar, and Student’s progress was clearly below expectations in all areas. (S-5)

ENTRY INTO DISTRICT

14. The District developed a “transfer IEP” for Student to start the school year. This document incorporated the prior state’s IEP and proposed implementation in a District junior high school with counseling as a related service. The Parents approved the Notice of Recommended Educational Placement (NOREP) for a program of Supplemental Emotional Support. (N.T. 3/31/17 at 613-14, 703, 722; S-5)
15. Student began the school year in regular education classes. Several weeks later, upon further review of the IEP from the prior school, Student was provided with academic instruction in an emotional support classroom with approval of the Parents. (N.T. 1/25/17 at 105-07, 215-21; N.T. 3/3/17 at 61, 127-28, 160-61, 222; N.T. 3/31/17 at 612; S-10)
16. The school building where Student began attending at the start of the 2016-17 school year has a school-wide positive behavior support program. (N.T. 3/31/17 at 678-80)
17. A meeting convened in October 2016 where the parties had a discussion regarding Student’s educational needs and how the District would address them. The District proposed a structured program of full time emotional support in an Intermediate Unit (IU)-run program outside of the District that provides small class sizes and various behavioral and other support, or in another therapeutic placement outside of the regular education environment. The Parents did not agree to the District’s proposals. A full-time paraprofessional was assigned to Student at that time with agreement of the Parents. (N.T. 1/25/17 at 38-40, 119-20, 233, 261-62; N.T. 3/3/17 at 164-69, 224-26; N.T. 3/24/17 at 262; N.T. 3/31/17 at 614-17, 697-98, 707-09, 720-22; S-11; S-12)
18. The role of Student’s paraprofessional was to address Student’s behaviors, redirecting and prompting Student as needed; removal from the classroom was sometimes necessary. She was with Student throughout the school day except when she had her lunch period.

She also took notes and collected data on Student's problematic behaviors as paraprofessionals do for all students. (N.T. 3/3/17 at 129-32; N.T. 3/24/17 at 256, 260, 262-63; N.T. 3/31/17 at 515-16, 520-22, 534-36, 538-39, 541, 545-46, 548-50, 592-93)

19. The paraprofessional's logs and notes regarding Student's behavior were shared with Student's emotional support teacher, who used the information for progress monitoring and educational programming decisions. (N.T. 3/31/17 at 718-19; S-7, S-8, S-14)

REEVALUATION REPORT

20. The District conducted an evaluation of Student at the request of the Parents joined by a similar proposal by the District. A Reevaluation Report (RR) was issued on December 1, 2016 with a conclusion that Student was eligible for special education on the bases of an Emotional Disturbance and Other Health Impairment (due to ADHD). (N.T. 3/3/17 at 108, 223; S-9, S-15)
21. The RR provided a summary of Student's education records from the other state, as well as attendance, grades, and disciplinary referrals at the District. Student's medical history was noted to include diagnoses of ADHD, Disruptive Behavior Disorder, and Oppositional Defiant Disorder. Cognitive and achievement assessments from the other state were also reported. (P-6 pp. 1-2; S-15 pp. 1-2)
22. Observations by the paraprofessional and teachers reflected Student's need for redirection, and behaviors that included calling out, disrupting the class, and putting head down on the desk. Student's teachers recommended a therapeutic setting to address emotional needs. (P-6 p. 3; S-15 p. 3)
23. The District conducted a cognitive assessment (the Fifth Edition of the WISC). Student attained a full scale IQ score in the very low range, with a General Ability Index (GAI) score in the low average range. Student's subtests scores were variable, with a relative strength on the Visual Spatial Index and relative weaknesses on the Working Memory and Processing Speed Indices, indicating that the GAI score was an important consideration in estimating Student's cognitive ability. (N.T. 3/31/17 at 648; P-6 pp. 4-8; S-15 pp. 4-8)
24. Results of the Woodcock-Johnson Tests of Achievement – Fourth Edition reflected areas of relative strength and weakness. The majority of subtest scores were in the very low range, but Student attained higher scores on some reading and mathematics subtests, with an average range score on applied problems. (P-6 pp. 8-9; S-15 pp. 8-9)
25. A Wilson Reading Screening was administered and reported in the RR, with results below the first percentile. Some factors that might impact the effectiveness of a Wilson program for Student were unknown. (N.T. 3/31/17 at 650-51; S-15 p. 23)
26. One of the Parents and two teachers completed the Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-2). The Parent ratings did not indicate any areas of concern. The teacher ratings indicated a number of areas of concern, including resisting impulses, appropriate awareness of functioning in social settings, reaction to

events, initiating tasks, and planning and organization. The teachers' BRIEF-2 scales suggested significant difficulties with problem solving and emotional regulation. (P-6 pp. 9-12; S-15 pp. 9-12)

