

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

Child's Name:

A. S.

CLOSED HEARING
ODR Case #21435-18-19

Date of Hearing:

March 8, 2019

Parents:

[redacted]

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Counsel for Parents

School District:

Colonial School District – 230 Flourtown Road
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Date of Decision:

April 5, 2019

Hearing Officer:

Michael J. McElligott, Esquire

INTRODUCTION

Student (“student”)¹ is an early elementary grades student who has been identified as a student with autism. The student resides in the Colonial School District (“District”).

The parties do not dispute that the student is a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)². The parties dispute whether or not the District has provided the student with FAPE in the current 2018-2019 school year. The parties also dispute whether the District’s proposed individualized education program (“IEP”) is reasonably calculated to provide FAPE and, more specifically, where the student’s educational placement should be for the upcoming 2019-2020 school year.

For the reasons set forth below, I find that the District has not denied FAPE to the student in the current 2018-2019 school year and, the student’s 2019-2020 placement shall be in a District-based placement.

¹ To protect the confidentiality of the student, the generic use of “student”, rather than a name or gender-specific pronouns, will be employed and will be substituted in direct quotes throughout the decision.

² It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-162.

PROCEDURAL BACKGROUND

The parties engaged in a previous round of special education due process which resulted, in May 2018, in a decision and order at ODR file number 19718-1718 (Hearing Officer Exhibit ["HO"]-1). The decision at 19718-1718 found that, *inter alia*, the District's evaluation process and report were prejudicially flawed and could not serve as the basis for appropriate programming. The hearing officer in that matter, a hearing officer different from the undersigned hearing officer, ordered an independent educational evaluation ("IEE") to serve as the basis of a new individualized education program ("IEP") and explicitly established the private placement the student attended at that time as the student's pendent placement.

In August 2018, the IEE had not yet been issued, and the District convened the student's IEP team (Parent Exhibit ["P"]-5; School District Exhibit ["S"]-13). Dissatisfied with the IEP proposed by the District in the absence of the IEE, the parents requested mediation. (HO-2).

In October 2018, mediation concluded and was unsuccessful. The IEE had still not been issued and, in November 2018, the parents filed the complaint in this matter, alleging that the student was denied a free appropriate public education ("FAPE") through the District's program/placement proposed in August 2018. (HO-2, HO-3). Throughout these events, the student's placement continued to be pendent at the

private placement which the student was attending when the May 2018 decision was issued. (HO-1).

As part of the November 2018 complaint, parents requested a pendency ruling given the August 2018 IEP meeting and fall 2018 mediation process. (HO-2). At approximately the same time as the filing of the complaint, the IEE was issued. (P-3). With the issuance of the IEE, the student's IEP team met in December 2018, and parents amended their complaint, disagreeing with the proposed December 2018 IEP. (S-12; HO-4). In February 2019, pending the conclusion of the hearing process, the undersigned hearing officer issued a pendency ruling, maintaining the student's private placement where the student had been attending throughout the 2018-2019 school year. (HO-7).

In the midst of these procedural elements over the fall of 2018 and winter of 2019, the parties continued to attempt a resolution of their dispute, including a dispute as to extended school year ("ESY") programming for the summer of 2019. These efforts did not bear fruit, and this decision follows.³

³ On March 6, 2019, the parents explicitly rejected the District's plan for ESY programming for the summer of 2019. That issue was taken up at ODR file number 21886-1819 on an expedited hearing schedule contemporaneously with this matter. The affiliated decision at 21886-1819, addressing ESY-2019 programming, is being issued at the same time as this decision. As set forth below, the decision and order at 21886-1819 intersects to a degree with the instant decision and order.

ISSUES

Is the District providing the student with FAPE in the 2018-2019 school year?

What should the student's educational placement be for the 2019-2020 school year?

FINDINGS OF FACT

1. Under the terms of the February 2019 pendency ruling, the student attends a private school ("private school #1"). This placement is being maintained under the stay-put doctrine of the IDEIA, which itself is a continuation of a pendency determination made by a hearing officer in the parties' prior round of special education due process at ODR file number 19718-1718. (HO-1, HO-7).
2. To provide support and services for its students, private school #1 contracts with another private academy ("Academy") that focuses on serving students with autism. The student in this matter receives services from Academy providers while attending private school #1. (HO-1, HO-8; Notes of Testimony ["NT"] at 26-54, 78-111).
3. The independent evaluator who issued the IEE in November 2018 completed a thorough evaluation of the student, including records-review, assessments and testing, input from parents and educators, and observations of the student. (P-3).

