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

CLOSED HEARING

ODR File Number:
26590-21-22

Child's Name:
J.B.

Date of Birth:
[redacted]

Parent:
[redacted]

Counsel for Parent
Pro Se

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Hearing Officer:
Charles W. Jelley Esq.

Date of Decision:
10/31/2022

PROCEDURAL HISTORY

The Parent filed the pending Due Process Hearing Complaint alleging failures under the Individual with Disabilities Education Act ("IDEA").[1] The Parent contends the District failed to offer and provide the Student a Free Appropriate Public Education ("FAPE") during the 2020-2021 school year. The District, however, argues that it always complied with the Act. The Parents now seek an award of reimbursement for out-of-pocket expenses and an undetermined about money for future services.

For the reasons below, I now find that although the Parents established a series of procedural violations, those violations did not deny the Student a FAPE. Next, I find the procedural violations did not substantially interfere with the Parents' participation in the development of the Student's program. Therefore, I must deny the Parents' request for reimbursement and monetary damages. I will, however, Order the District to remedy the procedural violations. A Final Order granting limited procedural relief follows.

STATEMENT OF THE ISSUE

Did the District offer and provide the Student with a free appropriate public education during the 2020-2021 school year? If not, is reimbursement appropriate relief?

Did the District change the Student's placement without providing prior written notice and Parental input? If yes, did the change cause a denial of a FAPE? Assuming a change in placement occurred, what relief - reimbursement or monetary damages - is appropriate?

FINDINGS OF FACT

[1] All references to the Student and the family are confidential. Certain portions of this Decision will be redacted to protect the Student's privacy. The Parent's claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). References to the record throughout this decision will be to the Notes of Testimony (NT. p.,), Parent Exhibits (P- p.) followed by the exhibit number, followed by the exhibit number, finally, Hearing Officer Exhibits will be marked as (HO-) followed by the exhibit number.

EDUCATIONAL HISTORY

1. The Student enrolled in the District in [redacted] the 2020-2021 school year. S-1.
2. Before entering the District, the Student was found eligible for early intervention services by the Bucks County Intermediate Unit ("BCIU"). The BCIU is a local education agency (LEA) as defined in the IDEA. S-2 p.1.
3. In January 2020, a private Board Certified Behavior Analyst (BCBA) completed a Functional Behavior Assessment (FBA) with Parent consent as part of the Student's reevaluation. S-1.
4. The FBA identified behaviors of concern, including aggression, kicking, biting, hair pulling, throwing, pinching, head butting, and property destruction. S-1.
5. During a four-hour observation at the preschool setting, the BCBA documented 90 occurrences of aggressive behavior. S-1 p.8.
6. The BCBA's FBA report recommended several behavioral interventions and Student specific strategies for addressing aggressive behaviors. S-8 pp. 9-11.
7. In February 2020, to prepare for the Student's transfer from the BCIU preschool program to the District's school-age program, the District issued prior written notice (PWN) outlining its plan to complete a District-sponsored reevaluation. The Parents consented to the reevaluation. Id. S-2 pp.20-23.
8. On or about April 21, 2020, the District completed the reevaluation by reviewing the existing records. S-2 p.1.
9. The reevaluation included input from the preschool teachers, Parent input, a review of progress in early intervention, observations by related service providers, a record review, ability and achievement testing, Autism spectrum rating scales, and behavior rating scales. S-2.
10. Due to the COVID-related school closures, the District could not complete the promised in-person speech and language evaluation. In place of the promised testing, the District completed a review of all existing speech and language data. S-2 p.13.

11. The reevaluation team, including the Parent, found that the Student continued to be eligible for special education services with a primary disability of Emotional Disturbance. S-2.