27. One of the Parents and two teachers completed rating scales for the Behavior Assessment System for Children – Third Edition (BASC-3), and Student completed a self-report. BASC-3 results suggested parental concerns with attention, but that Student exhibited slightly better ability to react to change than peers. The teacher rating scale results revealed significant concerns on the Externalizing Problems (hyperactivity, aggression, and conduct problems) and School Problems (attention and learning problems) Composites and on the Behavioral Symptoms Index (atypicality), as well as anger control, bullying, social skills and communication, emotional control, executive functioning, and negative emotionality. Other concerns were noted with respect to depression, several adaptive skills, and resiliency. Student reported concerns with attitude toward teachers. (P-6 pp. 12-23; S-15 pp. 12-23)
28. The RR made recommendations for a Functional Behavioral Assessment (FBA) to obtain current behavioral information, as well as a structured educational program to address behavioral and academic needs. (N.T. 3/31/17 at 651; P-6 p. 26; S-13, S-15 p. 26)
29. The RR was provided to the Parents by regular mail. The Parents did not attend any meeting to discuss the RR, but one was scheduled in December 2016. (N.T. 3/31/17 at 442, 585-86, 621, 652-53; S-16 pp. 1-3)
30. The Parents did not consent to the District's requests to conduct an FBA. (N.T. 1/25/17 at 263; N.T. 3/3/17 at 104; N.T. 3/31/17 at 611, 619-20; S-13)

FALL 2016 THROUGH FEBRUARY 2017

31. District teachers and administrators have been concerned about Student's behaviors since the start of the school year. (N.T. 3/3/17 at 44, 45, 137-38, 140, 144-45; N.T. 3/31/17 at 611)
32. Between the start of the 2016-17 school year and mid-January 2017, Student was subject to lunch detentions, "time out" in detention, in-school suspension (ISS), and out of school suspension (OSS), as well as suspension from the bus. Student's father was called to the school to address Student's behavior, and on at least one occasion was asked to remove Student from school. (February 7, 2017 Decision at 3-6; S-18)
33. Behavioral data from the start of the school year reflected Student's ongoing disruptive behavior in class and inconsistent attention as well as a need for redirection and prompting on a daily or near-daily basis. Behaviors included task refusal, lateness to class, making inappropriate verbal comments to staff and classmates. Student was frequently removed from class. (S-7, S-8, S-14, S-18)
34. From mid-January through Student's removal to the 45-day AES placement, Student continued to incur disciplinary referrals that resulted in counseling and warnings, time

out, bus suspension, ISS, and OSS. Parent/school conferences also resulted. (S-18 pp. 5-41)

35. Student's grades as of mid-January 2017 were all in the low D- to failing range, with the exception of physical education. (S-19)
36. Student believed the teacher and other District staff imposed unnecessary discipline on Student. (N.T. 1/25/17 at 102-03, 128-29, 137)
37. Student did not like having the paraprofessional around all day. (N.T. 1/25/17 at 119-21; N.T. 3/31/17 at 425, 426)
38. The District drafted a proposed IEP based on the completed RR, and invited the Parents to a meeting to discuss the RR and draft IEP in December 2016. The Parents did not attend an IEP meeting following that invitation. (N.T. 3/31/17 at 464-65, 621-22; S-16)

DECEMBER 2016 PROPOSED IEP

39. The December 2016 draft IEP summarized Student's present levels of academic achievement from the prior state and since entering the District, incorporating results of the District's RR. Detailed teacher input was also included describing classroom performance, assignment completion, and accommodations provided to Student, as well as behavioral information. The guidance counselor also summarized sessions with Student. (S-16 pp. 9-13)
40. Student's grades at the time were reported, as were below average range scores in reading and mathematics compared to peers and state standards. Transition information and planning were also part of the draft IEP. (S-16 pp. 13-14, 22, 25-26)
41. The draft IEP also summarized Student's present levels of functional performance that provided extensive information about Student's behaviors at school, and described the school-wide behavior system. Student's disciplinary record was also included. (S-16 pp. 15-19)
42. Student's academic and functional strengths were identified and included some mathematics and written expression skills. Academic and functional needs were also noted, and included higher level reading, mathematics, and writing skills, as well as behavioral concerns (positive communication, emotional regulation, participation in and completion of tasks and assignments, and maintaining focus and attention). (S-16 pp. 23-24)
43. Annual goals in the draft IEP addressed skills in written expression, reading comprehension, mathematics problem solving, communication, emotional regulation, maintaining attention, remaining on task, and class participation. A number of program modifications and items of specially designed instruction were provided: the manner of providing directions, multi-modal instruction, preferential seating, chunking of assignments, assignment and test accommodation, a behavior plan, and social skills