4. In December 2018, following the issuance of the IEE, the student's IEP team (including the independent evaluator) met to design an IEP for the student. (S-12; NT at 26-54, 57-111).
5. The December 2018 IEP included updated levels of academic and functional performance, including data from the IEE. (S-12 at pages 7-20).
6. The December 2018 IEP included thirteen goals, three in appropriate classroom/peer-related behavior, four in pragmatic expressive language, four in academic areas (two each in reading and mathematics), one in handwriting, and one in social skills (S-12 at pages 26-35).
7. The December 2018 IEP contained extensive modifications and specially-designed instruction ("SDI") (modifications and SDI that were identical to those found in the August 2018 IEP, which the independent evaluator agreed were appropriate and comprehensive). (S-12 at pages 36-38; P-3 at pages 10, 39; P-5 at pages 32-34).
8. The December 2018 IEP provided for individual OT 30 minutes weekly with 15 minutes monthly of OT consultation, individual S&L therapy 30 minutes weekly, small group S&L therapy 30 minutes weekly, and 30 minutes monthly of S&L consultation, social skills instruction four times monthly, and regular education social skills group four times monthly. (S-12 at page 38).

9. The December 2018 IEP did not qualify the student for ESY programming, although the parties eventually agreed that the student would receive ESY programming. (HO-9).
10. The December 2018 IEP recommended that the student receive programming in a specialized District learning support classroom, for students grades K – 3rd, for 54% of the school day, with the student included in regular education for arrival, morning meeting, art/music/gym/library, lunch, recess, assemblies, class parties, and pack-up/dismissal. (S-12 at pages 40, 43; NT at 78-111).
11. The District elementary school with the specialized classroom is the student’s neighborhood school in the District, the elementary school the student would attend even if not identified under IDEIA. (S-12 at page 42; NT at 78-111).
12. The independent evaluator opined in the IEE that the student should receive support and services in a “specialized school” with small class size and minimal transitions between environments. She shared this view at the December 2018 IEP meeting. (P-3 at pages 39-40; NT at 57-78).
13. The independent evaluator shared her opinion in the December 2018 IEP team meeting that the student’s placement at private school #1 involved being pulled out of the regular education classroom and being provided with services and support in a

- specialized-learning classroom, limiting interaction with typically-developing peers and increasing the number of transitions. (P-3 at page 40; NT at 57-78).
14. In the view of the independent evaluator, this dynamic rendered the placement at private school #1 inappropriate. (NT at 57-111).
 15. The independent evaluator testified that the student should be in an academically-oriented environment, rather than an autism-support environment, with limited transitions and small class size/teacher-to-student ratios. (NT at 57-78).
 16. At the recommendation of the independent evaluator, at the December 2018 IEP team meeting another private placement (“private school #2”) was identified where the student might receive more appropriate programming. (P-7; NT at 57-111).
 17. The December 2018 IEP noted the following in terms of the student’s educational placement: “(The independent evaluator) recommends that (the student) attend a special school, such as (private school #2). While the District believes that (the student’s) IEP can be delivered at (the student’s neighborhood school), we will support this recommendation.” (S-12 at page 42).
 18. It is the particular concern— indeed a stated requirement— of the parents that, regardless of the student’s placement in the

2019-2020 school year, the student continue to receive autism-support services from the Academy. (NT at 51-53).

