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: A. W.

Date of Birth: [redacted]

Dates of Hearing:
October 18 and October 21, 2011

CLOSED HEARING

ODR File No. 2201-1112AS

Parties to the Hearing:	Representative:
[Parents]	Jeni Hergenreder, Esquire Disability Rights Network of Pennsylvania 429 Fourth Avenue, Suite 701 Pittsburgh, PA 15219
Keystone Oaks School District 1000 Kelton Avenue Pittsburgh, PA 15216	Aimee Rankin Zundel, Esquire Law Offices of Ira Weiss 445 Fort Pitt Boulevard, Suite 503 Pittsburgh, PA 15219
Date Record Closed:	November 18, 2011
Date of Decision:	December 3, 2011

Hearing Officer: Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

A student (hereafter Student)[1] is an elementary school-aged student in the Keystone Oaks School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)[2] on the basis of a specific learning disability. The Parents of Student and [redacted] other eligible students in the District filed a single due process complaint against the District in August 2011, asserting that the District's proposed plan to relocate the placement of all [redacted] children for the 2011-12 school year was inappropriate under the IDEA, as well as discriminatory under Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act (ADA).[3]

The case proceeded to a closed due process hearing convening over two sessions, at which the parties presented evidence in support of their respective positions. The Parents of each child expressly consented to convening a single hearing for all [redacted] students, and all agreed that the hearing would be closed.[4] The Parents collectively sought to establish that the District's decision to revise its special education plan and centralize its learning support services at the elementary level into one elementary school amounted to discriminatory exclusion of their children from their neighborhood schools on the basis of their disabilities, and was made without parental input and without regard to the students' individual needs. The District, for its part, asserted that its decision was made in response to valid concerns with overall academic proficiency, declining enrollment, a decrease in the number of students exhibiting a need for special education, and an effort to effectuate compliance with state regulations regarding permissible age ranges in special education classrooms.

For the reasons which follow, I find in favor of the Parents on their principle claim, and in favor of the District on the remaining claims.

ISSUE

Whether the District's decision to change the location of special education services from a particular elementary school to another elementary school in the District constituted a change in educational placement under the IDEA, Section 504, and the ADA?

[1] In the interest of confidentiality and privacy, Student's name and gender, as well as other potentially identifying information, are not used in the body of this decision.
[2] 20 U.S.C. §§ 1401 *et seq.*
[3] 29 U.S.C. § 794 and 42 U.S.C. §§ 12101 *et seq.*, respectively.
[4] Notes of Testimony (N.T.) 7-9.

FINDINGS OF FACT

1. Student resides within the District and is eligible for special education under the IDEA., on the basis of a specific learning disability, and is also a student with a disability under Section 504. (N.T. 32-33, 62-63)[5]

2. Student is elementary school-aged and currently attends the District elementary school which is the closest to Student's home (hereafter "home elementary school"). (N.T. 33)

3. The home elementary school serves students from kindergarten through fifth grade, both students with disabilities and students without disabilities. There are approximately [redacted] students in that school building this school year, 2011-12. (N.T. 232)

4. The home elementary school is the school Student would attend if Student did not have a disability. (N.T. 33)

5. A meeting convened on May 12, 2011 to develop an initial IEP for Student. One of Student's Parents attending that meeting and participated in the development of an IEP. There was no suggestion that Student might be attending any school other than the home elementary school. (N.T. 63-66, 84-85, 471-72; J 34)

6. The team developed an IEP for Student at that meeting. Goals addressed needs in reading comprehension, reading fluency, spelling, mathematics, and written expression; program modifications and specially designed instruction were also included. The IEP calculated that Student would spend 53% of the school day in the regular education classroom for all subjects and special classes, with supplemental learning support (instruction in mathematics and language arts) outside of the regular education environment. The IEP specified that it was to be implemented at Student's home elementary school between May 13, 2011 and May 11, 2012. (J 34)

7. Student's Parents approved the NOREP accompanying the May 2011 IEP. (N.T. 66-67; J 35)

8. In the learning support classroom at the home elementary school this school year (2011-12), there are typically [redacted] students in the room with one teacher. (N.T. 342-43; 436, 452)

[5] References made throughout this decision are to the Notes of Testimony (N.T.), Joint Exhibits (J), Parent Exhibits (P), and School District Exhibits (S).