instruction. Counseling was identified as a related service; Student would also be assigned a teaching assistant/paraprofessional. (S-16 pp. 31-37)

44. A Positive Behavior Support Plan (PBSP) was made part of the draft IEP, identifying antecedents, consequences, and the perceived functions of a number of behaviors of concern. Academic and other skill deficits were noted as part of the PBSP. (S-16 pp. 46-56)
45. The draft IEP proposed emotional support at a supplemental level at the District. However, the District members of the IEP team were prepared to suggest that it be implemented at the IU-run program. (N.T. 3/31/17 at 621-22; S-16 pp. 39-42)

ALTERNATIVE EDUCATION SETTING PLACEMENT

46. Student was removed to the 45-day AES placement on March 1, 2017. That placement is at the IU-run program where the District first proposed services in October 2016. (N.T. 3/3/17 at 166, 232)
47. The AES program provides a highly structured environment with a school-wide positive behavior support program. (N.T. 3/31/17 at 500-02, 560, 580)
48. Approximately 300 students of middle and high school age attend school in the IU-run program building from fifteen area school districts. The building houses a number of programs for students who have behavioral needs, including emotional support, life skills support, and autistic support; partial hospitalization and AES placements are also available. (N.T. 3/3/17 at 189; 3/31/17 at 561-62, 573, 582-83, 606-07)
49. The emotional support classrooms at the AES placement have three staff members (teacher, an associate teacher, and a mental health worker) and twelve students. A number of mental health professionals on staff are available to provide counseling as needed throughout the school day. (N.T. 3/31/17 at 499-501, 561)
50. The IU-run program building has a resolution room where students may be taken to de-escalate and discuss behaviors in order to prepare to return to class. (N.T. 3/31/17 at 565-66)
51. Students may be subject to lunch or Friday detentions at the AES placement following problematic behavior. (N.T. 3/31/17 at 568-69, 572, 580)
52. There are several time-out rooms at the AES placement. The rooms are small and the walls, floor, and door are padded. The door to each room has a window for staff to observe the student while he or she is in the room when the door is closed and the staff member is not inside. A staff member will discuss the incident that led to the removal to the time-out room before the student returns to class. The time-out rooms are cleaned each night. (N.T. 3/31/17 at 411, 497-998, 564-65, 576)

53. An IEP revision/intake meeting was held that included staff from the AES placement before Student began to attend there. The Parents did attend this meeting. Student's program was described as one of emotional support. (N.T. 3/3/17 at 177-79)
54. Student has been redirected as well as removed to a time-out room at the AES placement on a number of occasions. Students are removed to the time-out room even if he or she does not wish to go inside. Student does not like to be removed to the time-out room. (N.T. 3/31/17 at 407-09, 411-12, 495-99, 563, 566)
55. The Parents wrote a letter to the AES placement withdrawing any consent to Student being removed to a time-out room. However, those removals are not dependent on parental consent but rather are implemented for safety of students and staff. The Parents also withdrew consent for Friday detentions. (N.T. 3/31/17 at 568-69, 581)
56. When a student or parent has a complaint or concern at the AES, a procedure for addressing and resolving those matters is followed. (N.T. 562)
57. A District Supervisor of Special Education has observed Student in the AES as part of routine visits several days each week that involve observations of all students from the District attending there. (N.T. 3/31/17 at 419, 494-95, 502)
58. Student has experienced difficulty with peers at the AES placement, but at other times has gotten along with peers. (N.T. 3/31/17 at 413, 416, 418, 420)
59. Parents of students at the AES placement are provided with reports of behaviors on a regular basis. (N.T. 3/31/17 at 570-71)
60. By Order of April 7, 2017, the 45-day AES placement was determined to be authorized under the IDEA; but the manifestation determination was reversed. The District was ordered to arrange for an independent FBA. (*D.J. v. Pocono Mountain School District*, ODR No. 18869-1617KE (Skidmore, April 7, 2017)).
61. District and AES placement staff believe that the AES placement is appropriate for Student's needs at the present time. (N.T. 3/31/17 at 502, 570, 605-06, 620, 622, 653, 663-64, 680, 709-10, 723, 742)
62. The proposed IEP would require some revision if approved because of some differences in the IU-run program and the District's own programming. (N.T. 3/31/17 at 570, 622, 653-54, 680-81)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of

