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 Final Decision and Order

ODR File Number
25995-21-22

CLOSED HEARING

Child's Name:
B.L.

Date of Birth:
[redacted]

Parent:
[redacted]

Pro Se

Local Education Agency:
Owen J. Roberts School District
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Pottstown, PA 19465

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Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
04/08/2022

Introduction

This special education due process hearing concerns a student with disabilities (the Student). The hearing was requested by the Student's parent (the Parent) against the Student's public school district (the District).

There is no dispute that the Student currently is a child with disabilities as defined by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. The IDEA is the federal special education law. Under the IDEA, children with disabilities are entitled to special education until they either receive a regular high school diploma or until the end of the school year in which they turn 21 years old. The Student turned 21 years old during the current 2021-22 school year, and so the Student ages out of IDEA eligibility at the end of this school year. The Parent argues Pennsylvania Act 66, which was passed to mitigate the impact of COVID-19 school closures, entitles the Student to an additional year of education from the District.

The crux or gravamen of this case is whether the Student is entitled to special education from the District during the upcoming 2022-23 school year. The Parent demands that the Student remain enrolled in, and receive special education from, the District during the 2022-23 school year. The Parent advances five issues in support of this demand.

Issues

The issues in this case are:[1]

1. Whether, pursuant to Section 1501.10 of the Pennsylvania Public School Code, the District must maintain the Student's enrollment and continue to provide special education to the Student during the 2022-23 school year?

[1] In a document presented during the hearing session titled "Parent's issues for hearing," the Parent phrases this issue as: "1. Whether [the District] can deny the student to repeat a year of education in the 2021-22 school year that Public School Code Section 1501.10 permits? 2. Whether there is a law allowing [the District] (e.g., a government body) to revoke its approval of a student's application? 3. Whether [the District] can terminate a stay-put on its own? 4. Whether [the District] must continuously provide the student with education until all proceedings have been completed and [the Student] has revived all educational programs and benefits that [the Student] is entitled to have?" I made that document part of the record as exhibit H-1. The waiver and estoppel issues come from the Parent's compliant, but do not appear in H-1. During the hearing session, the Parent clarified that he was not abandoning those claims. During the hearing session, the Parent also raised 14th Amendment due process claims. The Parent's Constitutional claims do not appear in the complaint or H-1, and exceed my jurisdictional authority.

2. Whether the District may revoke the Student's application to remain enrolled in, and receive special education from, the District during the 2022-23 school year?

3. Whether the IDEA's pendency rule, also known as the "stay-put" rule, requires the District to maintain the Student's special education placement during the 2022-23 school year (or indefinitely until all administrative and court proceedings are resolved)?[2]

4. Whether the doctrine of waiver or promissory estoppel requires the District to maintain the Student's special education placement during the 2022-23 school year?

Findings of Fact

I have reviewed the record in its entirety. I make findings of fact, however, only as necessary to resolve the issues before me. Items of public record, such as the dates of governmental orders and court decisions, are established through judicial notice. I find as follows:

Background

1. At all times pertinent to this matter, the Student has attended a Pennsylvania Approved Private School (the APS). *See, e.g.* NT 69-70. The Student attends the APS pursuant to an Individualized Education Program (IEP) at the District's expense.[3]

2. The APS provides a specialized program for students with disabilities. The Student's program is skills-based and has no grade levels (i.e. the concept of 1st grade through 12th grade does not apply). *See, e.g.* NT 55-56.

The 2019-20 School Year

3. The Student turned age 19 during the 2019-20 school year. NT 46.[4]

[2] The Parent presents the question of whether the pendency rule requires continued enrollment in the 2022-23 school year, or requires enrollment indefinitely, as separate questions. I combine them because analysis is the same.
[3] The Student's IEPs were not entered into evidence, but there is no dispute about this point.
[4] The Student's date of birth appears on the cover page of this decision. I have omitted that date from the body of the decision to aide redaction and to protect the Student's privacy.

4. I take judicial notice that on March 13, 2020, Governor Wolf issued an order closing all Pennsylvania schools to mitigate the spread of COVID-19.