19. The parents are willing to consider a placement at private school #2 for the 2019-2020 school year but only if the student's autism-support services are provided by Academy providers. (NT at 51-53).
20. At the time of the hearing, it was the parents' understanding that private school #2 was in the midst of negotiations with the Academy, and seeking Commonwealth approval, for the provision of autism-support services by Academy providers at private school #2 (akin to the arrangement the Academy currently has with private school #1). (NT at 26-54).
21. In January 2019, the District formally recommended private school #2 as the educational placement for the student. (P-7).
22. In February 2019, given concerns about the student's transition in the midst of a school year and the pendency ruling issued that same month, the District confirmed for parents that the student would complete the current 2018-2019 school year at private school #1. (HO-7; P-10; S-7).⁴
23. The District's ability to coordinate a placement at private school #2 has been hampered by the parents' withholding of

⁴ At this time, the District also recommended ESY programming at the summer camp directly operated by private school #2. Parents did not agree to this ESY program. See the decision and order at 21886-1819.

consent to allow the District to communicate with private school #2. (P-11; S-8, S-9, S-10, S-11; NT at 48, 86-90).

24. The specialized District learning support classroom in the student's neighborhood school is a District-wide program for elementary students with language-based learning needs. It offers a slower pace for direct intensive instruction, small class size, low student-to-teacher ratios, and the opportunity for repetition/review. (NT at 98-105).
25. In the specialized District learning support classroom in the student's neighborhood school, some students are placed in the class for most of the day, some are placed there for supplemental services for certain subjects, and others utilize it as a resource room for targeted services. (NT at 98-105).
26. Where students in the specialized District learning support classroom in the student's neighborhood school require related services such as S&L and OT, those services are provided in the classroom. (NT at 98-105).
27. The specialized District learning support classroom in the student's neighborhood school has a certified special education teacher and two classroom aides who are also certified teachers. Any student who requires a one-to-one aide has that aide available to him/her. (NT at 98-105).

28. The specialized District learning support classroom in the student's neighborhood school meets all of the criteria identified by the independent evaluator, namely that the student should be in an academically-oriented environment, rather than an autism-support environment, with limited transitions and small class size/teacher-to-student ratios. (NT at 57-78, 98-105).
29. This decision is issued contemporaneously with the decision at ODR file number 21886-1819. (HO-9).
30. Because this decision was handled in one hearing process contemporaneously with the issues presented at 21886-1819, and the witnesses nearly mirrored each other in both cases, the testimony of witnesses sometimes crossed over from the issues in this matter to the ESY issue presented in the hearing for 21886-1819. For that reason, the transcript for the case at ODR file number 21886-1819 is made part of the record here, should clarity be required on certain points. (HO-8).

DISCUSSION AND CONCLUSIONS OF LAW

FAPE

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield

meaningful educational benefit to the student. (Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982)). ‘Meaningful benefit’ means that a student’s program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis* or minimal education progress. (Andrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); K.D. v. Downingtown Area School District, F.3d (3d Cir. at No. 17-3605, September 18, 2018)).

Least Restrictive Environment

An aspect of providing FAPE also requires that the placement of a student with a disability be in the least restrictive environment (“LRE”). Educating a student in the LRE requires that placement of a student with disabilities be supported, to the maximum extent appropriate, in an educational setting which affords exposure to non-disabled peers. (34 C.F.R. §300.114(a)(2); 22 PA Code §711(b)(11); Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993)). Furthermore, a school district must ensure that “(u)nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled”. (34 C.F.R. §300.116(c)).

2018-2019 School Year/Denial of FAPE

As part of their claim for remedy, parents seek a finding that the District denied the student FAPE in the current 2018-2019 school year. This claim is denied, and it is an explicit finding that the District did not deny the student FAPE in the current 2018-2019 school year.

First, as the result of the stay-put doctrine and through the date of this order, the student's program/placement at private school #1 was determined as a matter of pendency. The student's placement at private school #1 was a placement preferred by the parents, and the District met its obligation to support this placement financially pending the outcome of these proceedings.

Second, equitable considerations aside given the inability of a school district to counter the stay-put doctrine, pendency does not necessarily exclude a finding that a school district did not meet its FAPE obligations to a student. Here, though, that notion is a non-factor because the record fully supports a finding that the student was receiving appropriate services and making progress at private school #1.

Third, the finding below is that the December 2018 IEP is appropriate and the student's needs can be met appropriately (perhaps even robustly) in a placement at the specialized District learning support classroom in the student's neighborhood school. It is quite appropriate that the District's view is that as of February 2019, with the pendency ruling, and as of April 2019, with this final decision, that the student not

be forced in the midst of the current school year into a transition from the placement at private school #1. That transition must be planned-for and managed, and so the District's decision to support the student's current placement at private school #1 through the end of the 2018-2019 school year is not only defensible but in line with the provision of FAPE for the current school year.

Accordingly, the District has provided, and will continue to provide, FAPE to the student by supporting through the end of the 2018-2019 school year the student's placement at private school #1.⁵

2019-2020 School Year/Appropriate Placement

Having the student remain in the current placement at private school #1 for the remainder of the 2018-2019 school year, as described above, is appropriate under the circumstances. But the record is preponderant, especially through the view of the student's needs as outlined in the IEE and the opinion of the independent evaluator, that having the student remain at private school #1 would cease to be appropriate for the upcoming 2019-2020 school year. The placement question for the student for the upcoming 2019-2020 school year, then, is weighed between two potential options: A placement at private school

⁵ The provision of FAPE for the student in summer-2019 is addressed in the decision and order at ODR file number 21886-1819.

#2, or a placement at the specialized District learning support classroom in the student's neighborhood school.

Placement at Private School #2. The record fully supports a conclusion that, between the two placements at this time, the more appropriate placement is the specialized District learning support classroom in the student's neighborhood school. This somewhat misstates the situation, however, because whether a placement at private school #2 is available to the student and, if so, what the student's program would look like (and, consequently, how the District can put itself in a position to support it) is unknown. This is solely because the parents have not, at least as of the date of the hearing, provided consent for the District to communicate and collaborate with private school #2. There is no way to gauge—either as a matter of educational planning for the IEP team, or as a matter of evidence in this proceeding—the appropriateness of a placement at private school #2. Again, that is because the parents have not opened the door for such considerations by not providing their consent to have the District engage with private school #2.

This finding should not be read to impute bad faith or unfair dealing on the part of the parents. It is clear that they want only the best for their child, and have had a longstanding, trusting relationship with service providers from the Academy. In their estimation, they have seen

marked progress from having received services from the Academy, and while not a direct focus of this hearing, aspects of the documentary evidence in the record where the student's past profile, needs, and achievement are in evidence, their position would seem to be supported. Put simply, they like and trust the providers from the Academy, have seen results for their child, and wish to place that relationship/those providers at the center of the student's education. That is the prism through which parents view educational decision-making.

More detrimental to the parents' position in this matter than the lack-of-consent, though, is their position that only providers from the Academy can be considered for meeting the student's educational needs. That is an untenable position. The provision of a FAPE is rooted in understanding a student's needs and designing goal-based programming to meet those needs. Provision of FAPE cannot be linked to a specific organization or provider.

Therefore, the parents' reluctance to provide consent for the District to communicate/collaborate with private school #2, unless and until perhaps parents can be assured that providers from the Academy would be involved in autism-support for the student, is understandable. But it also negates any possibility for the student's IEP team, or this hearing officer, to consider private school #2 as a potential placement for the student.

Placement in District-Based Classroom. As a result, one is left only with the consideration of the appropriateness of the specialized District learning support classroom in the student's neighborhood school. Fortunately, this potential placement is entirely appropriate for the implementation of the December 2018 IEP.

As for the December 2018 IEP itself, it is reasonably calculated to provide the student with significant learning in light of the student's unique needs. The District's understanding of the student's present levels of academic and functional performance is comprehensive and incorporates the insights from the IEE. The IEP goals are also comprehensive and appropriate. As the independent evaluator observed, the modifications and specially-designed instruction, too, are comprehensive, and interventions with which she agrees. In short, as designed, the December 2018 IEP is wholly appropriate.

The placement at the specialized District learning support classroom in the student's neighborhood school meets all of the deep concerns which the independent evaluator highlighted in the IEE and for the IEP team in December 2018, and in her testimony. Specifically, the student's transitions can be managed effectively, yet the student can still be afforded consistent and substantial access to regular education settings and typically-developing peers.

However, in her report the independent evaluator opined that while "a full-time educational placement in a learning support classroom could

meet the criteria for [recommended] class size [approximately 9-12 students], it is this clinician’s opinion that such a placement should not occur for (the student)”. (P-3 at page 39, bracketed material added).

While the specialized District learning support classroom in the student’s neighborhood school is an instructionally-based, academic-support setting, the evaluator’s abstracted concern has little traction with the concrete realities of the District classroom.