production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Here, the Parents challenged the District’s provision of FAPE and claimed discrimination and retaliation, whereas the District sought approval of its RR, draft December 2016 IEP, and proposed continued IU-run program placement. Accordingly, the burden of persuasion was not placed solely on one party or the other; but, the evidence was not in equipoise on any issue, and the following conclusions are based upon a preponderance of the evidence.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be generally credible, testifying to the best of his or her recollection from his or her perspective. It should be noted that there was some discrepancy in the testimony on matters that were not essential to disposition of the issues presented, such as whether certain remarks were made in a particular meeting or encounter; the relationship between the parties is certainly strained to the point that perceptions of others involved in making decisions regarding Student’s programming are likely less than objective. Credibility is discussed further below as necessary. In reviewing the record, the testimony of every witness, and the content of each

exhibit, were thoroughly considered in issuing this decision, as were the parties' closing arguments.

GENERAL IDEA PRINCIPLES

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to a student who qualifies for special education. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that the FAPE requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 247 (3d Cir. 1995). Local educational agencies (LEAs), including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Recently, the U.S. Supreme Court considered a lower court’s application of the *Rowley* standard, observing that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 197 L.Ed.2d 335, 350 (2017). The Court explained that, “an educational program must be appropriately ambitious in light of [the child’s] circumstances... [and] every child should have the chance to meet challenging objectives.” *Id.*

at 351. This is especially critical where, as here, the child is not “fully integrated into the regular classroom.” *Id.* In addition, the Court concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* at 352. This standard is consistent with the above interpretations of *Rowley* by the Third Circuit.

Critically, of course, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, the IEP need not “provide ‘the optimal level of services,’ or incorporate every program requested by the child’s parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Furthermore, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

Parents who believe that an LEA has failed to comply with its obligations under the IDEA may file a Due Process Complaint wherein they may “present a complaint [] with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to [a] child.” 20 U.S.C. § 1415(b)(6)(A). An administrative hearing will be held on the issues presented. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.511, 300.512, 300.515; 22 Pa. Code § 14.162.

GENERAL SECTION 504 PRINCIPLES – DISCRIMINATION AND RETALIATION

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major

life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is “disabled” as defined by the Act; (2) he is “otherwise qualified” to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

Ridgewood at 253. With respect to discriminatory retaliation, the following principles are applicable.

The elements of a retaliation claim require a showing by the filing party (1) that they engaged in a protected activity, (2) that defendants' retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or her rights, and (3) that there was a causal connection between the protected activity and the retaliatory action.

Lauren W. v. DeFlaminis, 480 F.3d 259, 267 (3d Cir. 2007) (citations omitted).

DISCRIMINATION AND RETALIATION CLAIMS

Because the Parents’ discrimination and retaliation claims will bear on the FAPE issue, they will be addressed first. These concerns relate broadly to (1) the District’s RR and IEP; and (2) the District’s alleged exaggeration of and unnecessary focus on Student’s behaviors and asserted attempts to provoke Student into engaging in problematic conduct.

With respect to the RR, the Parents challenge the eligibility category of emotional disturbance and an emphasis on Student’s behaviors and the discipline imposed in the document. (N.T. 3/31/17 at 432-33, 436, 464, 468, 476-79, 589-90, 640-44; Parents’ Closing at 1-2, 4-5) The IDEA sets forth two purposes of a special education evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to determine his or her educational needs. 20 U.S.C. §1414(a)(1)(C)(i). The IDEA further defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34

C.F.R. § 300.8(a). As part of any evaluation, including a reevaluation, an LEA must do the following.