The 2020-21 School Year

5. The Student turned age 20 during the 2020-21 school year. NT 46.

6. Pennsylvania schools remained physically closed for the 2020-21 school year, providing remote instruction to nearly all students. Schools then gradually reopened, providing hybrid instruction before reopening completely. The record does not indicate when the District or the APS reopened. Those facts do not change the outcome of this case but give context to the passage of Act 66 in the summer of 2021.

7. On June 30, 2021, Governor Wolf signed Act 66 of 2021 (Act 66) into law. Act 66 is discussed in detail below. For context, Act 66 attempts to mitigate possible educational harms of COVID-19 mandatory school closures in two ways. First, all students who were enrolled in school during the 2020-21 school year, regardless of disability, could choose to repeat the same grade level during the 2021-22 school year. Second, children with disabilities who turned age 21 during the 2020-21 school year could choose to receive an extra year of public education. *See discussion, infra*.

8. On July 14, 2021, the Parent wrote to the District's Supervisor of Special Education (the Supervisor) by email with copy to the District's Director of Pupil Services (the Director). The Parent said that he "made the decision for the student [] to repeat a year of education. That means legally [Student] can receive education until the age of 22 years old. If there is any form that I need to sign, please forward a copy to me." P-1.

9. The Director replied by email the same day, sending the Parent a link to a website with a form. The Director wrote, "The guidelines for this retention are also listed on the website. Again – once you send the completed form by July 15 – I can review to see if [Student] qualifies." P-3, P-4.

10. On July 15, 2021, the Parent sent a completed, signed Act 66 form to the Director via email. P-6, P-7.

11. On July 20, 2021, the District wrote to the Parent, confirming receipt of the Act 66 request form. In a letter signed by the Director, the

District wrote, "[Student] will repeat grade as requested [sic]. The request form and this confirmation will be placed in your child's academic records. Building level staff will process your request and you can reach out to them directly with any questions about the 2021-2022 schedule." S-1 (the Act 66 Confirmation Letter), P-8, P-9.

The 2021-22 School Year

12. The Student turned age 21 during the 2021-22 school year. NT 46.

13. On December 3, 2021, the Supervisor sent an email to the Parent, asking for the correct spelling of the Student's name for the Student's diploma. S-6 at 4, P-10.

14. Between December 21, 2021, and January 19, 2022, the Parent and District employees exchanged a series of emails. These started with a renewed request from the District for the correct spelling of the Student's name for a diploma. The Parent replied, stating his belief that the Student would not graduate until the end of the 2022-23 school year. One of the Parent's replies included a copy of the Act 66 Confirmation Letter. In response, the Supervisor explained that the Student is set to graduate at the end of the 2021-22 school year, and that Act 66 does not entitle the Student to continued enrollment in the District during the 2022-23 school year. S-6, P-10, P-11.

15. District employees never promised that the Student could remain enrolled in the District or receive a FAPE from the District during the 2022-23 school year. To the contrary, the District only promised that the Student could repeat the Student's 2020-21 grade level during 2021-22 school year. *See, e.g.* NT 56, 58, 72, 75, 82-83.

16. On January 25, 2022, the Parent requested this due process hearing by filing a due process complaint with the Office for Dispute Resolution with copy to the District.

17. At the time that the Parent filed the instant due process complaint, several matters between the parties were pending in the United States District Court for the Eastern District of Pennsylvania. *See* P-18 through P-23. There is some ambiguity as to whether those matters are properly characterized as appeals of prior due process decisions.[5]

[5] This matter is the 16th special education due process complaint that the Parent has filed against the District. Four of the prior complaints were consolidated and two were dismissed, so there are 10 prior due process decisions going back to the 2014-15 school year. *See* ODR

18. On March 21, 2022, two days before this hearing convened, the Honorable Judge Tucker of the Eastern District dismissed three of the Parent's lawsuits with prejudice. *See* Case 2:14-cv-06354-PBT (Document 106).[6] Although I cannot agree with the Parent's characterization of a prejudicial dismissal as a minor change in the status of the litigation, the Parent sent notices of appeals of Judge Tucker's orders to me by email on April 7, 2022.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

I find that all witnesses testified credibly in that all witnesses candidly shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. To the extent that witnesses recall events differently or draw different conclusions from the same information, genuine differences in recollection or opinion explain the contradictions. In this case, that difference is particularly seen in the testimony concerning the repetition of a grade level during the 2021-22 school year. While there is no genuine dispute about what the parties said to each other (and nearly all of that was in writing), the parties view those conversations quite differently.