12. The District's psychologist, as part of the reevaluation, recommended the following:

> The available information indicates that [redacted] is in need of direct instruction to support [the] development of social skills and self-regulation skills. [Redacted] needs to improve [redacted's] ability to remain calm and engage in safe behaviors at school, use social/communication skills to express [redacted] thoughts and needs, and stay focused on academic tasks and complete activities as directed. The positive behavioral supports that were implemented in preschool as a result of [redacted] FBA should be implemented in [redacted's] school-age program. [Redacted] will be in need of close staff supervision in [redacted's] educational program to ensure [redacted's] safety and that of others as [redacted] is learning new skills. [Redacted] will need access to a behavior management system throughout [the] school day as well as check-ins/check-outs and adult support for problem solving when he is engaging in problematic behavior. At this time, [redacted] should have access to small group repetition and review of skills when [redacted's] behavior or attention/focus is interfering with [redacted's] performance in a larger group setting. S-2 p.16.

13. On or about May 12, 2020, the District developed and offered a proposed IEP. S-3. For the most part, the proposed IEP adopted the positive behavior supports utilized by early intervention teacher, as recommended by the BCIU BCBA. S-3 pp.29-34. The family rejected the initial May 2020 IEP, and another IEP meeting was held to discuss additional concerns. S-3 p.47.

14. At an IEP meeting on July 13, 2020, the Parties discussed the family's concerns and gathered feedback from the early intervention teacher. S-4 p.4-6. The IEP was revised, and the family again rejected the IEP. Before the start of school, the Parties participated in a third IEP meeting on September 8, 2020. The parties discussed the Parents' concerns and the District made revisions to the IEP. The revisions call for the Student to receive IDEA-based services, including a positive behavior support plan (PBSP), in the District's full-day [redacted] program, with additional support in an emotional support class, at the Student's neighborhood school. S-5 p.2.

15. That same day, after receiving prior written notice (PWN), the Parent approved the proposed Notice of Recommended Placement (NOREP) and IEP. S-5 p.8. The NOREP and the IEP call for the Student to receive regular education services in the kindergarten and emotional support at the Student's neighborhood school. N.T. 145. The IEP included measurable goals, multiple forms of specially-designed instruction (SDI), and the PBSP. S-5.

16. School started in mid-September 2020. By late September 2020, some two weeks into the school year, the Student began to act out and display aggressive behaviors, in the regular education [redacted] classroom, like hitting, kicking, biting, and throwing objects. N.T. 158. While the behaviors were not constant, the overall severity and intensity interfered with the Student's participation in regular education. *Id*.

17. On September 29, 2022, 15-days into the school year, the District asked, and the Parent agreed to another reevaluation. The District proposed, and the Parents agreed to review the existing data, a new FBA, an occupational therapy (OT) evaluation, and a speech evaluation. The District issued PWN documenting the request, and the Parents approved. S-6.

18. On October 16, 2022, pending the reevaluation report, the District invited the Parent to participate in another IEP conference. The Parties met on October 21, 2020, reviewed the IEP, and discussed the Student's perceived sensory needs. The discussions also noted how the Student's behavior escalated as the day continued. The Parties agreed to explore additional sensory options as they awaited the results of the OT evaluation. S-6.

19. Awaiting the FBA data collection and parental input, the special education teacher consulted with the District BCBA and the special education supervisor. The teacher, the BCBA, and the supervisor discussed a "trial" of in-class and out-of-class behavioral interventions. N.T. 153-154.

20. To increase academic and social engagement and reduce interfering behaviors, the BCBA, the supervisor, and the teacher discussed having the

Student spend more time outside the regular education classroom and in the emotional support classroom. N.T. 154.

21. The record indicates the discussed change responded to two circumstances of immediate concern. First, feedback from the Parent and the early intervention teacher noted that the Student occasionally found the regular education classroom overstimulating. Second, when the Student engaged in similar behavior in the past, the early intervention teacher removed the Student from the class to a quiet and safe space free from distraction and stimulation. The record indicates that the strategy had some limited success. S-1 p.11, S-4 p.4. N.T. 161.