- (A) review existing evaluation data on the child, including—
 - (i) evaluations and information provided by the parents of the child;
 - (ii) current classroom-based, local, or State assessments, and classroom-based observations; and
 - (iii) observations by teachers and related services providers; and
- (B) on the basis of that review, and input from the child’s parents, identify what additional data, if any, are needed to determine—
 - (i) whether the child is a child with a disability as defined in section 1401(3) of this title, and the educational needs of the child, or, in case of a reevaluation of a child, whether the child continues to have such a disability and such educational needs;
 - (ii) the present levels of academic achievement and related developmental needs of the child;
 - (iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and
 - (iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum.

20 U.S.C. § 1414(c); *see also* 34 C.F.R. § 300.305(a). In conducting the evaluation, the law also imposes certain requirements on LEAs to ensure that sufficient and accurate information about the child is obtained:

- (b) Conduct of evaluation. In conducting the evaluation, the public agency must—
 - (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—
 - (i) Whether the child is a child with a disability under § 300.8; and
 - (ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. §§ 300.304(b); *see also* 20 U.S.C. § 1414(b)(2). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3).

Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1). When evaluating a student for autism, an emotional disturbance, intellectual disability, multiple disabilities, other health impairment, traumatic brain injury, or specific learning disability, a certified school psychologist must be part of the team. 22 Pa. Code § 14.123(a). In interpreting evaluation data and making these determinations on eligibility and educational needs, the team must:

(i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and

(ii) Ensure that information obtained from all of these sources is

documented and carefully considered.

34 C.F.R. § 300.306(c). School districts are responsible for conducting the required assessments, and also must provide a copy of the evaluation report and documentation of the eligibility determination to parents at no cost. 34 C.F.R. §§ 300.305(c) and 300.306(a)(2).

Review of the District's RR reveals that it met all requisite criteria. The Parents do not specifically challenge the RR as inappropriate in lacking requisite content, but rather contend that the report itself contains information that is discriminatory and reaches an unsupported conclusion regarding Student's eligibility category.

With respect to the identification of emotional disturbance, the IDEA federal implementing regulations define that category of disability as follows.

(4)(i) *Emotional disturbance* means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under [the above] section.

34 C.F.R. § 300.8(c)(4). This definition makes clear that one or more of the enumerated characteristics are sufficient to establish eligibility under this category if the other criteria are met. Here, Student clearly demonstrates "[i]nappropriate types of behavior or feelings under normal circumstances" and has done so to a marked degree over a long period of time, at least

since the spring of 2012 when the other state conducted a psychoeducational evaluation and FBA, and continuing through Student's entry into and tenure in the District. Although the Parents point out that schizophrenia is a possible basis for an emotional disturbance identification, and that Student has not been so diagnosed, the language is plain that that disorder is but one example, and not a requisite characteristic to finding IDEA eligibility on this basis of an emotional disturbance. Moreover, it is difficult to follow the argument that the District incorrectly identified Student as a child with an emotional disturbance after a review of the record information provided by the other state that reached an identical conclusion for very similar reasons. In light of its obligations to consider all available information, there also can be nothing discriminatory in the District's consideration of the type of school that Student attended in the other state. (N.T. 3/31/17 at 480-81) This hearing officer finds no discriminatory or otherwise improper action on the part of the District in its eligibility determination in this matter.

With respect to the content of the RR, Section 300.304(b) quoted above imposes several requirements regarding the process of conducting an evaluation so that sufficient and accurate information is obtained. The applicable law makes clear that the evaluation team was required to consider Student's behavioral presentation, particularly in light of the records provided by the other state, as well as Student's problematic behaviors beginning in the first month of school in the District. Whether or not the District might have changed the order of information documented in the RR, or even omitted some of the details, relevant state guidance⁵ suggests the type of information to be included in the section entitled "Physical condition, social, or cultural background, and adaptive behavior relevant to the student's disability and need for special

⁵ Reevaluation Report (Annotated) – School Age, Pennsylvania Department of Education, Bureau of Special Education, Pennsylvania Training and Technical Assistance Network (2016), available at http://www.pattan.net/category/Legal/Forms/Browse/Single/?id=57616e44140ba074688b4581&bor=search=**ag=School%20Age%20Annotated**l=English**page=2 (last visited April 10, 2017).

education:”

This item allows for documentation of any physical, social or cultural background, or adaptive behavior that may affect a student’s school performance.

There are many reasons outside of the presence of a disability that may lead to a student having difficulty in school. This section documents relevant information necessary for the evaluation team to make an accurate decision about the student’s eligibility for special education and education programming. Document either the presence of an issue (e.g. chronic health problems) or the lack of an issue (e.g. hearing and vision screening results within normal limits).