The Parent's *ad homonym* attacks against the District's attorney within the Parent's closing brief – attacks similar to language that the Parent has used

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Nos. 15205-1415; 15486-1415; 15811-1415; 16036-1415; 17067-1516; 17920-1516; 18443-1617; 18734-1617; 25004-2021.

[6] The ECF document was filed on March 18, 2022. During the hearing, the parties agreed that they received the document on March 21, 2022.

in court filings presented as evidence in this hearing – diminish the Parent's overall credibility. The outcome of this case, however, does not depend in any way upon a credibility determination.

Discussion

IDEA Eligibility

Under the IDEA, a student who meets the definition of a "child with a disability" is entitled to special education and related services from their Local Educational Agency (LEA). The parties agree that, currently, the Student is a child with a disability and the District is the Student's LEA. For as long as the Student is a child with a disability, the Student is entitled to a free appropriate public education (FAPE) from the District.

Children with disabilities are entitled to special education from their LEA until they receive a "regular high school diploma" or until the end of the school year in which they turn 21 years old. *See, e.g.* 34 C.F.R. § 300.102.[7]

Act 66: Overview

The COVID-19 school closures prompted Pennsylvania's legislature to draft and pass Act 66, which was intended to mitigate educational losses that children potentially suffered during school closures during the 2020-21 school year. *See* 24 Pa. Stat. §§ 13-1383(a), 15-1501.10(a) (both regarding the intent of the General Assembly). Act 66 amended the Public School Code of 1949 (the School Code) by adding two new sub-sections: 24 Pa. Stat. § 13-1383 (regarding "Extended Special Education Enrollment Due to Covid-19") and 24 Pa. Stat. § 15-1501.10 (regarding an "Optional Year of Education Due to Covid-19").

Act 66: Extended Special Education Enrollment Due to COVID-19

Functionally, Act 66 entitled students with disabilities who would have aged out of special education eligibility at the end of the 2020-21 school year to an additional year of school. This aspect of Act 66 applied only to children with disabilities. 24 Pa. Stat. § 13-1383(b). Moreover, the option for an additional year applied only to a "student with a disability … who has reached twenty-one (21) years of age during the 2020-2021 school year or between the end of the 2020-2021 school year and the beginning of the 2021-2022."

[7] There is no suggestion that the "diploma" referenced in these proceedings is a "regular high school diploma" described in the IDEA's regulations. 34 C.F.R. § 300.102(a)(3)(iv).

The Student did not turn age 21 during the 2020-21 school year or in the summer of 2021. Consequently, the portion of Act 66 amending 24 Pa. Stat. § 13-1383 does not apply in this case. The Parent concedes that this aspect of Act 66 is irrelevant, focusing instead on the portion of Act 66 that applies to all children regardless of disability. I note this aspect of Act 66 both for completeness and because it illustrates how Pennsylvania lawmakers can draft legislation adding a year of special education eligibility when they choose to do so.

Act 66: Optional Year of Education Due to COVID-19

Act 66 added a sub-section to the School Code at 24 Pa. Stat. § 15-1501.10. This new sub-section enabled children to repeat their 2020-21 grade level during the 2021-22 school year. For example, if a child was in 7th grade during the 2020-21 school year, parents could choose to have the child repeat 7th grade during the 2021-22 school year. This option was available to all students, regardless of disability.

As a threshold matter, I must question my own jurisdiction to resolve disputes under 24 Pa. Stat. § 15-1501.10, which is a "regular" education law, not a special education law. While my authority has not been resolved by any court and is not specified in any statute, I find that the application of 24 Pa. Stat. § 15-1501.10 in this case relates to the Student's special education rights. Like Pennsylvania's laws concerning graduation, I may resolve disputes under regular education laws when the application of those laws impacts upon a child's special education rights. *See, e.g. In re: J.B., a Student in the Minersville Area School District*, ODR No. 2782-1112-AS (11/25/2012).