9. The District has experienced declining enrollment in recent years and has also observed that fewer students need special education services. (N.T. 273)

10. In late winter/early spring of 2011, District personnel began to discuss the possibility of centralizing learning support services for the kindergarten through fifth grades into one elementary school building (hereafter "alternate elementary school") which is not the home elementary school. (N.T. 187-88, 211, 251-52, 258-59, 390-91)

11. The alternate elementary school serves students from kindergarten through fifth grade, both students with disabilities and students without disabilities. There are approximately [redacted] students in that school building this school year. (N.T. 378-79, 387-88)

12. The District previously centralized special education services for students in its life skills program into one elementary school building, sometime in the mid-1990s. (N.T. 188-90, 348)

13. Additionally, the District previously centralized special education services for students receiving autistic support services into one elementary school building. (N.T. 191-92, 217, 289-90, 348)

14. The purposes of the currently proposed centralization of special education services for elementary school students were to configure instructional groupings of students within the applicable state regulations, and to institute a new, more intensive reading program to increase overall proficiency in language arts, particularly for special education students in the fourth and fifth grades. (N.T. 251-54, 257, 260-61, 335-41, 346, 391-92; *see* 22 Pa. Code § 14.146)

15. The District first contacted the Pennsylvania Department of Education (PDE) about its proposal to revise its special education plan in March 2011, and was advised to complete a Special Educational Plan Revision Notice (SEPRN). (N.T. 285-87, 354, 392-94)

16. In March or April of 2011, the District presented its special education reconfiguration and centralization plan to the school board, and the proposal was discussed on several occasions. The school board did not decide to proceed with the plan until the end of May 2011. (N.T. 193, 255-56, 423)

17. In late May 2011, the District Coordinator of Pupil Services sent a letter to all parents and guardians of students in special education at the home elementary school and another elementary school. The letter advised the parents of the initiation of a plan to reconfigure elementary special education programming to centralize and relocate those services to the alternate elementary school for the 2011-12 school year. (N.T. 274, 394-95; J 9)

18. The District did not seek input from any of the parents of the students in special education at the home elementary school or the other elementary school regarding the reconfiguration and centralization plan. (N.T. 368-69)

19. After the May 2011 letter was sent, the District Coordinator of Pupil Services called the parents of all affected students at the home elementary school to advise them of an open house at the alternate elementary school, and to ask if there were any questions. (N.T. 397-98)

20. Student's Parents first learned of the proposed relocation plan after Student reported having heard about it from classmates at school. Student's Parent did not receive a copy of the May 2011 letter, and called the home elementary school principal to confirm the change. (N.T. 67-70, 240-41, 396-97)

21. The Superintendent spoke with one of the Parents on the telephone and exchanged email messages, but no meeting about the proposed relocation was scheduled or held. (N.T. 81-82, 196-201; S 4)

22. The District held the open house at the alternate elementary school on June 13, 2011 to introduce the students and their families to the teachers and allow the families to tour the building an ask questions about the change. Administrators were available throughout the summer to conduct additional tours, and a second, more informal open house was scheduled to be held several days before the start of the 2011-12 school year. (N.T. 48-49, 258, 276, 380-82, 385-87, 388-89, 398-99, 439-40, 473-76)

23. Information provided at the open house included the teacher and paraprofessional for each instructional grouping (K-2, 3-4, and 4-5). (N.T. 380-81; S 1)

24. One of the Parents and Student did attend the open house. Student was upset about changing schools. (N.T. 70-73, 83)

25. PDE representatives met with District representatives again in July 2011 to discuss the SEPRN and to visit the alternate elementary school building. (N.T. 288-89, 413-14, 427-28)