Thus, not only was behavioral information a necessary component of the RR, documentation rather than mere passing reference was important for the team to consider in accurately determining Student’s eligibility for special education and the appropriate programming to address the disability or disabilities. Simply put, there is nothing in the District’s RR to suggest any disability-related discrimination or retaliatory action through its comprehensive evaluation of Student and resulting report, and this claim must therefore fail.

The Parents similarly challenge the same type of information in Student’s December 2016 proposed IEP. (N.T. 3/31/17 at 447-48, 453-54, 465, 468, 597; Parents’ Closing at 1-2, 4-5) An IEP is defined by the IDEA, in relevant part, as “a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

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

(aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;

* * *

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education

curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals ... will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc)[.]

20 U.S.C. § 1414(d); *see also* 34 C.F.R. §§ 300.320.

There can be no question that the District was required to address Student's behavior in the educational program it proposed and implemented; thus, information on how Student's behavior was impacting Student's overall performance, including academic progress, was a necessary component of the IEP. 20 U.S.C. § 1414(d)(I)(aa). As with the RR, whether or not one might have considered limiting the amount of detail regarding Student's behaviors and disciplinary referrals, that content could not have been eliminated without omitting crucial information relevant to "how [Student's] disability affects [Student's] involvement and progress in the general education curriculum." 20 U.S.C. § 1414(d)(I)(aa). In recognition of the District's statutorily mandated obligations in developing an appropriate IEP, this hearing officer cannot

conclude that the District's inclusion of relevant behavioral and disciplinary information in the IEP amounted to discriminatory or retaliatory conduct.

With respect to the Parents' concerns that the District was overly focused on and exaggerated Student's problematic behaviors (N.T. 1/25/17 at 44-45, 49, 51, 239-41; N.T. 3/3/17 at 197-99, 215-18; N.T. 3/31/17 at 440-41, 447-49, 464-65, 480, 530-31) to the exclusion of academic goals and needs (N.T. 3/31/17 at 482), and that its staff provoked Student to engage in improper conduct (N.T. 3/3/17 at 211-12; N.T. 3/31/17 at 434-35, 443, 536), this hearing officer finds that the evidence of record does not support their assertions. As noted in the April 5, 2017 Decision at 16, it is very evident that Student's presentation at home and in the community is vastly different from how Student presents in the school setting, as detailed in the home and school input, including responses to the rating scales, in the RR. Student did admit to some of the incidents for which discipline was imposed (February 5, 2017 Decision at 11 n. 27). Moreover, although Student's testimony that contradicted some of the District's descriptions of behavioral incidents was not deemed by this hearing officer to be incredible but rather exemplified Student's unique perspective, Student's demeanor as a witness at times reflected inaccurate perceptions of Student's conduct and that of others, and frequently appeared to minimize the impact of behaviors that were certainly disruptive to the educational environment and peers. Although aspects of Student's presentation at the hearing appear to be consistent with characteristics of Student's disabilities, they cannot be ignored when considering all of the evidence, and Student's testimony as to behavioral incidents was not accorded significant weight. Viewing the record as a whole, there can be no question that Student exhibits significant behavioral difficulties that impact educational performance and require intensive programming. There is no basis for finding disability-related discrimination or retaliation in this regard.

Finally on these issues, and despite all of the foregoing conclusions, the District is reminded that a major premise of the IDEA is that parents must be permitted to participate meaningfully in making educational decisions about their children. Importantly, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). Going forward, the District is on notice of, and must be prepared to consider and respond to, the Parents' concerns with the content of the RR and IEP at the time of the next team meeting.

WHETHER THE DISTRICT DENIED STUDENT FAPE

The next issue is whether the District denied Student FAPE during the 2016-17 school year to the present. The record establishes that, upon Student's enrollment, the District took steps to acquire information from the previous school in the other state. Upon receipt of those records that included an IEP, a psychoeducational evaluation and FBA, and information about the non-public school for children with emotional and behavioral needs that Student had attended, the District proposed additional emotional support. The parties agreed at that time to academic instruction for certain classes in that classroom. A "transfer IEP" was developed, and revised as additional information was obtained, in order to provide a program that was similar to that in the other state. The goals, program modifications/specially designed instruction, and related services from the previous IEP were retained as an RR was conducted. The RR once completed established that the initial IEP was directly responsive to Student's various identified academic and social/emotional/behavioral needs at the time, and was reasonably calculated to address them appropriately.

Shortly after the school year began, however, Student began to exhibit problematic behaviors, and disciplinary action soon followed. The District was not granted permission by the

Parents to conduct an FBA, which would have provided crucial information to the IEP team in considering how to address the behaviors. A one-on-one paraprofessional and other staff, including the teachers, continually attempted to address Student's behavioral challenges, but were largely unsuccessful. By December 2016, it was readily apparent that Student required more intensive interventions, and the District promptly drafted a new IEP that once again targeted identified academic and social/emotional/behavioral needs demonstrated at the time in the District to the extent the professionals working with Student understood them without an FBA. At that point, the location of services remained unchanged, although a more restrictive setting was contemplated by District members of the IEP team. All of these efforts reflect the District's preparation to provide an educational program that was individualized for Student and responsive to Student's unique profile.

As specific challenges to the issue of FAPE, the Parents point to their understanding that the paraprofessional was only logging negative behavior and not positive conduct, and exaggerated the former (N.T. 3/31/17 at 523-26, 538-39); and that the paraprofessional did not provide adequate assistance to Student and interfered with socialization and peer relationships (N.T. 1/25/17 at 44; N.T. 3/31/17 at 440-41, 443). They also expressed concern that the District was not addressing Student's academic needs, including the possibility of providing a Wilson reading program. (N.T. 3/31/17 at 474-76, 482) However, the District witnesses credibly and persuasively testified to the contrary as to the role of the paraprofessional and to the manner and type of data that was collected. (N.T. 3/3/17 at 129-32; N.T. 3/24/17 at 256, 260, 262-63; N.T. 3/31/17 at 515-16, 520-22, 534-36, 538-39, 541, 545-46, 548-50, 592-93, 718-19) Additionally,

the District had been implementing the last agreed upon IEP⁶ developed before the RR was completed, and there had been no meeting attended by the Parents to discuss Wilson⁷ or any other program. In the meantime, Student's behaviors continued to impact all academic functioning to a significant degree. While it is perhaps understandable that the Parents declined to attend an IEP meeting after they filed their Due Process Complaint, the District's program cannot be deemed inappropriate based on programming decisions that have yet to be made. The IEP team will be directed to reconvene as discussed more fully below, at which time Student's academic and other needs can and should be discussed.

The Parents throughout the hearing raised logical and heartfelt objections to the IU-run program that was proposed shortly after the school year began and where Student is currently in a 45-day AES placement. (*See, e.g.*, N.T. 3/31/17 at 454-55) As this hearing officer noted in her February 5, 2017 Decision, LEAs are required to make available a continuum of services to meet the needs of special education students. February 5, 2017 Decision at 12 (citing 20 U.S.C. § 1412(a)(5); 34 C.F.R. §§ 300.115, 300.116). The IDEA demands that eligible students be educated in the "least restrictive environment" (LRE) which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). It is not at all clear on the record that there was a need in December 2016 to take the giant step from supplemental learning support in the regular school building that Student would have attended absent any disability to a full-time, out-of-District special education placement. Nevertheless, Student's placement was not changed until certain

⁶ The IDEA expressly provides that, "during the pendency of any proceedings conducted pursuant to this section, unless the State or 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).

⁷ It merits mention that there are a number of multi-sensory reading programs available should the IEP team determine that Wilson is not appropriate.

intervening events occurred in January and February 2017 which permitted the 45-day removal. Based on all information known to the District at the start of the 2016-17 school year and through the removal to the 45-day AES placement (which will be discussed below in connection with the District's requests for relief), the evidence simply does not establish any denial of FAPE to Student.

THE DISTRICT'S CLAIMS

The District seeks approval of its December 2016 RR and proposed December 2016 IEP. Despite the conclusions above that these documents are not discriminatory or retaliatory and meet the requisite criteria in the IDEA and all implementing regulations, the documents are as yet incomplete. The parties will be directed to convene a meeting of Student's IEP team to discuss the Parents' concerns with the RR and permit them the opportunity to provide a written statement to be included as part of that document in Student's education record if they wish to do so.

The District's December 2016 IEP is not yet finalized and requires revision during and following the independent FBA. In addition, any proposed placement in the IU-run program following completion of the 45-day AES placement and going forward beyond the current school year shall not be part of the attached Order for several reasons. First and foremost, the District "must ensure that "[t]he placement decision ... [i]s *based on* the child's IEP." 34 C.F.R. § 300.116(a)(2)(b)(emphasis added). Student's placement simply may not be identified before the IEP is completed. Second, as noted above, the District is required to have a continuum of placements available, and the law demands that Student, like all eligible students, be provided an educational program in the least restrictive environment. Third, while many District and IU witnesses opined that the IU-run program is currently appropriate (N.T. 3/31/17 at 502, 570, 605-

06, 620, 622, 653, 663-64, 680, 709-10, 723, 742), it was also described by a District Supervisor of Special Education as a short-term, not permanent, placement. (N.T. 3/31/17 at 605-06)

Moreover, Student has continued to demonstrate challenging behavior in the AES placement in the IU-run program, and clearly more intensive interventions that do not rely on the time-out room as a deterrent must be considered for implementation; Student needs to learn to manage and cope with behaviors. The 45-day AES placement has been determined to be authorized and therefore shall not be disturbed, but the team will be required to meet to consider the results of the FBA to develop a PBSP to address Student's challenging behaviors that have been exhibited in various educational settings and use that information to guide future decisions, including placement, and to consider other IEP revisions as may be appropriate.

In order to minimize transitions for Student as data becomes available and programming decisions to address concerning behavior may be made, and recognizing that the Parents do not seek to have Student returned to the District building from which Student was removed for 45 days⁸ (N.T. 3/31/17 at 456-57) where Student experienced significant difficulty, the District will not be ordered to return Student to a District program prior to the end of the current school year. The team must have the opportunity to consider and make revisions to Student's IEP as the independent FBA provides preliminary and final results for development of a PBSP and to inform other revisions to the IEP. (See April 5, 2017 Decision) Unless the IEP team determines otherwise, Student shall remain in an IU-run program following the end of the 45-day AES placement through the end of the 2016-17 school year while the FBA is completed and the IEP team has the opportunity to make all appropriate decisions regarding Student's educational program.

⁸ Based on the District's calendar, Student's 45-day removal will end sometime in May 2017. (HO-8)

The team will be directed to consider an appropriate educational setting in the least restrictive environment that will meet all of Student's needs, including academic and social/emotional/behavioral strengths and weaknesses. The placement decision must be based upon the IEP that the team has yet to finalize for implementation no later than the start of the 2017-18 school year.

Finally, as was previously suggested, this hearing officer strongly encourages the parties to consider including a neutral IEP facilitator, such as is offered by the Office for Dispute Resolution at no cost, to assist them in the next IEP meeting to collaborate together in making appropriate educational programming decisions for Student.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District did not deny FAPE to Student or otherwise engage in disability-based discrimination or retaliation against Student; and that the District's RR and proposed IEP are not yet final documents that may be formally approved at this time.

ORDER

AND NOW, this 12th day of April, 2017, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not discriminate against Student on the basis of Student's disability.
2. The District did not retaliate against Student on the basis of Student's disability.
3. The District did not deny Student FAPE during the 2016-17 school year through the date of this Order.
4. The District's December 2016 RR meets the required criteria in the law, but shall remain open until the Parents are provided with an opportunity to provide any statement of

disagreement with its content and/or conclusions for inclusion in Student's education records. The Parents shall be given a reasonable period of time (at least ten calendar days) following the meeting to discuss the RR.

5. The District's proposed December 2016 IEP meets the required criteria in the law, but requires revision as set forth below.
6. Within five calendar days of the date of completion of the preliminary results of the independent FBA (as directed in the April 7, 2017 Decision), Student's IEP team to include representatives of the IU-run program shall meet to review and discuss the December 2016 RR and the preliminary results of the independent FBA, and to make revisions to Student's IEP, including development of a PBSP, consistent therewith.
7. Within ten calendar days of the date of completion of the independent FBA (as directed in the April 7, 2017 Decision), Student's IEP team to include representatives of the IU-run program shall meet again to review and consider its results, and to make further revisions to Student's IEP and PBSP consistent therewith. Student's placement shall be determined, in the least restrictive environment appropriate for Student and based upon the final IEP, and shall be implemented no later than the start of the 2017-18 school year.
8. Within three school days of the IEP meeting described in Paragraph 7, the District shall issue a NOREP to the Parents, to which all procedural safeguards shall attach.
9. Unless the IEP team agrees otherwise, Student shall remain in the IU-run program through the end of the 2016-17 school year while the FBA is conducted and the IEP team considers revisions to Student's IEP and develops a PBSP
10. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are **DENIED** and **DISMISSED**.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER