

*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 Due Process Hearing Officer Final Decision and Order**

### **Closed Hearing**

#### **ODR File Number**

25118-20-21

#### **Child's Name**

[A.P.]

#### **Date of Birth**

[redacted]

#### **Parents**

[redacted]

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#### **Hearing Officer**

Michael J. McElligott, Esquire

#### **Date of Decision**

08/24/2021

## Introduction

This special education due process hearing concerns the educational rights of A.P. ("student"), a student who resides in the Pittsburgh School District ("District").<sup>1</sup> The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")<sup>2</sup> as a student with autism and emotional disturbance.

The parties agree that the student requires a placement outside of the District. The parties disagree, however, over the student's placement for the 2021-2022 school year.

The student's parents support a certain private placement. The District has proposed a different private placement. Additionally, parents claim that the District's issuance of a re-evaluation report ("RR") for the student was not timely.

For the reasons set forth below, the student's placement will be at the private placement supported by the parents. The District's RR was not timely issued, but this procedural violation does not require remedy under these circumstances.

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<sup>1</sup> The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

<sup>2</sup> It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. See *also* 22 PA Code §§14.101-14.162 ("Chapter 14").

## **Issue**

1. Which of the two placements should the student attend for the 2021-2022?
2. Was there a delay in the issuance of the District's RR? If so, what is the remedy for this procedural violation?

## **Findings of Fact**

All evidence in the record, both exhibits and testimony, were considered. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. The student has long been identified as a student with autism and emotional disturbance. (School District Exhibit ["S"]-2).
2. In addition to a psychological diagnosis of autism, the student has been medically diagnosed with attention-deficit hyperactivity disorder ("ADHD"), anxiety disorder, panic disorder, and depression. (Parents' Exhibit ["P"]-4).
3. The societal results of the COVID-19 pandemic led to dramatically increased concerns of the student related to anxiety. (S-1, S-2; Notes of Testimony ["NT"] at 46-130).

4. The student has sensory needs but had not exhibited problematic or acting-out behaviors in educational environments. (S-1, S-2; NT at 46-130).
5. The student has appropriate interactions with peers and adults, although assessment of behavioral/social-emotion assessment completed by the parents support the social, communication, and perseverative behaviors associated with autism. (S-1, S-2).
6. By report, in the past as a younger child, the student experienced significant bullying in a charter school environment and experienced other events which led to trauma-related treatment. At times, the student voices potential self-harm, but those instances occur at home or with family and have not occurred in the school environment. (S-2; NT at 46-130).
7. Peer influence and peer modeling can be significant influences on the student's behavior and sense of anxiety. (S-2; P-5; NT at 46-130).
8. The student has had generally strong academic achievement, with scores ranging from low (mathematics) to below average (reading comprehension/fluency) to average (basic reading) to high average (oral language). (S-2).

9. Uniformly, the student's affect and engagement with others is described in very positive terms. (S-1, S-2; P-4, P-5, P-6; NT at 46-130).
10. Through the 2020-2021 school year, the student attended a program at a [private] school for students with disabilities. (S-1).
11. Programming at the [private] school programming included six goals (two in reading, one in mathematics, one in written expression, one in spelling, and one in social skills). (S-1).
12. The student did not require a behavior intervention plan. (S-1).
13. In the 2020-2021 school year, the student continued with the [private] school but due to anxiety related to COVID-19, the student largely remained at home and received parent-directed instruction. (S-1; NT at 46-130).
14. In October 2020, the parents requested that the District evaluate the student. (P-2; NT at 46-130).
15. By the end of October 2020, the parents had returned the permission-to-evaluate ("PTE"), granting permission to allow the District to evaluate the student. (P-1; NT at 46-130).

16. In December 2020, not having heard from the District, the parent emailed the District, inquiring about the status of the evaluation. (P-2; NT at 46-130).
17. On February 24, 2021, approximately 116 calendar days after the parents returned the PTE to the District, the District issued the RR. (S-2).
18. The District identified the student with autism and emotional disturbance. (S-2).
19. In March 2021, the student's IEP team met. The IEP team included a group of private individuals who have long been involved in the student's care, including the student's psychologist, psychiatrist, and in-home behavior specialist. (S-4; P-4, P-5, P-6; NT at 46-130).
20. The IEP team agreed that the student required a placement outside of a District school. The District made several referrals to multiple placements. (S-5; NT at 46-130, 132-189).
21. One placement felt that it could not appropriately program for the student. One placement was determined by the IEP team to be too far away for daily transportation of the student. The third placement felt it could appropriately program for the student. The District feels the student should attend this placement ("SD-placement") and

offered it for the provision of the student's free appropriate public education ("FAPE").<sup>3</sup> (S-6, S-7, S-9, S-13; P-3; NT at 46-130, 132-189, 258-305).

22. The parents, in conjunction with the student's team of providers, did not feel that the SD-placement was appropriate. The parents, in conjunction with the providers, feel that the student's placement should be at a private school which specializes in serving students who require support for autism but who exhibit strong academic skills ("parents-placement"). (P-4, P-5, P-6; NT at 46-130, 196-251).

23. The parents-placement delivers its online curriculum individualized at the pace of each student, with each student working at an individual desk space in a classroom setting. The school day includes multiple breaks away from the computer-based instruction. A special education teacher and classroom aide are present to support students, answer questions, and provide instruction as necessary. A behavior specialist is on site to work with students. (NT at 196-251).

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<sup>3</sup> The SD-placement contains a partial hospitalization program for students with more significant mental health or behavior needs, and a "therapeutics" program for students who, while still having behavior or other needs, do not require the more intensive supports of a partial hospitalization program. Initially, it was unclear which of the two programs at the SD-placement the student would attend. By the time of the hearing, however, it was clear that the SD-placement would be the therapeutics program. (NT at 258-305).

24. The SD-placement delivers live instruction to students working at an individual desk space in a classroom setting. The school day includes multiple breaks. A special education teacher and two classroom aides are present to deliver instruction and to support students. Behavior specialists are on site to work with students. (NT at 196-251, 258-305).
25. The student would be one of four students in the classroom at the parents-placement. The student would be one of six students in the classroom at the SD-placement. (NT at 196-251, 258-305).
26. Both placements have an intake process where the student's academic ability is gauged to have the student start at an appropriate level in the curriculum. (NT at 196-251, 258-305).
27. Both placements have sensory rooms and other spaces where students can find time alone, whether by choice or by necessity. (NT at 196-251, 258-305).
28. Both placements provide mental health support for students who require it, or who may be in crisis. (NT at 196-251, 258-305).
29. Over the past two school years, the SD-placement had markedly more behavior incidents that required restraint of students than did the parents-placement. (P-9).



30. The placements are both very close to the student's home. The parents-placement is 3.9 road miles from the student's home; the SD-placement is 5.3 road miles from the student's home. (P-11).<sup>4</sup>
31. Administrators from both placements, given the materials they had reviewed about the student, and where there had been a meeting with parents or the student, both testified that they felt the placement they oversee would be appropriate for the student. (NT at 196-251, 258-305).

### **Witness Credibility**

All witnesses testified credibly and a similar degree of weight was accorded to each witness's testimony.

### **Discussion**

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives a free appropriate public education (34 C.F.R. §300.17; 22 PA Code §14.102(b)(iv)) ["FAPE"], a student must be regularly re-evaluated to

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<sup>4</sup> The parents will voluntarily undertake transportation of the student to/from whichever placement the student attends (NT at 305-307).

ensure that the student's IEP team continues to understand the student's strengths/needs and that the student's educational programming continues to build on those strengths and continues to address those needs. (34 C.F.R. §300.303(b)(2); 22 PA Code §14.124(c)). Any RR, issued upon the re-evaluation of a student, must be issued within 60 calendar days (not including summer days when the school district is not in session) from the date a school district receives written permission to evaluate the student. (22 PA Code §14.124(b)).

Once issued, the RR serves as the basis to re-visit the student's IEP and, more generally, for the IEP team to gauge the appropriateness of the student's educational programming and placement. (34 C.F.R. §300.324(b)(1)(ii)(B); 22 PA Code §14.102(b)(xxvii). The educational placement of a student is an IEP team decision, based on the student's IEP, and must be as close as possible to the student's home; where possible, the IEP team should seek to have the student educated in the school he or she would attend if the student did not have an IEP. (34 C.F.R. §300.116(a)-(c); 22 PA Code §14.102(b)(xiii).

The legal analysis will take these in reverse order, with consideration of the placement issue presented first and the re-evaluation issue presented second.

*Educational Placement.* The two placements under consideration are very similar. The classrooms are similar in terms of a small student-to-staff

ration, and both placements provide the full range of services that the student may require. Both are very close to the student's home, such that transportation time or issues do not weigh in the balance.

The biggest differences are (1) the focus of the programming from an academics/behavior balance, (2) the model for the delivery of instruction, and (3) the restrictiveness of each placement, at least as the student might initially engage in the placement.

First, the composition of the student body at the parents-placement is predominantly one where the students are focused on academics and where behavior support, while necessary for students—and acutely necessary at times—is a smaller part of the mosaic of needs for most of the students. By contrast, the composition of the student body at the SD-placement is predominantly one where the students' behavior needs appear to be co-equal with academics and, many times, overwhelming the academic needs of some students. On this front, the evidence is persuasive that the student's needs, both academically and behaviorally, are more appropriately matched to the parents-placement. Too, the opinions shared by the parents, (through father's testimony) and the professionals who work with the student are credited to the extent that they feel problematic behaviors by fellow students would not only be distracting to this student, but could serve as an exacerbation of mental health needs like anxiety and depression, as well as imitative behaviors which the student does not normally exhibit.

Taken all together, the parents-placement is more appropriate to address the student's strengths and needs.

Second, the delivery model for instruction between the placements is quite different. The parents-placement is a self-paced online learning platform with support from a special education teacher and aide, as needed. The SD-placement delivers instruction by a special education teacher, supported by aides. While both models appear to be effective, the model at the parents-placement mirrors well the higher-achieving academic skill level of the student. It is also a considered advantage that should societal circumstances related to the COVID-19 pandemic impact in-person schooling in the upcoming school year, the self-paced online learning model would be minimally impacted (i.e., the student would engage with the same curriculum and delivery from home as at the placement) whereas the live instruction model would have to be entirely replaced by a new teaching/learning scheme.

Third, at least initially, the parents-placement appears to be less restrictive than the SD-placement. "Restrictiveness" is not exactly the correct term or concept. But the student had academic, social, and behavioral success in the [private] educational setting—in short, the last time the student attended school, the student did not require intensive behavioral support and the student performed well in largely academic programming. The parents-placement is closer to this experience than the

SD-placement. The focus of the parents-placement is a largely academic experience where behavioral needs are addressed. The focus of the SD-placement is an experience where academic needs are addressed but with a student population that requires a deeper foundation of behavioral needs.

It is the considered opinion of this hearing officer that the student should attend the parents-placement and, if behavioral or mental health needs overwhelm the academic focus of that placement for the student, the student's placement can be changed and the student can be serviced at a placement much more like the SD-placement. To initially place the student at the SD-placement would, however, in the opinion of this hearing officer, elevate behavioral and mental health needs where the student, particularly, may not need that level of support. To be concise, it seems more appropriate to have the student attend a placement like the parents-placement and then move to a placement like the SD-placement, if need be. Therefore, the student's placement for the 2021-2022 school year will be at the parents-placement.

*Re-Evaluation Timeline.* However, where a school district has engaged in a procedural violation of IDEIA, a finding of "procedural inadequacies" may be the basis of a finding of denial-of-FAPE only where (1) the student's right to FAPE has been impeded, (2) the parents have been "significantly impeded" in the opportunity to participate in decision-making about the provision of FAPE to their child, or (3) the student has been deprived of

educational benefit. (34 C.F.R. §300.513(a)(2); 22 PA Code §14.102(b)(xxx).

Here, the District clearly failed to timely perform the evaluation for the student. In fact, it issued its RR in almost double the time it should have (116 calendar days instead of 60 calendar days). This is deeply problematic, and, certainly to its credit, one senses that the District recognizes that. But fortunately for all involved, the failure to timely evaluate the student and issue the RR did not educationally harm the student, or significantly impede the parents' participation in the student's education.

Therefore, while the District did not comply with the procedural requirement that the RR be issued within 60 calendar days of having received parental permission to re-evaluate the student, this delay—while lengthy—did not result in a denial-of-FAPE for the student. Accordingly, there is no remedy owed by the District for this procedural violation.

## ORDER

In accord with the findings of fact and conclusions of law as set forth above, the placement supported by the parents shall be the student's educational placement. The Pittsburgh School District shall undertake the measures necessary to support that placement.

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

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire  
Special Education Hearing Officer

08/24/2021