26. By letter of July 20, 2011, the District Superintendent notified the parents of all children who would be affected by the reconfiguration and centralization plan of its intention to relocate some special education classes to a different elementary school for the 2011-12 school year. The Superintendent offered to meet with each of the parents along with other District personnel to answer any questions about the relocation. (N.T. 194-96; J 10, J 30, J 36A, J 43)

27. In early August 2011, the District received indication from PDE that its SEPRN could be approved if submitted. The District submitted the SEPRN around the same time. (N.T. 293, 295-97, 414-16; J 57; S 2)

28. The Parents filed their due process complaint on August 4, 2011. (Due Process Complaint)

29. By notices dated August 8, 2011, PDE denied the SEPRN because of the due process complaint filed in this case. The District attempted to appeal that determination but, as of the date of the hearing, had received no response. (N.T. 205-08; J 58, J 59)

30. On August 17, 2011, the District Superintendent sent a letter to all parents of students who would have been relocated pursuant to the proposed plan, advising that the District was awaiting final approval of the centralization proposal, and that parents should plan for their children to remain in the previous building (the home elementary school) for the 2011-12 school year. (N.T. 209-10; P 28)

31. Under the proposed relocation plan, the current learning support teacher at the home elementary school would also move to the alternate elementary school and have responsibility for one of three instructional groupings for learning support. The speech/language therapist serving the home elementary school would also be assigned to the alternate elementary school. Occupational and physical therapy would continue to be provided through the local intermediate unit. (N.T. 263-66, 278-80)

32. Each student's instructional grouping would be determined by his or her grade level. However, for students in fourth grade, a determination would have to be made on whether the student would be in the 3-4 or 4-5 instructional group based upon his or her IEP as well as on standardized and achievement testing. (N.T. 318-21)

33. The District would provide transportation for all of the students who were relocated to the alternate elementary school consistent with their IEPs. (N.T. 267-69)

34. The District delayed implementation of the relocation plan until this proceeding is completed. (N.T. 34)

35. The District planned to convene IEP meetings and revise the IEP for each student affected by the relocation plan to note the change in location of the services; no other revisions were contemplated as a result of the relocation. (N.T. 260-63, 299-303, 309-18, 320, 376, 409)

36. The District did not plan to issue new NOREPs to the students who would be relocated. (N.T. 320-21)

37. If the District would implement the proposed plan, Student would be relocated to the alternate elementary school in order to continue to receive special education services. (N.T. 33-34)

38. The Parents had concerns about the relocation. (N.T. 75, 78-80)

39. Student is transported to the home elementary school by a bus, and the ride is approximately 10 minutes. The bus ride to the alternate elementary school would take approximately 15-20 minutes. (N.T. 77, 269-70)

40. The District is a recipient of federal financial assistance. (N.T. 34)

41. The following exhibits were admitted into evidence without objection:

P 2, 6A, 28, 50, 56, 57

J 1, 6, 7, 9, 10, 11, 11A, 12, 18, 19, 21, 27, 28, 30, 34, 35, 36A, 37, 40, 41, 43, 49, 50, 51, 57, 58, 59

S 1, 2, 4

(N.T. 486-89, 491)[6]

Two Hearing Officer Exhibits were also marked and are hereby admitted into the record. The notice of the final decision due date was marked as HO 1 and provided to counsel on October 22, 2011; and, the parties' additional closing remarks sent to this hearing officer via email on November 29, 2011 by counsel for the Parents (replying to the District closing) and November 30, 2011 by counsel for the District (objecting to the Parents' reply) were printed and marked collectively as HO 2. This Hearing Officer did not consider the comments submitted in HO 2 because the record closed on November 18, 2011 and, in any event, appeared to be cumulative rather than necessary to complete the record.

DISCUSSION AND CONCLUSIONS OF LAW

Broadly stated, 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);[7] *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents of the [redacted]children who requested this hearing. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. *See Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Nevertheless, application of these principles 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.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to

[6] J 21 and P 28 were referenced during the hearing without objection and, though omitted from the parties' motions for admission of exhibits, they are also deemed admitted. (N.T. 137, 209-10; *see also* N.T. 16)

[7] The burden of production, "*i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding," *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

be generally credible and the testimony as a whole was essentially consistent. The credibility of particular witnesses is discussed further in this decision as necessary.

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this 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 Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (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). Most critically, the IEP must be appropriately responsive to the child's identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, it has long been recognized that "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).

The Parents' principle claim in this case is that the District has ignored the mandate of the regulations implementing the IDEA that a child's placement be "as close as possible to the child's home," 34 C.F.R. § 300.116(b)(3) and 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). This assertion implicates the least restrictive environment principle, which requires that students with disabilities are, "to the maximum extent appropriate," educated with students who do not have disabilities. 34 C.F.R. § 300.116.114(a)(2). "The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled." *Carlisle Area School v. Scott P.*, 336 F.3d 260, 272 (3d Cir. 2003).

School districts are also obligated to offer a continuum of placements for special education services, 34 C.F.R. § 300.115, and it is the determination of placement within that continuum where the express preference is given for educating students with disabilities in the school closest to their homes. 34 C.F.R. § 300.116. Citing *Christopher S. v. Stanislaus County Office of Education*, 384 F.3d 1205 (9th Cir. 2004), and *LIH v. New York City Board of Education*, 103 F.Supp.2d 658 (E.D.N.Y. 2000), the Parents assert that the District's reconfiguration and centralization plan was based upon administrative convenience and did not include consideration of their children's individual needs. These cited authorities do lend support to the general proposition that special education program decisions cannot be based upon administrative convenience but must instead be premised upon individual student needs.

The District counters that selection of particular schools or school sites are not educational placement decisions but, rather, are administrative matters left to its discretion which do not trigger IDEA protections. It further contends that even if it is determined that the proposal here constituted a change in placement, it has complied with the requirements of the law, including providing notice to the parents. The District relies primarily on *Concerned Parents and Citizens for the Continuing Education of Malcolm X. v. New York City Board of Education*, 629 F.2d 751 (2d Cir. 1980), *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003), and *A.W. v. Fairfax County School Board*, 372 F.3d 674 (4th Cir. 2004), as well as *DeLeon v. Susquehanna Community School District*,747 F.2d 149 (3d Cir. 1984), and *Lebron v. North Penn School District*, 769 F.Supp.2d 788 (E.D. Pa. 2011), from the Third Circuit, in addition to certain policy guidance.

In *Malcolm X.*, the New York City Board of Education decided in 1979 to close a particular public school for budget reasons. More than half of the students in the school were in special education classes. A group of those students and their parents challenged the transfer of special education students to other schools, and the District Court concluded that those transfers constituted a change in placement and, therefore, ordered various remedies. On appeal, the Second Circuit Court of Appeals framed the issue as whether the transfer of the students with disabilities to substantially similar classes at other schools was a change in placement under the predecessor to the IDEA.[8] 629 F.2d at 753. The Second Circuit interpreted the meaning of "educational placement" in the new Act rather restrictively, concluding that the term referred to the general type of educational program, not to transfers among several different options offering that same general program. The Court concluded that the Act's protections did not extend to such adjustments in programming that an agency may determine to be necessary, including the transfer of students from a closed school, which did not in that case constitute a change in placement. *Id*. at 755-56.

In *White*, decided 23 years after *Malcolm X.*, the Fifth Circuit Court of Appeals addressed the issue of whether the school district improperly assigned the student to a centralized school, "notwithstanding his parents' request that he be assigned to his neighborhood school." 343 F.3d at 378. A main dispute there was how much parental input was required into that decision, and the Court recognized that the IDEA and its implementing regulations did not "explicitly require parental participation in site selection." *Id*. at 379. Recognizing that the parents in *White* had participated as members of the IEP team, including the discussion of the location of special education services, the Court found that the school district met its obligations in considering parental input when making program decisions for the child. The Court went on to clarify that schools do have broad authority to determine sites for providing special education services as a matter of policy and that children with disabilities are not necessarily entitled to be educated in the neighborhood school, as long as the selected location is appropriate. *Id*. at 382-83 (citing, among others, *Letter to Veazey*, 37 IDELR 10 (OSEP 2001), and *Letter to Fisher*, 21 IDELR 992 (OSEP 1994)).

[8] Education for All Handicapped Children Act of 1975, P.L. 94-142 (*see now* 20 U.S.C. §§ 1400 *et seq.* (IDEA)).

One year after *White*, the Fourth Circuit decided *A.W.*, wherein it considered the propriety of a District's change in a student's placement following disciplinary proceedings. That Court concluded the term "educational placement" within the pendency context presented meant "the environment in which educational services are provided" rather than a location. 372 F.3d at 682.

White acknowledged the parents' argument that the 1997 amendments to the IDEA enlarged the role of parent participation in the IEP process. 343 F.3d at 382. It rejected this contention in part on the policy interpretation in *Letter to Veazey* because that guidance document post-dated the 1997 amendments. *Id*. *Veazey* is instructive on another basis, however. There, the Office of Special Education Programs did opine that a public agency may determine school assignment as an administrative decision, if that determination is consistent with the decision of the placement team. However, OSEP went on to explain that, "[t]he public agency should exercise caution in making such a determination so that the placement of a child with a disability is not based on factors such as the category of disability, configuration of the service delivery system and the availability of staff[.]" 37 IDELR 10 at ¶ 7. This persuasive interpretation is consistent with that given in *Letter to Fisher* that, "[i]f the District determines, *based on the student's individual needs*, that the student should have the same educational program and opportunities for interaction with his or her nondisabled peers at the [new location], the change in location alone would not constitute a change in educational placement." 21 IDELR at ¶ 18 (emphasis added).

In considering the parties' arguments in this case, it is important to recognize that the 2004 amendments to the IDEA purposefully carried the principle of parental participation even further than had been done in 1997.[9] Notably, the District does apparently recognize that the cases on which it relies, and particularly *White*, contemplated, in some form or another, meaningful parental participation in team placement decisions including site selection. (District's closing at 19-20; *White*, 343 F.3d at 380; *see also A.K. ex rel J.K. v. Alexandria City School Board*, 484 F.3d 672, 681 n.10 (4th Cir. 2007) (refusing to state that "a change in the school where services were to be provided would constitute a change in placement," but recognizing that parents would have an opportunity in an IEP meeting to state their preferences on placement if more than one setting would meet the child's needs)). It is also important to recognize that this case does not involve a district decision to close a school entirely, as was the case in *Malcolm X.*, nor is a disciplinary pendency determination at issue as was the case in *A.W.* Moreover, these cases from outside the Third Circuit, as well as the policy guidance cited above, are not binding.

Relevant case law in the Third Circuit provides limited guidance to the issue presented. In *DeLeon v. Susquehanna Community School District*, 747 F.2d 149 (3d Cir. 1984), the Court addressed the issue of whether a change in the method of transporting a student to school was a change in educational placement. The Court focused on "the importance of the particular modification involved" and gave the term "change in educational placement" an "expansive reading, at least where changes affecting only an individual child's program are at issue" as compared to all children in the district. *Id*. at 153. Thus, the Third Circuit impliedly rejected the

[9] *See, e.g.,* S. Rep. 108-195.

more narrow interpretation of the phrase "educational placement" than did the *Malcolm X*. Court. Some years later in *S.H. v. State-Operated School District of City of Newark*, 336 F.3d 260, 272 (3d Cir. 2003), the Third Circuit confirmed that least restrictive environment placement decisions should "ideally be the same school the child would have attended if she were not disabled." Courts in this jurisdiction have also acknowledged that what constitutes a change of placement depends on whether there has been "a fundamental change in, or elimination of a basic element of the education program … and is, necessarily, fact specific." *R.B. ex rel. Parent v. Mastery Charter School*, 762 F.Supp.2d 745,757 (E.D. Pa. 2010). This interpretation is consistent with policy guidance such as *Letter to Fisher*, which opined that the question of whether a change in location amounted to a change in educational placement "would have to be determined on a case by case basis." 21 IDELR 992 at ¶ 15.

Much more recently, in *Lebron v. North Penn School District*, 769 F.Supp.2d 788 (E.D. Pa. 2011), the parents of a young child with autism challenged the school district's recommendation for regular education kindergarten in the neighborhood school for fifteen hours each week in addition to a supplemental special education program at a different location for fifteen hours each week. The parents in *Lebron* argued that this arrangement violated the least restrictive environment mandate in the IDEA including the regulation that favors neighborhood schools. The Court disagreed with the parents' contention, concluding that the IDEA "does not create a right for a child to be educated" at his or her neighborhood school. *Id*. at 801. Critically, however, the *Lebron* Court noted that the IEP team, including the parents, had expressly considered whether the student could be placed at the neighborhood school before making the decision to propose placement at a different school. *Id*.

After careful consideration of the relevant legal authority, as well as the facts of this case involving the [redacted] particular children, this hearing officer concludes that the District's decision to relocate the [redacted] students to the alternate elementary school cannot be sustained. The specific facts of these cases lead to the inescapable conclusion that the decision to relocate these children from the home elementary school to the alternate elementary school was, indeed, a change in their educational placements. *See Petties v. District of Columbia*, 238 F. Suppp.2d 114 (D.D.C. 2002). It is very significant that the decisions were made following spring 2011 IEP meetings at which the teams determined in each case, and specified in each child's IEP, that the students' special education services would be provided in the home elementary school. *Cf. T.Y. v. New York City Department of Education*, 584 F.3d 412, 419 (2d Cir. 2009) (concluding that pursuant to the IDEA, the term "educational placement" relates to the general type of educational program, not the specific building, and, thus, the IEP need not specify the "location" where services will be provided).[10] The relocation decisions were made without consideration of each individual's child's specific needs, were made solely based upon the proposed re-configuration of the service delivery system in a centralized location, and did not invite parental participation. *Cf. Letter to Fisher* at ¶¶ 17-18. Further, there was no consideration

[10] In Pennsylvania, IEP teams must state the location of services including the name of the school building. "The first consideration for placement of the student is always the student's neighborhood school, which is the school the student would attend if he/she did not have an IEP. If the student's placement is not in the neighborhood school, the IEP team must indicate the reason." *Individualized Education Program (IEP) (Annotated)*, available at http://pattan.net-website.s3.amazonaws.com/files/materials/forms/IEP-ANN061010.pdf (last visited December 2, 2011)

by each child's IEP team as to whether the special education services these children needed could be provided in the neighborhood school. As the Department of Education explained when it issued its final regulations implementing the 2004 version of the IDEA:

> The Department has consistently maintained that a child with a disability should be educated in a school as close to the child's home as possible, unless the services identified in the child's IEP require a different location. Even though the Act does not mandate that a child with a disability be educated in the school he or she would normally attend if not disabled, section 612(a)(5)(A) of the Act presumes that the first placement option considered for each child with a disability is the regular classroom in the school that the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement.

71 Fed. Reg. 46,588 (August 16, 2006).

Having concluded that the decision here amounted to a change in the students' educational placement, the parents and their children were entitled to the protections of the IDEA. That statute requires that parents be provided with an opportunity "to participate in meetings with respect to the identification, evaluation, *and educational placement of the child,* and the provision of a free appropriate public education to such child[.]" 20 U.S.C. § 1415(b)(1) (emphasis added); *see also* 34 C.F.R. § 300.501(c) . Additionally, parents must be provided with written prior notice whenever a local education agency proposes to make a change to their child's educational placement. 20 U.S.C. § 1415(b)(3); *see also* 34 C.F.R. § 300.503. The contents of that prior written notice are also expressly set forth. 20 U.S.C. § 1415(c)(1); *see also* 34 C.F.R. § 300.503.

It is true that the District offered to meet with the parents of the affected children, but providing an explanation for why a change in the location of service delivery was made after that decision occurred does not truly invite meaningful parental participation, nor does it demonstrate conformity with the IDEA mandated prior written notice including the protections of the procedural safeguards. Accordingly, this hearing officer cannot conclude that the information provided to the Parents in this case was sufficient to constitute compliance with all of the protections afforded to parents and students under the IDEA when a placement determination is made.

This hearing officer does not discount the apparently well-reasoned and well-intentioned efforts of the District to meet certain legitimate needs of its population and also address accountability and other expectations. The testimony regarding its prior unchallenged experiences with revising its special education plans, coupled with the seemingly reliable advice on which it confidently relied in the late spring and summer of 2011, was credible and evidences no suggestion of improper motivation. This hearing officer is also cognizant of the extremely delicate balance between "the competing interests of economic necessity, on the one hand, and the special needs of a handicapped child, on the other, when making education placement decisions." *Cheltenham School District v. Joel P.*, 949 F. Supp. 346, 352 (E.D. Pa. 1996) (quoting *Barnett v. Fairfax County School Board*, 927 F.2d 146 (4th Cir. 1991), *aff'd mem*., 135

F.3d 763 (3d Cir. 1997). The fact that school districts are placed in the less than enviable position of having to make difficult and broad policy decisions that impact a large and diverse population cannot, however, dictate the resolution of the relatively narrow issue presented by this case involving [redacted] individual students.

The next question to resolve is what remedy should be awarded. The Parents request that the District be enjoined from relocating the six students in this case to a location other than the home elementary school. It should be noted that, at this juncture, the District does not even have an approved SEPRN pending resolution of this due process matter. Even assuming that the District moves forward with obtaining the requisite PDE approval, this process will in all likelihood take some time. The District would also be required, if the reconfiguration and centralization plan is approved, to convene meetings of each of the students' IEP teams as discussed above in order to determine whether any or all of the students should be relocated to the alternate elementary school. This hearing officer will not enjoin the District from ever having an opportunity to make such determinations. However, in order to achieve some stability and consistency, this hearing officer will direct that no decision to relocate any of the [redacted]students in this case be made, absent express parental approval, until Student's next annual IEP meeting in the spring of 2012, and that, in any event, no such change take place prior to the start of the 2012-13 school year without express parental consent.

The last issue is whether the District has discriminated against the students under Section 504 and, to the extent this hearing officer has jurisdiction, the ADA.

> 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. The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood*, *supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Commw. 2005). "An IDEA claim may bear certain similarities to claims brought under the Rehab Act and ADA, and '[i]f a plaintiff applies the same core facts supportive of the IDEA claim and it fails, the ADA and [Section 504] claims must also fail.'" *Taylor v. Altoona Area School District*,737 F. Supp. 2d 474, 487 (W.D. Pa.2010) (citation omitted). Here, while the discussion above demonstrates that the District failed to follow all of the IDEA requirements in this case, there has not actually been any substantive denial of FAPE because the District did not remove any of the students from the home elementary school. For the same reason, there has been no exclusion from participation in, denial of the benefits of, or discrimination at, school for any of these students including Student. Accordingly, the claims under Section 504 and the ADA are denied.[11]

[11] This hearing officer lacks the authority to award counsel fees. 20 U.S.C. § 1415(i)(3); *see also* 34 C.F.R. § 300.517.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's proposal to relocate the [redacted] children in this case, including Student, constituted a change in educational placement which did not comport with the protections provided by the IDEA.

2. The Student's IEP team shall make the determination, with parental input, of any future change in the location of Student's special education services, which may not occur, absent parental approval, until the next annual IEP in the spring of 2012 and, further, any such change may not be implemented, absent parental consent, prior to the start of the 2012-13 school year.

3. There was no substantive denial of FAPE to Student, nor was Student subject to discrimination on the basis of disability under Section 504.

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

Dated: December 3, 2011