The pertinent section is 24 Pa. Stat. § 15-1501.10(b), which states:

> Notwithstanding any other provision of law, for the 2021-2022 school year, a parent or guardian may elect … to have a child … repeat a grade level to make up for any lost educational opportunities due to COVID-19, notwithstanding whether the child met the requirements to be promoted to the next grade level.[8]

This is not a direct entitlement to an extra year of public education. The regulation only creates an entitlement for children to repeat whatever "grade

[8] The omitted language concerns deadlines, differences in how the election is made for students under and over age 18, and participation in interscholastic athletics.

level" they took in the 2020-21 school year during the 2021-22 school year. The regulation says nothing about age-based eligibility for education.

The language of 24 Pa. Stat. § 15-1501.10 sharply contrasts with the language of 24 Pa. Stat. § 13-1383(b). Both laws were passed as part of Act 66, and so the differences are surely intentional. The language of 24 Pa. Stat. § 13-1383(b) clearly adds a year of entitlement to education beyond the point where a child would typically age out of programming. The language of 24 Pa. Stat. § 15-1501.10 does no such thing.

In practice, for many children repeating a grade level will result in an extra year of school. Discussed below, that is not true for all children and is not true for the Student in this case.

The Student is Not Entitled to an Additional Year of Public Education Pursuant to 24 Pa. Stat. § 15.1501.10

I find that the Student is not entitled to special education during the 2022-23 school year pursuant to 24 Pa. Stat. § 15-1501.10.

The key language in the regulation (quoted above) is "grade level." The regulation enables all students to repeat a grade level during the 2021-22 school year. For some students, repeating a grade level may result not only in an extra year of school, but in an extra year of special education as well. One can imagine an elementary school student with a specific learning disability repeating a grade level. That student may go on to receive a "regular high school diploma" after completing 12th grade – but it will take the student 13 years to go that far, and the student may receive special education all along the way.

In this case, the concept of grade levels does not apply. The District is correct that, for the Student in this case, repeating a grade level means re-teaching skills that were previously presented. Therefore, the District's only obligation under 24 Pa. Stat. § 15-1501.10 was to reteach the Student's 2020-21 curriculum during the 2021-22 school year (or, more accurately, fund that programming at the APS).[9]

The Parent argues that 24 Pa. Stat. § 15-1501.10 must be interpreted so that it applies equally to all children. I appreciate the Parent's argument and I am concerned that Act 66 may create two classes of children with disabilities: one class who will likely graduate with regular high school diplomas and another who are likely to age out of IDEA eligibility without a

[9] No issues concerning the content of the Student's education were presented.

regular high school diploma. Under Act 66, the "likely to graduate" class may receive an extra year of special education while the "likely to age out" class may not. My task as an administrative hearing officer, however, is to apply the law to the facts of this case. I cannot ignore the language of the law even if it potentially divides students with disabilities into two groups and treats those groups differently. A special education due process hearing is not the forum to challenge the law itself.

The District Did Not Revoke the Student's Application to Remain Enrolled During the 2022-23 School Year Because No Such Application Exists

I find that the Act 66 application form that the Parent completed does not entitle the Student to enrollment or special education during the 2022-23 school year.

The only "application" in question in this matter is the form that the Parent completed to exercise the option to repeat the Student's 2020-21 grade level during the 2021-22 school year. The form itself says nothing about enrollment beyond the 2021-22 school year. Discussed above, as applied in this case, that option only required the District to repeat the content of the Student's education. It does not require the District to maintain the Student's enrollment after the Student ages out of IDEA eligibility.

The IDEA's Pendency Rule Does Not Entitle the Student to Special Education During the 2022-23 School Year

The IDEA requires LEAs to maintain a child's educational placement during the pendency of due process proceedings and appeals of due process proceedings into court. 20 U.S.C. § 1415(j) provides as follows:

> Except as provided in subsection (k)(4) [regarding disciplinary placements], 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, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

This pendency rule, also referred to as the stay-put rule, creates an "automatic preliminary injunction" designed to "protect handicapped children and their parents during the review process," by "block[ing] school districts from effecting unilateral change in a child's educational program."

Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 82, 83 (3d Cir. 1996) *citing Drinker by Drinker v. Colonial Sch. Dist.*,78 F.3d 859 (3d Cir. 1996). Pendency determinations are highly fact-specific. *See id*.

"Although [Parents] need not meet the traditional preliminary injunction standard, an injunction under the stay-put provision is only available where the LEA proposes or effects a change in a student's "educational placement."" *R.B. v. Mastery Charter Sch.*, 762 F. Supp. 2d 745, 756 (E.D. Pa. 2010) *citing Union Beach Bd. of Educ.*, 2009 U.S. Dist. LEXIS 108148, 2009 WL 4042715, at *4.

A student's last approved IEP often, but not always, is the student's pendent placement. It is also critical to determine what services the student was receiving at the time of the dispute, regardless of what is written in the IEP. This underscores the fact-specific nature of pendency determinations. *See M.R. v. Ridley Sch. Dist.*, 744 F.3d 112, 118 (3d Cir. 2014), *cert denied Ridley Sch. Dist. v. M.R.*, 135 S. Ct. 2309 (2015).

The pendency rule is powerful, and sometimes outcome-determinative (as illustrated by *M.R. v. Ridley, supra*). Even so, nothing in the IDEA or its federal or Pennsylvania implementing regulations states or implies that the pendency rule extends the IDEA's maximum eligibility age. While the pendency rule may control what special education a student receives while disputes are pending, the pendency rule does not require schools to provide a FAPE to students after they age out of IDEA eligibility. Such individuals are no longer children with disabilities and no longer are entitled to a FAPE.

To be clear, I find that the pendency rule does not require the District to maintain the Student's enrollment or fund the Student's tuition at the APS during the 2022-23 school year because the Student will no longer be a child with a disability once the 2021-22 school year concludes. I go on, however, to make sure this conclusion squares with evolving case law concerning IDEA obligations schools have to children in the absence of a FAPE obligation.

Candidly, to my knowledge, no case in the Third Circuit or Pennsylvania courts directly resolve this issue. The closest fact pattern, however, is found in *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712 (3rd Cir. 2010). In *Ferren C.*, a hearing officer found that the school violated a student's (Ferren's) right to a FAPE and awarded compensatory education as a remedy. Ferren's parents then used the compensatory education to fund Ferren's tuition at a private school.[10] Ferren then turned 21 years old before all the

[10] Generally, compensatory education cannot be used to fund private school tuition. The exact mechanism by which Ferren's parents used compensatory education to fund the

compensatory education was spent. The private school would continue Ferren's education beyond age 21, but required Ferren to have an IEP from the school district. The school district refused to issue an IEP because Ferren had aged out of IDEA eligibility.

The court resolved *Ferren C.* by distinguishing between the school district's obligation to provide a FAPE and its obligation to provide an IEP. The court found that the school district had no obligation to provide a FAPE because Ferren had aged out. However, the court found that the school district was obligated to issue Ferren an IEP. Without an IEP, Ferren would have no access to the full compensatory education award, and so the prior denial of FAPE would not be remediated. In this way, the court required the school to take action so that Ferren could access a remedy without extending the school's FAPE obligation.

This case is the opposite of *Ferren C.* The Parent seeks an order that extends the District's FAPE obligation to the Student beyond the Student's 21st birthday. By doing so, the Parent demands that which the court in *Ferren C.* was careful to avoid. In *Ferren C.*, the court distinguished the FAPE obligation from other IDEA obligations, finding a path to fulfill the IDEA's purposes without extending the FAPE obligation. This separation of the FAPE obligation from other IDEA obligations kept *Ferren C.* consistent with prior precedent holding that the FAPE obligation completely ends at age 21. *Lester H. v. Gilhool*, 916 F.2d 865, 872 (3d Cir. 1990).

