

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

Child's Name: B.L.

Date of Birth: [redacted]

Date of Hearing: August 27, 2014

CLOSED HEARING

ODR File No. 15205-1415AS

Parties to the Hearing:

Representative:

Parent[s]

Pro Se

Owen J. Roberts School District
901 Ridge Road
Pottstown, PA 19465-8423

Sharon W. Montanye, Esquire
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Date Record Closed:

September 4, 2014

Date of Decision:

September 15, 2014

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

The student (Student)¹ is an early teenaged student residing in the Owen J. Roberts School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² on the basis of an autism spectrum disorder. Student's Parents filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA.

The case proceeded to a due process hearing which convened in a single session, at which the parties presented evidence in support of their respective positions.³ The Parents sought to establish that the District violated its FAPE obligation to Student in two respects: in making changes to Student's Individualized Education Program (IEP) in June 2014 without agreement of the Parents, and in refusing to place Student in a residential program for the 2014-15 school year despite an agreement of the IEP team to do so in early 2014. The District maintained that the non-residential special education program offered for the fall of 2014 was appropriate for Student, and that the IEP was properly revised.

For the reasons set forth below, I decline to order a residential placement at this time, but will direct an independent educational evaluation of Student, at public expense, to assist the parties in making a new placement decision pursuant to the IDEA.

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.

² 20 U.S.C. §§ 1400-1482.

³ The record consists of the transcript and the exhibits admitted into evidence at the conclusion of the hearing. Notes of Testimony (N.T.) 222-26. Student's father was present at the hearing and participated throughout the process; where it appears that he was speaking or acting for both parents, the plural Parents is used in this decision. It should also be noted that, following receipt of the transcript, the Parents sent a list of errata in the transcript to counsel for the District and the hearing officer. The attachment containing the errata was made part of the record as the last page of the Parents' closing; in addition, the September 4, 2014 email message and the attachment containing the errata have been marked as a two-page Hearing Officer Exhibit (HO-) 6 and is hereby admitted. This hearing officer further observes that some exhibits submitted by the parties were duplicative; this decision may cite to one or the other or both.

ISSUES

1. Whether the District complied with the procedural and substantive requirements of the IDEA when it failed to issue a Notice of Recommended Educational Placement in February 2014;
2. Whether the District's offer of special education programming and placement for the 2014-15 school year is appropriate;
3. If the District's offer for the 2014-15 school year was not appropriate, whether Student requires a residential placement for that school year; and
4. Whether the District complied with the procedural requirements of the IDEA when it made revisions to Student's IEP and issued a NOREP in June 2014.

FINDINGS OF FACT

1. Student is an early-teenaged student who is a resident of the District. Student is eligible for special education under the IDEA and federal and state regulations on the basis of an Autism Spectrum Disorder. (Stipulations, Notes of Testimony (N.T.) 88-89)
2. Student moved with Student's family to Pennsylvania from another state in 2012. (N.T. 120-21; School District Exhibit (S-) 1, S-3 p. 1)
3. Student currently attends a private school (Private School) where the District placed Student at the beginning of the 2012-13 school year. The Parents approved the District's initial Notice of Recommended Educational Placement (NOREP) for a day program at Private School in August 2012. (N.T. 89-90, 119, 120-21, 155; S-2)
4. Students who attend the day program at Private School are assigned to a house, with a houseparent, where they eat lunch and rest, as well as perform chores and other activities of daily living. (N.T. 136-37, 179-81; S-4 p. 11; S-8 p. 8)
5. In October 2012, the District issued an initial Evaluation Report (ER) for Student in October 2012. (S-3)
6. The November 2012 IEP which followed the ER noted a number of strengths and needs and described Student's present levels in some detail. Annual goals addressed handwriting and other fine motor skills, use of a picture schedule, sequencing of objects, counting, communication skills, and activities of daily living. (S-4 pp. 19-28)
7. Program modifications and specially designed instruction in the November 2012 IEP included predictable routines, prompts and cues, reinforcement of communication skills, opportunities for proprioceptive input, use of multiple modalities of instruction and communication, participation in various activities, opportunities for generalization of

skills to different environments and people, structure and consistent expectations, positive reinforcement, a crisis prevention plan, and the SETT process.⁴ (S-4 pp. 29-31)

8. Student's November 2012 IEP also provided for occupational and speech/language therapy, nursing/physician services, and transportation. (S-4 p. 31)
9. The level of support proposed by the November 2012 IEP and accompanying NOREP was full-time life skills at an approved private school. The Parents approved the NOREP. (S-4 pp. 35, 38-40)
10. A meeting of Student's IEP team convened again in November 2013. At that time, the Parents expressed a concern that Student behaved differently at home than at school, specifically with respect to feeding and sleeping. At home, Student waited for the Parents to feed Student, rather than feeding Student's self; whereas Student would feed Student's self at school. The Parents also shared a concern with Student's inability to sleep alone, requiring one of the parents at Student's side. (N.T. 93-95)
11. During that meeting, the classroom teacher and Parents discussed other activities that Student participated in at school but not at home, such as completing puzzles and collecting recycling materials. (N.T. 95-97)
12. Because of the concerns with feeding and sleeping, the Parents asked the IEP team at the November 2013 meeting to consider a residential placement for Student. That meeting was the first time residential placement was discussed. The team decided to revisit the question of a residential placement at a subsequent meeting. (N.T. 95, 97-98, 124)
13. The IEP that resulted from the November 2013 meeting provided input from the classroom teacher, who reported that Student was having less difficulty with transitions than in the prior year and had made general improvement in speech/language skills as well as gross and fine motor skills. This IEP also contained input from the occupational and speech therapists and the houseparent. (S-6 pp. 6-7, 39-40)
14. Parent input into the November 2013 included the concerns with Student's abilities to feed Student's self at home, sleep alone, and use the restroom and bathe more independently. (S-6 p. 9)
15. Strengths and needs were summarized in the November 2013 IEP, with needs identified in the areas of requesting preferred activities, identifying and sorting items, identifying and tracing numbers, shoe tying, expressive and receptive language, and daily living skills. (S-6 pp. 9-10)
16. Annual goals in the November 2013 IEP addressed use of picture icons, identifying and sorting objects, identifying and tracing numbers, tying shoes, speech/language skills, and activities of daily living. (S-6 pp. 16-24)

⁴ The SETT Process is used for exploration and consideration of assistive technology according to a framework: Student, Environments, Tasks, and Tools.

17. Program modifications and specially designed instruction in the November 2013 IEP were substantially similar to those in the prior IEP, as were the related services. (S-6 pp. 25-28)
18. As in the prior year, the level of support proposed by the November 2012 IE3 and accompanying NOREP was full-time life skills at an approved private school. The Parents approved the NOREP. (S-6 pp. 32, 35-37)
19. In December 2013, a District representative communicated with Private School about the possibility of residential placement, including a potential “4010 slot” (N.T. 154) where the state could provide financial assistance. This District representative decided to begin the process of securing the slot in the event Student began a residential program because there are frequently waiting lists for those slots. (N.T. 153-55, 163, 168, 193; Parent Exhibit (P-) 4 pp. 2-3)
20. Another meeting of Student’s IEP team convened in late February 2014. The team again discussed the possibility of a residential placement for Student, as well as extended school year services and a communication device for Student. No substantive changes were made to Student’s IEP at that time. (N.T. 101-02, 151-53, 159-61, 162-63, 173-74; P-5)
21. Sometime before May 9, 2014, the District sent an Application for Educational Assignment to Approved Private School, referred to as a Form 4010,⁵ to the Parents. The form indicated a 7-day residential program at Private School. Student’s father signed the form and dated it May 9, 2014 before returning it to the District. (N.T. 103-04, 164; P-9; HO-6)
22. On June 25, 2014, the Supervisor of Special Education assigned to Student called the Parents to make arrangements to meet. Student’s father went to the arranged meeting the next day, which was attended only by the father and the Supervisor of Special Education who was acting as the Local Education Agency (LEA) representative. (N.T. 104-05, 190; P-11 p. 1; S-10 p. 1)
23. At that June 26, 2014 meeting, the Supervisor of Special Education provided a Permission to Reevaluate form for the father to sign. Student’s father signed the Permission to Reevaluate form at the meeting. (N.T. 105; P-10)
24. The Supervisor of Special Education also asked Student’s father to sign a form Invitation to Participate in the IEP Team Meeting. Student’s father signed the form, despite having some confusion because the only attendees were himself and the Supervisor of Special Education. Student’s father crossed out the blank blocks for other team members to be identified and handwrote, “I already attended[ed] the meeting” (P-11 p. 2). (N.T. 105-07; P-11)