22. The District team members believed that changing the classroom environments following overstimulation or dysregulation would stabilize the Student's behaviors. The "trialed" hypothesis was if a short-term change in the environment could open up pathways to teach self-regulation, identify SDIs to improve behavior, steady dysregulation, and regain focus. N.T. 160. On October 1, 2020, the teacher began to "trial" the discussed behavioral interventions. The home and school communication log did not spell out the details of the "trialed" inventions; instead, the teacher reported that "We changed [redacted] schedule a bit to work in a quiet location separate from Mrs. [redacted] friends, which helped [redacted] to concentrate." P-6 p.4. Despite the slight changes brought on by removing the Student from the regular education classroom, the Student continued to exhibit escalated behaviors. N.T. 155.

23. The special education teacher then "trialed" instruction in other quiet areas, including a conference room (also known as the "Fishbowl" due to its windows), a hallway, and a calm-down room in the school office called the "serenity space." N.T. 155-157.

24. The strategy was to find a quiet and non-stimulating environment that would enable the Student to become self-regulated and then gradually reintroduce the Student back to the more stimulating classroom environment. N.T. 157-

158. Throughout this time, in all environments, - the hallway, the "Fishbowl," and the "serenity room" the Student received direct instruction from the emotional support teacher. N.T. 199.

25. On October 21, 2020, the IEP team convened to review the IEP, discuss the Student's needs, and determine what other support could be put in place to return to the regular [redacted] classroom. This meeting was the first time the emotional support teacher explained to the parents that they were removing the Student from class and "trialing a less stimulating environment for instruction." The Parent, at the meeting, reluctantly acquiesced. The Parties agreed that when too much is going on, the Student needs to learn to self-regulate or learn to disconnect from instruction. S-5 p.4. At the same meeting, the Parents expressed concerns about isolating the Student from peers and a sibling. N.T. *passim*.

26. The District team members continued to seek additional interim support pending the reevaluation results. The team candidly noted although the Student was adjusting, repeated instances of dysregulation continued to occur. Id.

27. By November 23, 2020, when the IEP team convened again, the Student had been returned to the regular education classroom for nearly the entire instructional day. The "trials" revealed that based on the Student's stimulation level, the teacher would offer the Student a choice of what location the Student wanted to work at, *i.e*., the hallway, the "Fishbowl," the "serenity room." By November 2020, both Parties seemed to agree that using "quiet" areas outside the regular education classroom during the day was an appropriate strategy for teaching self-regulation. At the same time, the Parents repeated ongoing concerns about how the "trials" were done, the lack of transparent communication about when the "trials" began, what the Student was doing during the "trials," and who was with the Student. P-1 pp.8-10, N.T. *passim.*

28. At the November 23, 2020, IEP meeting, the Parents again shared concerns

about of the removal from the classroom could affect the Student's mental health. Next, they shared concerns that the removals also affected the sibling. Finally, they expressed concerns that the teachers' communications from September 2020 through November 2020 were incomplete, ineffective, and not transparent. S-8 p.5

29. On or about December 4, 2020, the District provided the Parent with a copy of the updated reevaluation report. The reevaluation included updated objective data and revised recommendations on providing a specially-redesigned PBSP, increased academic support, OT, and speech instruction. S-7.

30. On December 16, 2020, the IEP team, including the Parent, met to revise the IEP. In summarizing the Student's behavioral data, the revised IEP and the reevaluation both state that: "When averaging all skills for all three months, [redacted] is averaging 83% overall with a growth from 70% in September to 89% then 90% in October and November, respectively. [Redacted] is also monitored weekly to determine the frequency of aggressive behaviors. When averaging these scores from the start of the year, [redacted] is engaging in aggressive behaviors approximately 3.6 times per hour. In the first few weeks, [redacted] was ranging between 2.6-13 times per hour, but with supports, [redacted] has moved down to a range of 0.2-4.4 times in the past month." S-9 p. 12. Revisions were made, and the Parties otherwise agreed to the IEP. *Id.*

31. On March 1, 2020, the IEP team met to discuss the staff's use of hands-on physical restraint techniques to stop aggressive behavior on February 24, 2022. During the meeting, the team reviewed the current IEP, PBSP, and SDIs. The details of the incident noted an escalation in behavior, and the subsequent use of hands-on crisis procedures were shared with the team. Before the incident, the Student was offered a sensory tool and selected the trampoline. During the transition from the classroom to the sensory room, the Student eloped and encountered another student. The Student grabbed a peer by the hair and kicked the Student. Crisis intervention procedures -

restraint- on this occasion, meant the staff used a two-person escort technique to move the Student to the office. S-10 p.4. No changes were made to the IEP at a follow-up IEP meeting to review the restraint. *Id.*

32. On March 4, 2021, the Parties met to revise the IEP. School District Exhibit 10 does not provide detailed information about how or if the goals, the PBSP, the related services, or the SDIs were revised. S-10.