Since *Ferren C.*, other courts have underscored the distinction between the FAPE obligation and other IDEA obligations, sometimes extending other IDEA obligations to ensure that the IDEA's purposes are fulfilled – but never extending the FAPE obligation itself. *See, e.g., I.H. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 771 (M.D. Pa. 2012); *L.T. v. N. Penn Sch. Dist.*, 342 F. Supp. 3d 610 (E.D. Pa. 2018) (both holding that an LEA's obligation to offer an IEP can exist in the absence of an obligation to provide a FAPE). These cases stand in contrast to cases in which courts explicitly consider the IDEA's age boundaries. In those cases, courts consistently hold that the right to a FAPE does not extend beyond the school year in which a child with a disability turns 21 years old. *See, e.g., Perkiomen Valley School District v*. *R.B.,* 533 F.Supp.3d 233 (E.D. Pa., 2021).

private school is irrelevant to the analysis. Additionally, the Parent in this case is not using a prior award to fund the Student's placement. Rather, the District is funding the Student's placement through the Student's IEP.

The obvious question, therefore, is whether pendency is one of those IDEA obligations that can exist in the absence of a FAPE obligation. For students over 21 years old, I hold that the answer is no.

As in the Third Circuit, courts in other jurisdictions consistently hold that the FAPE obligation does not extend beyond age 21. *See, e.g. Board of Education of Oak Park & River Forest High School District 200 v. Illinois State Board of Education*, 79 F.3d 654, 659-660 (7th Cir. 1996). Courts in other jurisdictions have also explicitly considered whether the IDEA's pendency rule applies after a student turns 21. Those courts hold that the pendency rule does not apply. The summary of those cases presented by the District in its closing brief is concise, correct, and consistent with my own research:

> *J.R. v. Cox-Cruey, 2013 WL 4101968 (E.D. KY, 8/13/2013)* (parents were not entitled to a stay-put order for the twenty-one year old student while their due process complaint was pending); *Detroit Public Schools v. Pappas, 30 IDELR 676 (E.D. MI, 6/17/1999)* (twenty-nine year old student was not entitled to a continuation of a stay-put order because he was well beyond the age of entitlement under the IDEA); *Hilden v. Lake Oswego School District, 1994 WL 519032 (D. OR, 9/20/1994)* (district was not required to maintain the placement of a twenty-four year old student because he was no longer entitled to protections under federal special education law).

I am persuaded by the logic of the cases above. I recognize that courts in the Third Circuit have found IDEA obligations in the absence of FAPE obligations more readily than courts in other jurisdictions. Despite that, this case is substantively distinguishable from the cases in which courts in the Third Circuit have found IDEA obligations in the absence of a FAPE obligation. Neither *Ferren C.* nor *I.H. v. Cumberland Valley* nor *L.T. v. North Penn* involved a demand for direct services or placement without a FAPE obligation. *Ferren C.* involved an IEP that the school district would never have to implement. *I.H.* and *L.T.* involved IEPs that would become active only if events reestablishing the school districts' FAPE obligations occurred. This case, again, is the opposite. The Parent is seeking IEP services from the District (funding and placement in the APS through an IEP). I am unaware of a court ever extending enrollment, or the right to a FAPE, or the right to special education from an LEA, beyond a student's maximum age eligibility.

Further, in the *Ferren C.* District Court decision, the court found that maintaining the Student's pendent placement beyond age 21 may be an equitable remedy. Under the facts of *Ferren C.*, the court did not exercise

that power. *Ferren C. v. Sch. Dist. of Phila.*, 595 F. Supp. 2d. 566, 577-581 (E.D. PA, 2009). The Parent presented no evidence and makes no argument that maintaining the Student's pendent placement beyond age 21 is an appropriate equitable remedy in this case.

In sum, after the 2021-22 school year, the Student will no longer be a child with a disability as defined by the IDEA. Consequently, the Student will have no entitlement to a FAPE or continued enrollment in the District, and the IDEA's pendency rule will not apply. While no case in this jurisdiction is directly on point, courts outside of this jurisdiction have consistently reached the same conclusion. Additionally, there are cases from this jurisdiction concerning schools IDEA obligations to children in the absence of a FAPE obligation. This case is the opposite of those cases. The Parent does not demand that the District satisfy an IDEA obligation in the absence of the Student's right to a FAPE or enrollment. Rather, the Parent demands an extension of the Student's enrollment and the right to a FAPE itself. Cases from this jurisdiction are scrupulously written to avoid the result that the Parent demands.