⁵ It appears that Student did qualify for one of the 4010 slots at Private School as of April 2014. (P-8 pp. 2-3)

25. The Supervisor of Special Education gave Student's father some information at the June 26, 2014 meeting about county services that might help provide support services for Student in the home. (N.T. 111-12, 190-91, 194, 196-97; S-11)
26. The Supervisor of Special Education told Student's father at the June 26, 2014 meeting that the District did not have sufficient information available for consideration of a residential program for Student, which is why it sought permission to reevaluate. He based this conclusion at least in part on the progress that he believed Student was making in the day program at Private School as of June 2014. (N.T. 107-10, 142, 194-95, 198, 209)
27. Progress reporting and other input from the classroom teacher and houseparent in the middle of June 2014 described improvement with gross motor and self-help skills at school, particularly using the restroom and feeding Student's self. Based on those reports, it appears that, overall, Student has made progress on IEP goals and objectives during the 2013-14 school year, although Student's performance has at times been inconsistent.⁶ (S-8, S-9; *see also* S-10 pp. 19-30)
28. Following the June 26, 2014 meeting, the Supervisor of Special Education sent to the Parents a letter setting forth two revisions he made to Student's IEP based on that meeting. The revisions to the IEP were to the section on Specially Designed Instruction: "Information regarding community resources and support provided to parent" and "Staff to provide parent with information and opportunities for guided training at [Private School] on self-help and self-care, which [Student] is currently able to perform during the school day." (N.T. 112-13, 202; P-12; S-10 pp. 5, 33)
29. Also on June 26, 2014, the Supervisor of Special Education sent the Parents a NOREP and the revised IEP, continuing to propose that Student's program be "Full-Time Life Skills Support in an Approved Private School" (P-14 pp. 1, 2). The revisions to the IEP were the addition to the two items of Specially Designed Instruction, inserting verbatim the language from the June 26, 2014 letter. The Parents disapproved this NOREP on June 27, 2014, and requested a due process hearing. (N.T. 114-15; P-13, P-14; S-10 pp. 5, 33, 41-43)
30. By letter of June 27, 2014, the Parents also revoked their consent for a reevaluation. (N.T. 115; P-15; S-12 p. 1)
31. Between the IEP meeting in February 2014 and the June 26, 2014 meeting with the Supervisor of Special Education, the Parents understood that Student would be provided a 7-day residential program beginning in the fall of 2014. (N.T. 102-04, 107-11, 117, 141)
32. Student experiences significant difficulty with changes to the environment and transitions, including a return to school after a weekend or extended break. Student

⁶ It should be noted that this finding is made because it relates to the District's reasons for taking the position on a residential program, and is based solely on the written progress reports admitted into evidence. There was little testimony based on firsthand knowledge of Student's skills and performance at Private School.

sometimes does not retain skills over breaks and, at times, engages in problematic behavior upon a return to school. (N.T. 97, 119, 136-37; S-8 p. 1)

33. Student is in good health and does not engage in aggressive behaviors. At some point in the past, Student sometimes would scream or roll on the floor in an effort to communicate, or bite/chew on Student's shirt or hit Student's thighs with Student's hands when frustrated or upset. Student no longer engages in the behaviors of hitting the thighs or rolling on the floor. (N.T. 128-31, 135-37)
34. On one occasion before moving to Pennsylvania, Student walked out of the school building alone and walked halfway home before the school located Student. That behavior did not occur again in the other state or ever in Pennsylvania. (N.T. 131-33)
35. Student has been able to walk among the buildings at Private School without assistance and without eloping. (N.T. 133; S-8)
36. Student's Parents believe that Student has done well in and made progress in the day program at Private School, although Student does not always perform consistently, especially at home. (N.T. 118-20)
37. Although it appeared to this hearing officer that English is not Student's father's first language (Observations of this hearing officer; *see also* N.T. 139; S-3 p. 3), he expressly denied the need for the services of an interpreter to participate fully in the hearing process and capably represent himself and the family. Student's father demonstrated a clear ability to understand and effectively use the English language throughout this proceeding. (*See, e.g.*, N.T. 45-46, 68-69, 44-46, 79-83; HO-1 pp. 5-7, HO-2 p. 9, HO-6; Parents' Closing)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where

the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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). This hearing officer found each of the witnesses to be credible, and the testimony was largely uncontradictory with one noteworthy exception discussed below. It should also be noted that the Parent, as well as the District personnel, all presented as dedicated individuals who care about Student and Student’s education, despite their conflicting positions at the hearing.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit.

IDEA Principles

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to a student who qualifies for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 247 (3d Cir. 1995). Local

education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). The standard is not maximization of the child’s potential. *Rowley, supra*, at 198.

Substantively, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, the IEP need not “provide ‘the optimal level of services,’ or incorporate every program requested by the child’s parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). The IEP is developed by a team. Pursuant to the IDEA and its implementing regulations, unless the parents and agency otherwise agree, the team of people who develop a child’s IEP must include, at a minimum, the child’s parents, teacher(s), someone who can interpret evaluation results, and an LEA representative. 20 U.S.C. § 1414(d)(1)(B) – (C); 34 C.F.R. § 300.321. Further, a child’s educational placement must be determined by the IEP team based upon the child’s IEP, as well as other relevant factors. 34 C.F.R. § 300.116.

There can be no question that a major premise of the IDEA is that parents must be permitted to participate meaningfully in making educational decisions about their children. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b); *see also Letter to Veazey*, 37 IDELR 10 OSEP 2001) (confirming the position of OSEP that local education agencies cannot unilaterally make placement decisions about eligible children to the exclusion of their parents). Parents play “a significant role in the IEP process.” *Schaffer, supra*, at 53. Indeed, a denial of FAPE may be found to exist if there has been a

significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program. Among other things, IDEA requires the IEP Team, which includes the parents as members, to take into account any "concerns" parents have "for enhancing the education of their child" when it formulates the IEP.

Winkelman v. Parma City School District, 550 U.S. 516, 530 (2007).

Another essential consideration in this matter is the IDEA obligation for eligible students to be educated in the "least restrictive environment" which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); 22 Pa. Code § 14.145; *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1205 (3d Cir. 1993), the Third Circuit adopted a two-part test for determining whether a student has been placed into the least restrictive environment as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, successfully be educated within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the school has included the child with non-exceptional children to the maximum extent possible. *Id.* All local education agencies are required to make available a "continuum of alternative placements" to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa Code § 14.145(5).

The Parents' Claims

The first issue is whether the District complied with the IDEA when it failed to issue a NOREP following the February 2014 IEP meeting. The parties' perspectives on what was

agreed to, or not agreed to, at that meeting is in serious contention. The Parents contended, and the father testified, that the IEP team agreed to a residential placement at the February 2014 IEP meeting. (N.T. 102) The District, on the other hand, argued and presented testimony that the team did nothing more than consider a residential placement at that time, and one of its witnesses went so far as to testify that the February meeting was not an IEP meeting at all. (N.T. 150-52, 159, 160-63, 186, 198) It merits mention, however, that even if one were to conclude that the IEP team members did reach a verbal consensus or “agreement” for a residential placement at the February 2014 meeting, this hearing officer lacks the authority to enforce that agreement.⁷ Nevertheless, as explained at the hearing (N.T. 70-73), the issues of whether or not there was an agreement and whether the District should have issued the NOREP in February are relevant to a determination of whether any procedural or substantive violations of FAPE have occurred.

Though ultimately inconsequential, it is puzzling that the District described the February meeting as something other than an IEP meeting, particularly when one considers who the attendees were and what topics were discussed. In any event, the fact that the District did not issue a NOREP following that meeting to propose a residential, or other, placement, lends support to the position of the District that no such a decision had been made. Despite the Parent’s contrary belief that a decision for residential programming had been determined at that time for the fall of 2014, placement decisions must be made by the IEP team, including the parent and agency representatives; where, as here, a number of members of that team have not yet reached a conclusion on programming or placement, there has been no such decision. Accordingly, this hearing officer cannot conclude that the failure to issue a NOREP following the February 2014 meeting amounted to a denial of FAPE, either procedurally or substantively, since the District was not then proposing or refusing to change the identification, evaluation, or

⁷ *J.K. v. Council Rock School District*, 833 F.Supp.2d 436, 448-49 (E.D. Pa. 2011).

educational placement, or the provision of FAPE, to Student. 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a).

The next two issues will be addressed together, which is the substantive determination of what is the appropriate program and placement for Student the 2014-15 school year. The Parents contend that Student requires a residential program because Student is not transferring skills learned and performed at school into the home; has not mastered many basic skills; and, is demonstrating behaviors they consider to be age-inappropriate and “bad habits.” (N.T. 95-97; Findings of Fact (FF) 10, 11, 12, 14; Parents’ Closing) They also suggest that a residential program is nothing more than a “sleepover in school.” (N.T. 110, 114-15) The District counters that Student was making progress, particularly in the third trimester of the 2013-14 school year and, thus, the day program was appropriate for Student. (FF 13, 27, 36; District’s Closing)

The federal regulations implementing the IDEA do provide for residential placement if it “is necessary to provide special education and related services to a child with a disability.” 34 C.F.R. § 30.104. The question of whether a residential placement must be at public expense requires an assessment of whether that full-time placement is “necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process.” *Mary Courtney T.*, *supra*, 575 F.3d at 243-44 (quoting *Kruelle v. New Castle County School District*, 642 F.2d 687, 693 (3d Cir. 1981)). In other words, if the medical, social, and emotional components of the residential program are “part and parcel of a specially designed instruction to meet the unique needs of a handicapped child,” the local education agency is responsible for that placement. *Id.* at 244 (quoting *Kruelle* at 694).

On the one hand, the evidence establishes that Student has been making educational progress in the day program at Private School, a conclusion with which the Parents agree. (FF 13, 27, 36) Although Student has not yet mastered many skills, Student's progress must be assessed according to Student's unique strengths and needs. Student does not currently demonstrate significant problematic behaviors or aggression, or engage in elopement posing a safety concern, in the day program at Private School. (FF 33, 34, 35) Additionally, contrary to the Parents' assertion that having the child "sleep over" at the school is not a significant change to the program itself, a 7-day residential placement is much more restrictive along the educational placement continuum than a full-time day program. On the other hand, generalization of learned skills outside of the school environment is very important for children, and can be a major challenge for children on the autism spectrum. The Parents presented compelling testimony that Student is not demonstrating several skills at home that Student is performing well at Private School, and this concern of the Parents has been known to the District since at least November 2013. (FF 10, 11, 12, 14) Moreover, Student, with complex special education needs, is demonstrating difficulty with maintaining skills at school, even after short weekend breaks, and Student's performance can be inconsistent. (FF 32, 36) These factors strongly suggest that Student's functioning at school is not necessarily solid in that environment such that generalization to other settings will follow, and perhaps signify that a more restrictive educational environment may be necessary.

Certainly the IEP team needs to determine how to address Student's educational needs, including the generalization of skills to the home and other environments, especially important self-help skills such as feeding Student's self. There was little if any evidence of what instructional approaches and interventions have been used to teach Student to generalize skills,

and what others may be tried, at the current level of support at Private School. It is true that some children have significant disabilities that require residential placements in order to be appropriate. *See, e.g., M.C. v. Central Regional School District*, 81 F.3d 389, 394 (3d Cir. 1996). Based on the present record, however, the evidence is simply insufficient to establish whether a residential placement is necessary for Student at this time. For the reasons discussed below, though, the IEP team will need to convene to make an informed placement decision based on all considerations, including the parties' respective positions, about Student's needs.

The final issue is whether the District complied with the procedural requirements of the IDEA with respect to the June 26, 2014 meeting and NOREP. The simple answer to that question is that it unmistakably did not, and for several reasons.

First, although this hearing officer has concluded that a decision on residential placement was not made at the February 2014 meeting, the NOREP of June 26, 2014 was not the result of a meeting of a proper IEP team, and was not an IEP team decision. There is no suggestion that the Parents agreed in writing to excuse any team members from that meeting, wherein a discussion was held regarding Student's placement for the fall of 2014. Indeed, the father's testimony, together with his action of crossing out the blocks for team members who were not present on the June 26, 2014 NOREP, speaks volumes about whether anyone was excused. Of the two people present at the June 26, 2014 meeting, there was no agreement, nor was there any indication that input from anyone else was sought.

Second, the IEP revisions of June 26, 2014 were similarly not the product of a team discussion or decision. While the content of what is set forth in the new Specially Designed Instruction from that date appears to be both relatively minor and accurate as to what happened, a student's IEP can be revised only in specifically prescribed circumstances which did not exist

on June 26, 2014. It is, to this hearing officer, simply incongruous with the IDEA to suggest that a meeting of a team in February 2014 was not an IEP meeting because the IEP itself was not revised, and then to make actual revisions to that document in a meeting of less than the full team four months later. Furthermore, the District's failure to convene another meeting after the February 2014 discussion, on the basis that the Parents did not request such a meeting (N.T. 158-61), is simply unfathomable given the lack of certainty (from the District's perspective) about Student's programming and placement for the fall of 2014.

Lastly, and most critically, the Parents were not given any meaningful opportunity to participate in the decision which prompted the June 26, 2014 NOREP. Although the District characterized the decision in that NOREP as a temporary measure pending the completion of a necessary reevaluation, the timing of that meeting and NOREP provided the Parents with no ability to explore any options prior to the start of the 2014-15 school year.⁸ Moreover, the District's request in early May 2014 for the Parents to complete the 4010 form that specified, in no uncertain terms, a 7-day residential placement (FF 21), served only to reinforce the Parents' belief that Student would be provided that level of support as of August 31, 2014. In sum, the IEP revisions and NOREP of June 26, 2014 were procedural violations of the IDEA that significantly impeded the Parents' ability to participate meaningfully in programming for Student for the start of the 2014-15 school year.

Having found those specific procedural violations that operated as a denial of FAPE, the next question is what remedy is due. Certainly the District must be ordered to convene a meeting of a properly-constituted IEP team to make a placement decision for Student and to consider any revisions to that IEP, including the addition of items of specially designed instruction. The

⁸ The parties participated in the statutory resolution period following the filing of the due process complaint, which is consistent with the spirit of the IDEA despite the fact that they could not reach a resolution prior to the hearing.

District will be ordered to remove the revisions to the Specially Designed Instruction and set them forth in a separate document for inclusion in Student's educational records as well as for consideration by the IEP team when it next meets. Further, under the circumstances presented in this case, this hearing officer is compelled to conclude that simply ordering a new IEP meeting does not go far enough toward remedying the procedural violations and assisting the parties in making an informed decision about Student's placement for the immediate future. Student presents with complex and significant special education needs that, at Student's current age, have become more pronounced since the start of the 2012-13 year and are of increased concern to the family. Furthermore, the District has already requested permission to conduct a reevaluation to acquire information necessary to make future programming determinations. Despite the Parents' contention that no evaluation is necessary at this time, this hearing officer must concur with the District, on the basis of the existing record, that a new evaluation of Student is essential so that the team has a comprehensive understanding of Student's current strengths and needs, before it can consider where the special education and related services should be provided.⁹

Accordingly, in an exercise of the hearing officer's broad discretion to fashion an appropriate remedy under the IDEA,¹⁰ the District will be ordered to provide an independent educational evaluation (IEE) of Student, which shall be comprehensive and include recommendations for Student's placement, for consideration of the IEP team upon its completion. The law is clear that hearing officers have the authority to order an IEE at public expense as part of a due process hearing, 34 C.F.R. § 300.502(d), and this hearing officer concludes that this remedy of a publicly funded IEE will serve the crucial function of "guarantee[ing] meaningful participation [of the Parents] throughout the development of the

⁹ It should be noted that the District did not seek to override the Parents' lack of consent to the reevaluation in this matter.

¹⁰ See, e.g., *Forest Grove v. T.A.*, 557 U.S. 230, 240 n. 11 (2009).

IEP” and placement decision, something that was denied between February and June 2014. *Phillip C. v. Jefferson County Board of Education*, 701 F.3d 691, 698 (11th Cir. 2012); *see also Schaffer, supra*, at 61 (noting that an IEE can afford parents “a realistic opportunity to access the necessary evidence” and information relating to an appropriate program and placement for their child).

This remedy is intended to serve as a means of providing unbiased expertise for the parties to consider in making a determination of how to meet Student’s needs appropriately, as well as begin the process of repairing the relationship between them. The Order will also permit observations in the home environment, with the consent of the Parents, which is strongly encouraged and recommended given the concerns with generalization of Student’s skills. While the recommendations of the independent evaluator need not be accepted wholesale, of course, this hearing officer finds that the most efficient path to present and future collaborative decision-making by these parties will be appropriately served by consideration of an objective opinion.

After the IEP team has met to consider all available information, including the IEE and input from the Parents, and to make programming and placement decisions together, the District shall issue a new NOREP to which all of the statutory procedural safeguards will attach.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District did not violate the IDEA in failing to issue a NOREP in February 2014, that its IEP and NOREP of June 2014 did violate the procedural protections in the IDEA, and that an IEE must be ordered to assist the IEP team in making programming and placement decisions for Student going forward.

ORDER

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

1. Within seven days of the date of this Order, the District's IEP revisions of June 26, 2014, which added two items of Specially Designed Instruction, must be removed from Student's IEP. These items must, at the same time, be set forth in a separate document to be made part of Student's educational record for consideration by the IEP team at its next meeting.
2. Within ten days of the date of this Order, the District shall provide to the Parents, in writing, a list of not less than three qualified individuals to perform an Independent Educational Evaluation of Student. The qualified individuals shall have experience in making recommendations for educational programming for students with autism spectrum disorder.
 - a. Within ten days of receipt of the District's list of qualified individuals to perform the Independent Educational Evaluation, the Parents shall notify the District, in writing, of their selection. The Parents may utilize the ten-day period to contact the proposed evaluators in order to gather information to make their decision.
 - b. If the Parents do not notify the District, in writing, of their selection within ten days of receipt of the District's list of qualified individuals, the District shall make the selection from that same list.
 - c. The selected evaluator shall determine the scope of the evaluation including what assessments and observations are necessary, including at Private School. With the consent of the Parents, the evaluator's observations may include those conducted in the home.
 - d. The selected evaluator shall provide a written report of the Independent Educational Evaluation within a reasonable time, not to exceed 60 days from the date of engagement, unless otherwise agreed by the parties.
 - e. The Independent Educational Evaluation shall be at public expense.
3. Following completion and receipt of the Independent Educational Evaluation Report, Student's IEP team shall meet, with the participation of that evaluator, to consider the Report and all other relevant information. The IEP team shall make a decision on revisions to Student's IEP and an appropriate placement. The attendance of the evaluator at the IEP meeting shall also be at public expense.
4. Within seven days of the IEP meeting described in Paragraph 3, the District shall issue a NOREP to the Parents, to which all procedural safeguards shall attach.

5. Unless the parties otherwise agree, the involvement of the selected evaluator at public expense shall end at the conclusion of the meeting set forth in Paragraph 3 of this Order.
6. Student shall remain in the day program at Private School pending the decisions made at the IEP meeting set forth in this Order.
7. Nothing in this Order should be read to preclude the parties from mutually agreeing to alter any of the directives set forth in this decision and Order.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: September 15, 2014