The independent evaluator’s first concern is that a learning support environment could have more than 9-12 students; the District classroom, however, maintains a student population of 8-10 students. (P-3 at page 39, NT at pages 100-101).

The independent evaluator’s second concern is that a learning support environment involving a “fluid peer group” that fluctuates throughout the day could prove potentially “problematic for (the student)”. (P-3 at page 39). This is a feature of the District classroom—certain students may come into the classroom for a period of time but not remain throughout the day. (NT at 98-100). Having said that, it is the considered opinion of this hearing officer that a variety of peer interaction should not be viewed as an absolute impediment—indeed, it may be utilized as a means to deepen the student’s strengths as recognized by the independent evaluator (observant of peers, improving initiation of communication with peers, affect recognition, outgoing personality, social interest, and improving play skills) and to address the

student's needs as recognized by the independent evaluator (improve attention, increase focus, improve social skills, reciprocal play/interaction skills, social engagement/pragmatic language skills with peers in play and conversation, perspective-taking, recognition of personal space). (P-3 at pages 10, 35).

The independent evaluator's third concern is that a learning support environment would necessitate "significant pull-out periods for related services [S&L and OT] that would fragment (the student's) day and negatively impact upon (the student's) learning". (P-3 at page 39, bracketed material added). Delivery of related services in the District classroom, however, is on a push-in basis, with service providers providing related services inside the classroom. (NT at 99).

The concerns of the independent evaluator for a learning support environment, then, are not a part of the instructional mosaic of the specialized District learning support classroom in the student's neighborhood school or, in the case of the "fluid peer group" concern, are a feature of the placement that creates an opportunity for significant learning based on the student's unique strengths and needs.

Finally, in an entirely serendipitous turn, the specialized District learning support classroom is located in the student's neighborhood school. Not only, then, is the specialized District learning support classroom helping to meet the LRE requirements of IDEIA in providing the student substantial access to regular education environments and to

typically-developing peers, it allows for these things in the student's neighborhood school—the school the student would attend even if the student was not eligible under IDEIA. This aspect of the District-based placement should not be overlooked: The student's interaction with typically developing peers in school will be with neighborhood children and geographically-near peers. Often, this is not the case, and for important, unavoidable reasons, a student's IEP must be implemented in a school which is not the student's neighborhood school. Here, that is not the case, and the student will be in the enviable position of seeing and interacting with, literally, neighborhood children.

Accordingly, in the upcoming 2019-2020 school year, the December 2018 IEP shall be implemented in the specialized District learning support classroom located in the student's neighborhood school. The order below, however, will contain an additional directive to the District regarding behavior programming.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the School District did not deny, and is not denying, the student a free appropriate public education (“FAPE”) for the 2018-2019 school year, including ESY programming in the summer of 2019.⁶

The December 2018 IEP shall be implemented in the upcoming 2019-2020 school year in the specialized District learning support classroom located in the student’s neighborhood school.

Over the first 20 calendar days of the 2019-2020 school year, the District shall perform and issue a functional behavior assessment (“FBA”) of the student in the District classroom and other school environments. Within the first 30 calendar days of the 2019-2020 school year, the District shall design a positive behavior support plan (“PBSP”) based on the FBA. Both the FBA and PBSP shall be incorporated thereafter in the student’s IEP.

⁶ Again, the provision of FAPE for the student in summer-2019 is addressed in the decision and order at ODR file number 21886-1819. The order at 21886 directs the District to coordinate a transition over the summer between Academy providers, who will continue to work with the student in the ESY program, and District providers (one-to-one aide, S&L therapist, occupational therapist, and special education teacher) who will, upon the student’s return to the District in the 2019-2020 school year, be providing services to the student. The transition process will be structured to allow for an eventual diminution of the time the providers from the Academy work with the student and a concomitant increase in the time the District-based providers work with the student. See decision and order at ODR file number 21886-1819.

Nothing in this order shall be read to limit the ability of the student's IEP team to amend the terms of the order as the IEP team shall determine and the parties shall agree in writing through an approved-NOREP process.

Any claim not specifically addressed in this decision and order is denied.

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

April 5, 2019