33. At no time during the litigation did the Parents raise any IEP content-related defects about the goals, the progress monitoring schedule, the present levels, the SDIs, the speech, or the OT services. (N.T. *passim*).

APPLICABLE LEGAL PRINCIPLES AT ISSUE

The IDEA offers federal funding to participating states to provide a "free and appropriate public education" ("FAPE") to school-aged children with disabilities. 20 U.S.C. §§ 1411, 1412. In general, the IDEA aims to ensure that every child with a disability has a meaningful opportunity to benefit from public education. *K.D. by & through Dunn v. Downingtown Area Sch. Dist*., 904 F.3d 248, 251 (3d Cir. 2018).

The IDEA mandates that children with disabilities, to "the maximum extent appropriate," should be educated with children who are not disabled, and special classes, separate schooling, or other removals of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A).

A core feature of the IDEA is the collaborative process that it establishes between parents and schools to create an IEP. *Ridley Sch. Dist. v. M.R.,* 680 F.3d 260, 269 (3d Cir. 2012). The "central vehicle" for this collaboration and the "primary mechanism" for delivering a FAPE is an "IEP," which is developed based on the student's needs, circumstances, and areas of disability. *Id.* Under the IDEA, school districts must work with parents to design an IEP, including an individualized instruction program for each special education student. 20 U.S.C. §§ 1412(a)(4), 1414(d).

"An IEP consists of a specific statement of a student's present abilities, goals for improvement of the student's abilities, services designed to meet those goals, and a timetable for reaching the goals by way of the services." *Holmes v. Millcreek Twp. Sch. Dist.,* 205 F.3d 583, 589 (3d Cir. 2000) (citing 20 U.S.C. § 1401(a)(20)). An "IEP Team" consisting of the student's parents and teachers, a curriculum specialist from the local school district, and, if requested, a person with special knowledge or expertise regarding the student must develop an IEP. 20 U.S.C. § 1414(d)(1)(B). The United States Court of Appeals for the Third Circuit has summarized the requirements of an IEP as follows: "Though the IEP must provide the student with a "basic floor of opportunity," it need not necessarily provide "the optimal level of services" that parents might desire for their child. *See Holmes,* 205 F.3d at 590 (*quoting Carlisle Area Sch. v. Scott P.,* 62 F.3d 520, 533-34 (3d Cir. 1995)). Nevertheless, "at a minimum, '[t]he IEP must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential.'" *Chambers v. Philadelphia Bd. of Educ.,* 587 F.3d 176, 182 (3d Cir. 2009) (*quoting Shore Reg'l High Sch. Bd. of Educ. v. P.S.,* 381 F.3d 194, 198 (3d Cir. 2004), *Mary T. v. Sch. Dist. of Phila.,* 575 F.3d 235, 240 (3d Cir. 2009).

In *Endrew F.*, the Supreme Court held that an IDEA educational program must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, at 988. In doing so, the Court also held that appropriate progress occurs when goals and SDI's are "appropriately ambitious in light of [the child's] circumstances." Id at 1000. Endrew also holds that a FAPE offer must be appropriately ambitious in light of the Student's circumstances. One measure of academic progress for students capable of grade-level work may be grade-to-grade advancement. Id. As is clearly evident in this case, a FAPE encompasses much more than academics. Stated another way students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued.

Violations of the IDEA are categorized either as procedural or substantive. A procedural violation occurs when a district fails to abide by IDEA procedural

requirements. Not all procedural violations rise to the level of a denial of a FAPE. *L.M. v. Capistrano Unified Sch. Dist*., 556 F.3d 900, 909 (9th Cir. 2009).

The IDEA directs that an impartial hearing officer's decision finding a denial of a FAPE must be made on substantive grounds. 20 U.S.C. § 1415(f)(3)(E)(i). If a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies: (a) impeded the student's right to a FAPE or (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits 20 U.S.C. § 1415(f)(3)(e)(ii), 34 C.F.R. § 300.513(a)(2). On the other hand, a substantive violation occurs when a school district fails to offer a FAPE that is reasonably calculated to provide meaningful benefit and significant learning. *Rowley*, 458 U.S. at 203, 20 U.S.C. § 1415(f)(3)(e)(ii), 34 C.F.R. § 300.513(a)(2).

A proper assessment of whether a proposed IEP meets the above FAPE standard must be based on information "as of the time it was made." *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010), *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993) (applying the snapshot rule).

In Pennsylvania, when disagreements arise about a FAPE, a due process hearing is held before an impartial hearing officer whose final decision is binding on the parties. 22 Pa. Code Chapter 14. Under the IDEA, parents who consider their child's placement and/or IEP inappropriate and who believe that their child has been denied a FAPE have a right to an impartial due process hearing by a state or local educational agency. 20 U.S.C. § 1415(f) and (g). In Pennsylvania, the "due process hearing" is conducted before an impartial hearing officer from the Office for Dispute Resolution (ODR) who is trained in special education law. *Id.* at 426-27; 20 U.S.C. § 1415, 22 Pa Code Chapter 14.162. Following exhaustion of this administrative process, the hearing officer’s Decision may be appealed to a court of competent jurisdiction. 20 U.S.C. § 1415(i)(2). The IDEA empowers courts and hearing officers to "grant such relief as the court determines is appropriate." *Id.* § 1415(i)(2)(C)(iii).

APPROPRIATE RELIEF

In this instance, both Parties seek appropriate relief within the meaning of the IDEA. *Sch. Dist. of Phila. v. Post.*, 262 F. Supp. 3d 178, 197 (E.D. Pa. 2017) (citing 20 U.S.C. § 1415(i)(2)(C)(iii)). The Parent seeks appropriate relief in the form of reimbursement for out-of-pocket expenses and monetary damages. Case law teaches us that monetary damages are not appropriate relief under the IDEA. *Chambers v. Sch. Dist. Of Phila. Bd. of Educ.*, 587 F.3d 176, 185-86 (3d Cir. 2009). While reimbursement for out-of-pocket expenses is a possible form of appropriate relief. *See Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (U.S. 1985). The District seeks a declaratory finding that at all times relevant, they offered a FAPE and implemented the IEP.

WITNESS CREDIBILITY

During a due process hearing, the hearing officer is responsible for 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). Explicit credibility determinations give courts the information that they need in the event of a judicial review. *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.").

To the extent that witnesses recall events differently or draw different conclusions from the same information, genuine differences in recollection or opinion may explain the difference. I did not discern any efforts to withhold information, misstate the facts or deceive me. I noted in the Conclusions below when I found the particular testimony from one or more witnesses either more persuasive, substantive, or cogent than others. Persuasive and cogent testimony describes the Student's needs, circumstances, interests, growth, and the overall changes in the present levels or progress monitoring data. Cogent testimony also includes indices of procedural and substantive compliance with the IDEA.

THE BURDEN OF PROOF

Generally, the burden of proof consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010). In this case, the Parents are the party seeking relief and must bear the burden of persuasion.

With these facts and guiding principles in mind, I will now discuss my legal conclusions.

DISCUSSION, ANALYSIS, AND CONCLUSIONS OF LAW

THE PARENTS' POSITION AND THE DISTRICT'S COUNTER

Parents weave three intertwined procedural arguments. First, they contend the District unilaterally changed the Student's placement when they removed the Student from class without an IEP meeting or prior written notice. Second, they contend the failure to hold an IEP meeting to discuss the "trials" violated their right to participate in the IEP process. Third, as a consequence of one and two, they argue the Student was denied a FAPE. Finally, they argue the Parents' participation rights such that monetary relief is required.

The District stands by the "trialing" strategy without conceding a substantive or procedural violation. The District insists that they otherwise implemented the IEP with fidelity. Finally, The District suggests that given the specific circumstances here, if I were to find procedural violations, those errors did not substantially alter or interfere with implementing the basic elements of the IEP or the Parents' rights. Simply put, if procedural violations occurred, said violations are otherwise harmless.

THE PROCEDURAL VIOLATIONS ARE NOT SUBSTANTIVE VIOLATIONS

The Parents are correct; the Student's removal from the regular education class created a three-fold procedural violation. First, the District failed to provide prior

written notice describing its proposed "trialing" action. Second, they failed to convene an IEP meeting to discuss the suggested "trialing" modifications. Third, they failed to seek meaningful Parental input prior to and during all phases of the "trialing." I now find this series of unchecked events are IDEA procedural violations. Notwithstanding this finding, the Parties are reminded that not all procedural violations are a denial of a FAPE.

While the Parents' factual argument that the IEP called for the Student to be educated in the regular kindergarten 87% of the school day and 13% in the emotional support class is correct, the record lacks preponderant proof of a substantive FAPE harm or a material failure to implement the IEP. This situation is highly irregular. The staff provided more rather than less services.

The question here is whether the "trials" resulted in a substantial or fundamental change in the basic elements of the Student's educational program. *Letter to Green*, 22 IDELR 639 (OSEP 1995) (whether changes in programming affecting a student's program or opportunities for interactions with nondisabled peers may be considered a change in educational placement triggering procedural safeguards requires a fact-based analysis), *Sherry A.D. v. Kirby*, 19 IDELR 339 (5th Cir. 1992). The IDEA regulations at 34 CFR 300.503(a) provide that prior written notice must be provided before a "change in placement." Oddly, while notice must be provided, neither the statute, the implementing regulations, nor the state regulations include a convenient definition of a "change in placement."

We know that pausing services for ten or more days is considered a change in educational placement. We also know that a pattern of disciplinary removals interrupting specially-designed instruction can be a change in placement. Finally, we know that reducing time spent in the regular education classroom, removing supplemental aides, services, and specially-designed instruction can also be a change in placement. *Id.* All three examples require prior written notice and an IEP meeting. *Id.* The first two examples change the basic elements of a FAPE, *as* specially-designed instruction and learning stops. The third example, however, may not be a substantive change in placement if specially-designed instruction, supplemental aids, and services continue during the change.

For the following reasons, I now find that the change in the Student's time in the regular education classroom did not materially alter the Student's placement under these circumstances. The Third Circuit addressed a similar change in placement question in *DeLeon v. Susquehanna Community School District,* 747 F.2d 149 (3d Cir. 1984). While the change in *DeLeon* focused on the IDEA's "stay-put" requirement, I find the analysis of what constitutes a basic "change" in the placement and hence the basic elements of the IEP applicable here.

In *DeLeon,* the factual issue was whether a change in transporting the child to school with other children rather than paying his parents to transport him in their own car -- constituted a change in "educational placement." Judge Becker's thorough opinion instructs hearing officers to "focus on the importance of the particular modification involved." *Id.* at 153. Judge Becker explained:

> It is clear that the "stay put" provision does not entitle parents to the right to demand a hearing before a minor decision alters the school day of their children. The touchstone in interpreting section 1415 has to be whether the decision is likely to affect in some significant way the child's learning experience. In some areas it may be possible to draw bright lines: for instance, replacing one teacher or aide with another should not require a hearing before the change is made. On the other hand, there are areas where such bright lines will be impossible to draw. *Id.* at 153-54.

In *DeLeon,* the Court held that even though the student was transported by a stranger rather than a parent, and transported with other children rather than alone, as a matter of law, the change in transportation did not constitute a change in "educational placement."

While acknowledging here that procedural violations occurred, the violations, contrary to the Parents' understanding of the regulations, are not a *per se,* substantive violation or outcome determinative. Furthermore, the Parents do not challenge the goal statements, the present levels, or the essential particulars of the PBSP in any of the offered IEPs. Therefore, it is axiomatic that the IEPs, when offered, were appropriate. This threshold conclusion cuts against the Parent's denial of FAPE argument.

The record here is also clear the teachers implemented the SDIs, the goals, and the PBSP in the regular and special education classroom, during the "trials" in the

"Fishbowl" and the "serenity room. These conclusions support my finding that although the Student's time in regular education went down in October and November 2020, the unilateral change by the staff did not deny a FAPE or substantially interfere with the Parents' procedural rights.

Had the District not issued an intent to reevaluate early on, delayed the FBA/ OT evaluations, overused discipline or restraint tactics, or let the "trials" morph into a *de facto* long-term segregated placement/program, I might conclude the opposite. Stated another way, the procedural violations here were harmless errors. *M.W. v. New York City Dep't of Educ.*, 61 IDELR 151 (2d Cir. 2013) (holding that the development of appropriate behavioral supports and the availability of parent counseling rendered IDEA procedural violations harmless), *W.K. v. Harrison Sch. Dist.*, 61 IDELR 123 (8th Cir. 2013, unpublished), reh'g *en banc* denied, 113 LRP 30277 (8th Cir. 07/23/13) (in light of parents' knowledge of the student's recent suspension and their participation in discussions about a new placement, the district's procedural error was harmless) *G.N. and S.N. v. Board of Educ. of the Twp. of Livingston*, 52 IDELR 2 (3d Cir. 2009, unpublished) (ruling that a district's offer of specialized instruction in reading and language arts outweighed its failure to develop individualized goals for the student). These facts support my conclusion that the Parents were fully involved in the IEP process.

SUMMARY AND AWARD OF APPROPRIATE RELIEF

The administrative record, as a whole, establishes several procedural violations. The record, however, lacks preponderant proof of a substantive violation that denied the Student a FAPE or substantially interfered with the Parents' participation. Applying *DeLeon*, *M.W.*, and *G.N.*, I now find the Parents failed to prove a basic, substantive, or material change in the Student's IEPs synonymous with a change in "educational placement*." S. v. Lenape Regional High School District Board of Educ.,* 102 F. Supp.2d 540, 544 (D.N.J. 2000) (applying *DeLeon* "only matters that will significantly impact the child's learning should be considered a change in educational placement for the purposes of the IDEA."). Therefore, the Parents' claims, as stated, are denied. Accordingly, the Parent's request for reimbursement and monetary damages is denied.

To remediate the PWN and parental input procedural violations, the District is directed to develop a checklist for staff use on when to provide prior written notice. Next, the District is directed to provide the teaching staff and the building-level local education agency representative with additional in-service training on using the PWN checklist. Finally, the District is directed to train the staff on when to issue PWN before implementing "trialing" strategies or interventions. See, *A.W. and M.W. v. Loudon County Sch. Dist.*, 122 LRP 39097 (E.D. Tenn. 09/28/22) (after finding a procedural violation hearing officer directed the district to create a checklist to correct all applicable IDEA procedural violations).

FINAL ORDER

And Now, this October 31, 2022, the District is hereby **ORDERED** as follows:

1. The District is directed to develop a checklist of when to provide prior written notice.
2. The District is directed to provide the teaching staff and the building-level local education agency representatives additional in-service training on how to use the prior written notice checklist.
3. The District is directed to provide the teaching staff and the building-level LEAs additional in-service training on when to issue prior written notice before implementing "trialing" strategies or interventions.
4. The Parents' request for reimbursement is **DENIED.**
5. The Parents' request for monetary damages is **DENIED.**

6. All other Student and Parent claims and District proffered affirmative defenses are now exhausted and otherwise **DENIED.**

It is so **ORDERED.**

s/ Charles W. Jelley, Esq. LL.M.
Special Education Hearing Officer
ODR FILE #26590 21-22
October 31, 2022