For the above reasons, I find that the IDEA's pendency rule does not extend the Student's right to a FAPE beyond the 2021-22 school year. I reject the Parent's pendency argument.

Neither the Doctrine of Waiver nor the Doctrine of Promissory Estoppel Require the District to Maintain the Student's Enrollment During the 2022-23 School Year

The Parent raises the issue of waiver in the due process complaint and has not clearly abandoned that issue. I will consider whether doctrine of waiver requires the District to maintain the Student's enrollment during the 2022-23 school year.

Waiver concerns setting aside a right in exchange for consideration. IDEA waivers must be in writing because they are held to the same level as other civil rights waivers. *W.B. v. Matula*, 67 F.3d 484, 498 (3d Cir. 1995).[11] Case law establishes that hearing officers have authority to determine whether an enforceable contract exists between parties to a special education dispute. *See, I.K. v. Sch. Dist. of Haverford Twp.*, 961 F. Supp. 2d 674 (E.D. Pa. 2013); *A.S. v. Office for Dispute Resolution Quakertown Cmty.*, 88 A.3d

[11] The court's holding in *Matula* that IDEA violations could be pursued through Section 1983 claims was overturned in *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791 (3d Cir. 2007). The court's analysis of waivers in *Matula* is still good case law. *See, e.g. R.D. v. Souderton Area Sch. Dist*., No. 11-2995, 2015 WL 2395156, 2015 U.S. Dist. LEXIS 65649, at *20-22 n.7 (E.D. Pa. May 19, 2015).

256 (Pa. Commw. Ct. 2014). I, therefore, have authority to determine if the parties are bound by a written waiver agreement.

The Parent presented no evidence of a written waiver agreement. The Parent's completion and submission of the Act 66 form, and the District's acknowledgment of that form, does not constitute a contract. Those actions include no form of consideration. Yet even if those actions are sufficient to form a contract between the parties, the contract does not contain a waiver. I reject the Parent's waiver claim because there is no contract between the parties and the document that the Parent holds forth as a contract does not include a waiver.

Having found that there is no contract between the parties, I consider the Parent's estoppel argument. Although the Parent does not use these exact words, under a fair reading of the due process complaint, the Parent invokes promissory estoppel by seeking an order requiring the District to do what it allegedly promised to do.

Promissory estoppel is an equitable doctrine that may be invoked to enforce a promise made by one party to another when there is no enforceable agreement between those parties. Under Pennsylvania law, a party invoking promissory estoppel must show that 1) the promisor made a promise that he should have reasonably expected to induce action or forbearance on the part of the promisee; 2) the promisee actually took action or refrained from taking action in reliance on the promise; and 3) injustice can be avoided only by enforcing the promise. A party asserting a claim of estoppel has the burden of establishing all the essential elements. *B.K. v. Haverford Sch. Dist. (In re I.K.),* 567 F. App'x 135, 137-38 (3d Cir. 2014) *citing, inter alia, Crouse v. Cyclops Indus.,* 560 Pa. 394, 745 A.2d 606, 610 (Pa. 2000).[12]

In the due process compliant, the Parent alleges as follows: the District's Director of Pupil Services "approved the student to repeat a year of education" so that the Student would graduate at the end of the 2022-23 school year *Complaint* at ¶ 3. The family then made plans for the 2022-23 school year based on the District's promise. *See Complaint* at ¶ 9. Then, when the District informed the Parent that it would not maintain the Student's enrollment during the 2022-23 school year, the Parent had no

[12] The *Haverford* case "bounced" up and down the Third Circuit in various permutations for years (B.K. and I.K. are the same family). The 2013 District Court decision and the 2014 Third Circuit decision, taken together, establish that I may resolve the parties dispute about promissory estoppel at the administrative due process level. *See B.K. v. Haverford Sch. Dist. (In re I.K.),* 567 F. App'x 135 (3d Cir. 2014); *I.K. v. Sch. Dist. of Haverford Twp.*, 961 F. Supp. 2d 674 (E.D. Pa. 2013)

time to make other plans. The record substantiates none of these allegations.

There is no evidence that the Director of Pupil Services or any other District employee promised that the Student could remain enrolled during the 2022-23 school year. To the contrary, the record as a whole supports a finding that no such promise was ever spoken. There is no evidence that the family took an action or refrained from taking an action in reliance on such a promise. The Parent, therefore, has not proven the first two elements of promissory estoppel.

For completeness, I consider the third element of promissory estoppel as well. In special education cases, it appears that the totality of circumstances is used to determine whether injustice can be avoided only by enforcing the promise. While no court has explicitly found that the totality of circumstances resolves the third prong of the test, this appears to be the practice (if a single case can establish a practice). *See B.K. v. Haverford Sch. Dist. (In re I.K.)*, 567 F. App'x 135, 138 (3d Cir. 2014).

In this case, ignoring that no promise was made, there is no preponderant evidence that enforcing the promise is the only way to avoid injustice. There are several methods available to remediate a loss of special education benefits. *See, e.g. M.C. v. Central Regional Sch. District,* 81 F.3d 389 (3d Cir. 1996) (concerning compensatory education); *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712 (3rd Cir. 2010) (concerning authority to craft unique remedies in special education cases). The only injustice that would be caused by failing to enforce the promise is a loss of educational benefits. That loss can be remediated without enforcing the promise, and so the Parent has not established the third element of a promissory estoppel claim.

In sum, under a preponderance of evidence standard, the record of this case does not establish that the District promised that the Student could remain enrolled during the 2022-23 school year, or that the Parent acted or refrained from acting in reliance on that promise, or that enforcing the promise is the only way to avoid injustice. I reject the Parent's estoppel arguments for these reasons.

Summary and Legal Conclusions

Act 66 addresses the potential harm of COVID-19 school closures in two ways. First, it gives an optional extra school year to students with disabilities who would have aged out of IDEA eligibly during the 2020-21 school year. This provision does not apply in this case because of the Student's age.

Second, Act 66 gives all children an option to repeat their 2020-21 grade level during the 2021-22 school year. The Student's program has no grade levels, and therefore Act 66 enables the Student to receive the content of the 2020-21 school year a second time during the 2021-22 school year. This does not extend the Student's right to a FAPE beyond the IDEA's maximum age eligibility or entitle the Student to enrollment during the 2022-23 school year. The Parent's Act 66 claims, therefore, are denied and dismissed.

The Parent also alleges that the Student is entitled to continued enrollment and a FAPE from the District during the 2022-23 school year because the District cannot rescind its acceptance of the Parent's application for continued enrollment during the 2022-23 school year. I find that no such application exists.

The Parent also alleges that the IDEA's pendency rule requires the District to maintain the Student's placement into the 2022-23 school year (and possibly beyond). I find that the IDEA's pendency rule protects the Student only for as long as the Student meets the IDEA's definition of a child with disabilities. After the 2021-22 school year, the Student will be an adult for educational purposes, no longer satisfying the IDEA's definition. The pendency rule will no longer apply. The pendency rule, therefore, does not require the District to maintain the Student's enrollment or provide a FAPE to the Student during the 2022-23 school year.

The Parent also raises waiver and promissory estoppel as the basis of the Student's entitlement to enrollment and a FAPE during the 2022-23 school year. Waivers in special education cases must be written, and no written waiver exists. The Parent did not present preponderant evidence in support of the promissory estoppel claim.

Neither Act 66, nor a written "application," nor a waiver, nor promissory estoppel, nor the pendency rule obligate the District to maintain the Student's enrollment or provide a FAPE to the Student during the 2022-23 school year. The District may, therefore, proceed as planned by ending the Student's enrollment at the conclusion of the 2021-22 school year.

An appropriate order follows.

ORDER

Now, April 8, 2022, it is hereby **ORDERED** as follows:

1. The Student has no right to continued enrollment or to a FAPE beyond the end of the 2021-22 school year.

2. The District may end the Student's enrollment at the conclusion of the 2021-22 school year.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER