IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

**DECISION AND ORDER**

ODR No. 01716-1011AS

Child's Name: K.H.
Date of Birth: <redacted>

Hearing Convened via Introduction of a Stipulated Record

**CLOSED HEARING**

| Parties to the Hearing: | Representative: |
|---|---|
| <Parent>, | Nancy Ryan, Esquire<br>McKinley & Ryan, LLC<br>238 West Miner Street<br>West Chester, PA 19382 |
| Marple-Newtown School District | Karl A. Romberger, Jr., Esquire<br>Sweet, Stevens, Katz & Williams LLP<br>331 Butler Avenue, Post Office Box<br>5069 New Britain, Pennsylvania 18901 |

Date Record Closed: May 6, 2011
Date of Decision: May 23, 2011

Hearing Officer: Brian Jason Ford, Esquire

## Introduction

This due process hearing concerns a Student[1], who has severe needs. Although three issues are presented, the primary question in this case is whether residential programming is necessary for the Student to receive a free appropriate public education (FAPE). For the reasons discussed herein, I conclude that residential programming is necessary.

This hearing was conducted in a very unusual, but highly effective way. From the start, the parties agreed that the facts were not in dispute. Their disagreement is over what result the law compels. At the parties' suggestion, an in-person hearing was not convened. Rather, the parties submitted extensive joint exhibits and stipulations. The parties also submitted briefs providing their analysis of the stipulated facts. Attorneys

[1] Other than the caption of this Decision and Order, all identifying information about the Student, including name and gender, has been omitted or redacted.

Romberger and Ryan have shown considerable creativity and pragmatism, and a remarkable willingness to work with each other. I hope they will share their experience in this case with their peers in the special education bar.

## Issues

As stipulated by the parties, the issues in this case are:

1. Whether the District offered the Student a free, appropriate public education for the 2010-11 school year pursuant to the IDEA and Section 504.

2. Whether the Student's June 10, 2010 Individualized Education Program (IEP) (Joint Exhibit D-43) is the Student's pendent placement pursuant to the IDEA.

3. Whether the Student must be provided with residential programming in order to receive a free, appropriate, public education and make meaningful educational progress pursuant to the IDEA and Section 504.

## Findings of Fact

Extensive factual stipulations have been submitted by the parties. I adopt those stipulations as my own findings of fact. The stipulations were presented to me in several jointly-submitted documents constituting about 60 pages of enumerated facts and charts. These were presented with a large volume of jointly-submitted exhibits. The stipulations and joint exhibits are, collectively, the stipulated record.

As the District notes in its closing brief, "the parties really are trusting [me] to review the lengthy record with utmost care and attention." *District's Brief* at N1. I have done so. The stipulated record is large in comparison to most special education cases. It goes beyond the periods of time directly applicable to the issues presented in this hearing. I, nevertheless, appreciate the comprehensiveness of the stipulated record, which allows me to form a complete picture of the student in the absence of live testimony.

As one might expect, the stipulations were presented un-redacted. They include many references to the Student's name and gender and the names of the programs and schools that the Student attended. I am concurrently obligated to both support this decision with findings of fact and to protect the Student's privacy. Therefore, the stipulations will be added to this decision as attachments A through G, and shall be considered part of this decision. Those attachments shall not appear on the redacted version of this decision that will be posted on the website for the Office for Dispute Resolution.

The attachments, which include numerous citations to the joint evidence, are hereby incorporated into this decision as follows:

- Attachment A - Stipulations: General Background/[Student's] Needs
- Attachment B - Stipulations: Educational History in the District

- Attachment C - Stipulations: [Student's] Progress Prior to [Placement in a Residential APS]
- Attachment D - Stipulations: [Student's] Placement at [a Residential APS]
- Attachment E - Stipulations: [Student's] Progress at [a Residential APS]
- Attachment F - Stipulations: Requirements of [a prior] Settlement Agreement
- Attachment G - Stipulations: Interagency Services

Ever since the Office for Dispute Resolution started posting redacted versions of hearing officer decisions on its website, the bar has looked to decisions for guidance. In recognition of this, and to provide context for this decision, some key facts from the foregoing stipulations are as follows:

1. The Student is [redacted] years old and resides within the District's boundaries. *See Attachment A.* The Student currently attends a residential program in a Pennsylvania approved private school (APS).

2. The Student developed normally until age four when, after flu-like symptoms, was admitted to the to the hospital with a diagnosis of status epileptics.

3. Currently, the Student is eligible for special education and related services under the IDEA due to Mental Retardation[2] Secondary to Mixed Intractable Seizure Disorder. The Student has also been diagnosed with ADHD, predominantly Inattentive Type (with symptoms of Autistic Spectrum Disorder), Oppositional Defiant Disorder, and Moderate Mental Retardation.

4. The Student's seizure activity consists of atonic (drop seizure), myoclonic (twitching/jerking), generalized tonic clonic (grand mal) and complex partial seizures (may stare, lip smack, chew, swallow, lose consciousness or report visual disturbances).

5. In May, 2001, the Student received a Vagus Nerve Stimulator (VNS) chest implant, a medical device used to aid in seizure management and amelioration. Use of the VNS, in addition to medications administered both orally and anally, are part of the protocol that must be used when the Student has seizures. The Student also must take several medications in an effort to prevent seizures.

6. Prior to placement in a residential APS, the District placed the Student in three different school districts and two center-based programs. This was done in conjunction with the District's Intermediate Unit. The Student made *de minimis* progress in these placements.[3]

[2] The parties reference the term "mental retardation" and that reference is carried through from the parties into this decision. Currently, at the federal level, the appropriate term is "intellectual disabilities" as per Rosa's Law.
[3] The amount of progress that the Student made in non-residential programming is discussed below in the discussion section of this decision.

7. At various times, the District and Parents attempted to secure the Student's admission to various APSs and private schools. None would accept the Student.

8. The Student's poor progress in prior District placements is partially attributable to poor coordination and inconsistent support from other agencies. Most notably, in addition to round-the-clock nursing support, the Student should have received "wraparound" services funded by Magellan Behavioral Health of Pennsylvania (Magellan).[4] These services were not provided with consistency or fidelity, and the stipulated record overwhelmingly supports the fact that wraparound services are not effective for the Student.

9. The Student's performance in District placements was also adversely affected by the Student's inability to attend school. Inadequate supports in the Student's home made it impossible for the Student to arrive to school on time.

10. The Student was frequently absent, and those absences are attributable, in part, to the Parents' inability to get the Student to school that flows from the Student's noncompliance with morning routines outside of residential programming.

11. It is not disputed that the Student requires care 24 hours per day, 7 days per week, 365 days per year. An independent certified school psychologist (Independent CSP), retained by the Parents, has concluded that the Student must be placed in a residential facility to derive a benefit from education. A psychiatrist who works for Magellan has also determined that placement in a residential facility is medically necessary. Magellan's doctor has reached this conclusion twice but, to date, Magellan has rejected funding for a residential program.[5]

12. In March of 2009, the Parents requested a due process hearing against the District. That hearing resolved through a Settlement Agreement and Release (Settlement) whereby the District agreed to pay for the educational and residential costs for the Student to attend the Parents' preferred residential program for one calendar year.

13. After the Settlement was executed, the District sent referrals seeking residential placement at several schools. The APS that the Student currently attends was the only school that accepted the Student.

14. The Student attended the day program run by the Student's current APS from September 26, 2009 through October 29, 2009. During that time, the Student was late to school on 5 days and absent on 6 days. Again, these late starts and absences are partly attributable to the Student's seizure activity and noncompliance with the morning routine.

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[4] Magellan is the managed care company contracted by Delaware County to provide behavioral health services to eligible members of HealthChoices, a program of insurance for behavioral health services for persons with qualifying disabilities, such as the Student.

[5] The Parents have pursued Magellan's internal appeals process to no avail.

15. After October 29, 2009, the Student started attending the APS's residential program. Since then, the Student has received 24-hour care and has been able to arrive on time and attend school regularly.[6]

16. The Independent CSP observed the Student in the residential program and saw remarkable progress. This is consistent with progress reporting from the APS.

17. When the Student entered the residential program, the APS issued a single document containing the Student's IEP, IPP and residential goals. These documents were divided at the District's request over parental objection.

18. A District representative attended an IEP meeting on June 10, 2010 that resulted in a combined IEP and IPP that calls for residential programming. The Parents claim that this document represents the Student's pendent placement.

19. The District did not prepare an IEP or Notice of Recommended Educational Placement (NOREP) for the 2010-11 school year for the Student. The Settlement contemplates that the District would issue a NOREP and IEP for the 2010-11 school year no later than May 31, 2010.

20. On August 16, 2010, the Parents asked the District to pay for the Student's participation in the APS's residential program for the 2010-11 school year. That request was denied. Instead, the District offered to fund the day program at the APS (that is, the non-residential components of the program that the Student attends).

The parties are well aware, and readers are advised, that the foregoing is only a synopsis of the stipulated record.

## Discussion

### I. The Student Requires Placement in a Residential Program to Receive FAPE

This hearing was requested by the Parents pursuant to the Individuals with Disabilities Education Act, as amended, 20 U.S.C. § 1400, *et seq*. (IDEA) and Section 504 of the Rehabilitation Act. The United States Supreme Court has determined that parents who request special education due process hearings must bear the burden of persuasion. *Schaffer v. Weast*, 546 U.S. 49 (2005). As such, the Parents must substantiate their claims by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See id; L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

The IDEA requires the states to provide FAPE to all students who qualify for special education services. 20 U.S.C. §1412. This requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction. *See Board of Education of Hendrick Hudson Central School District*

[6] The Student's progress in this residential program is discussed below in the discussion section of this decision.

*v. Rowley*, 458 U.S. 176 (1982). The Third Circuit has interpreted FAPE to require "significant learning" and "meaningful benefit" - something more than trivial or *de minimis*. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

As part of the FAPE obligation, school districts are required to fund residential programs for students with disabilities if such programs are necessary for the provision of FAPE. This obligation is codified in the IDEA's implementing regulations at 34 C.F.R. § 300.104:

> "If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child."

*Id.*

In *Kruelle v. New Castle County School District*, 642 F.2d 687, 694 (3d Cir.1981), the Third Circuit examined a student's right to a private, residential placement at public expense under the IDEA's predecessor statute, the Education for All Handicapped Children Act of 1975 (EHA). The 1975 version of the EHA included a FAPE obligation, and the then-operative implementing regulations explicitly contemplated residential programming. In 1975, the regulation read as follows:

> "If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child."

45 C.F.R. § 121a.302. Although there have been considerable changes to the act in the intervening 36 years, the regulation regarding residential placement has remained identical except for the replacement of the term "a handicapped child" with "a child with a disability."

In the *Kruelle* case, Paul Kruelle, after demonstrating an inability to make progress in day programs, was placed into a quasi-residential program that was funded by his Pennsylvania school district and other agencies. *Kruelle*, 642 F.2d at 689. Upon moving to Delaware, Paul's new school district proposed the same type of day programming that was unsuccessful in the past. *Id.* Paul's parents then initiated administrative proceedings, seeking a finding that a residential program was a necessary component of FAPE. Importantly, *Kruelle* does not come in the context of tuition reimbursement. The Kruelles were seeking placement, not reimbursement. *See Kruelle v. Biggs*, 490 F.Supp. 169 (D.Del, 1980), *affirmed* 642 F.2d 687.

There are striking similarities between this case and *Kruelle.* Both the the Student in this case and Paul Kruelle have remarkable needs. In this case, all parties agreed that the student requires full-time assistance. The same was true in *Kruelle. See Kruelle*, 642 F.

2d at 692. In *Kruelle*, "the school district [centered] its challenge on the proposition that [a] residential placement is required only for reasons of medical and domiciliary care, not for educational purposes." *Id* at 693. The District makes a substantively identical argument in this case.

It is true today, as it was in 1981, that the federal regulations require school districts to fund only non-medical care room and board. *See* 34 C.F.R. § 300.104. Consequently, it is my task to determine "whether full-time placement may be considered 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." *Kruelle*, 642 F. 2d at 693. The Parents claim that the Student's myriad of difficulties are not segregable from the learning process. However, "claimed inextricability of medical and educational grounds for certain services does not signal court abdication from decisionmaking in difficult matters. Rather, the unseverability of such needs is the very basis for holding that the services are an essential prerequisite for learning." *Id* at 694. In short, genuine - albeit difficult - analysis is required to determine if the Student's medical and educational needs are inextricably intertwined.

In *Kruelle*, the Third Circuit recognized the potential slippery slope that the District cautions against in this case: "ultimately any ... medical aid can be construed as related to a child's ability to learn." *Id* at 694. The court addressed this concern by noting that the "statutory language requires courts to assess the link between the supportive service or educational placement and the child's learning needs." *Id*. As in *Kruelle*, the "relevant question in the present case is whether residential placement is part and parcel" to the provision of FAPE for the Student. *Id*.

The evidence in support of the Parents' position, that the Student cannot receive FAPE outside of a residential placement, is more than preponderant. Throughout the Student's tenure in the District, the Student has attended almost every conceivable configuration of non-residential placement. *See Attachment B*. During that time - 12 school years - the Student made only trivial progress. *See Attachment C*; Exhibits C-2, C-4, C-6, C-7, C-8, C-9, C-11, C-14, C-15, L-2, and L-4.[7] The record shows almost no sign of behavioral progress between the spring of 2002 and the spring of 2009. During that same period of time, the Student made no progress in reading or math when measured by grade level. On standardized assessments, the Student's reading levels were basically stagnant between 2002 and 2009. In math, the Student showed some progress towards some math goals, but also showed minor regression in some standardized math assessments. Stagnation is also characteristic of the Student's ability to exhibit daily living/self care skills, peer interactions, and language/communication skills.

Given the severity and complexity of the Student's needs, it is possible that the Student's lack of progress in non-residential programming is consistent with the

[7] The parties provided charts within the joint stipulations that summarize some of the joint evidence. In the joint stipulations, the parties wisely point out that the exhibits, not the stipulations, are controlling evidence of the Student's progress or lack thereof. My review of the evidence and the stipulations reveals that the same information is provided in both. The charts in the stipulations were extremely helpful nonetheless.

Student's abilities. Such conjectures are belied by the progress that the Student made upon entering residential programming. *See Attachment E*; Exhibits P-2, P-9, D-43, D-45, O-24. When the Student entered residential programming, there was a remarkable decrease in the Student's aggressive behaviors, task refusal, elopement, property destruction and inappropriate touching *in school*. These behaviors were tracked separately in school and in the residential setting, leaving no question that the decrease of inappropriate behaviors in school is directly attributable to the initiation of residential programming. At the same time, and not surprisingly, the Student's use of positive replacement behaviors increased. The parties stipulate that the Student is learning replacement behaviors in the APS. In reading, since entering residential programming, the Student has mastered sight words and functional signs and has moved on to curricular instruction at the first grade level. In math, the student can independently complete two-digit subtraction with 90% accuracy and can tell analogue time at 30-minute intervals.

Perhaps most importantly, the Student has shown some progress in daily living/self-care skills (tooth brushing, shoe tying, appropriate eating, hygiene, the ability to independently follow a morning schedule, chore completion and meal preparation) since entering residential programming. Although there is considerable work to do in this regard, the Student's IEP and IPP target these functions. Whatever chance the student has to obtain a degree of independence later in life will hinge on continued efforts towards the Student's daily living/self-care goals. The parties stipulate that the Student is able to achieve a greater degree of success in many daily living goals in the residential setting.

In sum, all efforts to educate the Student in non-residential settings have failed while the Student has shown considerable progress in a residential setting. All evidence in this case – the entire stipulated record – compels the conclusion that the Student requires residential programming in order to receive FAPE. The constellation of problems that necessitates residential programming cannot be separated from the Student's educational needs.

In its defense, the District cites to and relies heavily upon *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235 (3rd Cir. 2009). *Mary Courtney T.* is a case about tuition reimbursement.[8] Generally, in tuition reimbursement cases, parents must prove both that the school district failed to offer FAPE and that the program for which reimbursement is requested is appropriate. *See, e.g. Mary Courtney T.*, 575 F.3d 235, 242 (3rd Cir., 2009). In *Mary Courtney T.*, the parents ultimately failed in their efforts to secure tuition reimbursement because their chosen placement was inappropriate. This case is different. The Parents, to date, have not paid for the Student's placement in the

[8] More specifically, in their due process hearing, the parents in *Mary Courtney T.* asked the hearing officer to "(1) reimburse Plaintiffs for the cost of Courtney's stay at Rancho Valmora [a private, out-of-state program for children with emotional disturbances], from December 2004 to April 2005, and SLS [a different program] from May 2005 up to the date of the hearing; (2) provide compensatory education for the period May 23, 2005 up to the date of the hearing, in the event that tuition reimbursement was denied; and (3) pay for an independent evaluation of Courtney." *Mary T. v. School Dist. of Philadelphia*, 575 F.3d 235, 240 (3rd Cir., 2009).

APS and, consequently, are not seeking reimbursement. Rather, the Parents seek a finding that residential programming is a necessary component of FAPE. The two-pronged tuition reimbursement test, therefore, does not apply.

Even so, *Mary Courtney T.* is instructive to the extent that it indicates there may be placements that are inappropriate *per se*. In *Mary Courtney T.*, the court concluded that the parents' placements were essentially medical in nature and did not provide educational programming. The unseverability of the Student's educational and medical needs notwithstanding, the court declined to obligate school districts to reimburse parents for non-educational placements. It is consistent with *Mary Courtney T.*, and not inconsistent with *Kruelle*, to hold that students who require residential placement as a component of FAPE are not entitled to placement in an entirely non-educational setting. Even so, the Student's residential placement in this case is quite different than the placements in *Mary Courtney T.* In this case, the Student receives educational instruction in the APS's school, and those lessons are reinforced in the residential setting. The Student is receiving instruction in reading, writing, math, social skills and independent living skills all while the Student's behaviors are being managed. For the first time in the Student's documented history, meaningful *educational* progress is being made.

At a more technical, but not less important level, the particular nature (medical versus educational) of the Student's current placement does not matter in this case. The issue at hand, as stipulated by the parties, is whether the Student requires residential programming as a component of FAPE. The issue is not whether the particular residential program that the Student currently attends is necessary. For the reasons stated above, I determine that the Student requires residential programming. If the District is able to identify a different residential program that will both meet the Student's needs and will accept the Student, the District is free to propose a change in program through the ordinary IEP/NOREP process. As a practical matter, the Stipulated record strongly suggests that that the Student's current placement is the only placement that will accept the Student, but the Student's IEP team is ultimately free to look elsewhere.

Finally, in its closing brief, the District argues that the Student's needs "have led to non-school-based, medical interventions through wrap-around services, among others. Those interventions, however, have been miserably and appallingly ineffective. Poor delivery and planning by Magellan have increased pressure on [the Student's] mother and primary care giver, while being of dubious benefit to [the Student]." The District seems to imply that the Student could derive an educational benefit from a non-residential program if only other agencies would break from their consistent pattern of failure. It may be true that other agencies, Magellan in particular, have failed both the Student and the District. Explicitly, nothing in this decision is intended to preclude either party from seeking funding (through any means) from Magellan or any other entity for the residential component of the Student's placement. I expect that the parties will work with each other in this regard, but it is beyond my authority to compel that attractive result. Even so, the Student's entitlement to FAPE is not contingent upon a third party's willingness to fund necessary services.

## II. The Student's Pendent Placement

The Parents have asked me to determine that the Student's June 10, 2010 IEP is pendent, meaning that IEP constitutes the Student's "stay-put" placement pursuant to 20 U.S.C. 1415(j); 34 C.F.R. 300.518(b). Under this provision of the IDEA, "during the pendency of any [due process hearing]... unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child."

Pendency is an issue in this case because the parties' prior settlement agreement specifies that an in-district placement would be pendent in the event of a dispute. O-14, p. 4, paragraph 6. There is a dispute between the parties as to whether the terms of the settlement agreement were breached. My jurisdictional authority to examine settlement agreements is questionable. Although the Office for Dispute Resolution has no enforcement mechanism, the Eastern District very recently found that a Hearing Officer "was incorrect in finding that contract disputes are not within the jurisdictional authority of a Special Education Hearing Officer. Certainly, it is within [a Hearing Officer's] jurisdiction to determine whether a valid settlement agreement exists." *I.K. ex rel. B.K. v. School Dist. of Haverford Tp.*, Slip Copy, 2011 WL 1042311, *5 (E.D.Pa.,2011).

Prior agreements notwithstanding, the District and the Parents agreed to continue the Student's residential placement at the District's expense during the pendency of these proceedings. Neither party argues that the subsequent agreement to continue funding supersedes the conflicting provision in the prior settlement. Neither party explains what should happen in the real world, should I find that the IEP in question is not pendent. I have been asked to examine the prior settlement only in the context of pendency.

In reality, the District has continued to fund the placement it objects to during these proceedings. Upon the issuance of this Decision and Order, no due process hearing will be pending. As explained above, I have already determined that the Student requires a residential placement. Pennsylvania has moved to a one-tier administrative system for special education disputes. My findings regarding the necessity of a residential placement, therefore, constitute an agreement between the State Educational Agency (SEA) and the Parents for purposes of the stay-put rule.[9] The parties can, and should, convene an IEP team meeting to bring the Student's IEP into alignment with this decision. The pendency issue as presented by the parties is, however, moot.

## III. The District's Failure to Offer FAPE for the 2010-2011 School Year Does Not Constitute a Substantive Violation of the IDEA

[9] There is nothing novel about this determination. Courts have long held that a decision from the final administrative tribunal that favors parents constitutes an agreement between the SEA and the parents for purposes of the IDEA's "stay put" rule. *See School Comm. of the Town of Burlington v. Dept. of Educ.*, 471 U.S. 359, 371-72(1985) *and Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 84 (3d Cir.1996). Although the decision is not reported, the District should be aware of the standard. *See Marple Newtown School Dist. v. Rafael N.*, 2007 WL 781896. The only change in recent years is Pennsylvania's move to a one-tier system, sliding the agreement down to the hearing officer level.

"In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies— (I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii).

The Parents argue that the District "violated [the Student's] rights to a FAPE for the 2010-11 school year when it failed to convene an IEP team meeting, failed to develop an IEP for [for the Student], failed to issue a NOREP and utterly deprived [the Mother] of her procedural rights to meaningfully participate in the placement decision for [the Student]." *Parents Brief* at 14. The District argues that "there is no dispute about the educational component of the [APS] generated IEPs, no contention that the IEPs are deficient ... The only claimed failing is that the District does not want to pay for a medically-needed residential placement." *District's Brief* at 10.

Some evidence shows that the District stopped participating in IEP development after it determined that it would not pay for the residential component of the Student's placement in the APS. The evidence also shows that the District itself did not offer an IEP or NOREP for the 2010-11 school year. The District argues that it "owns" the IEPs that were generated by the APS, but no evidence suggests that the District adopted those documents. Moreover, the District has clearly not claimed ownership of the residential components of the Student's program, which are necessary components of FAPE.

At the same time, no evidence suggests that the Parents' participation in IEP development was hindered in any way by the District's failure to participate in IEP development. That process continued via the APS with parental participation. Moreover, at all times the Student received the program that the Parents prefer at the District's expense. All evidence points to the appropriateness of that program. Even during the pendency of this dispute, the Student actually received FAPE by attending the Parents' preferred program at the District's expense.

The standard established at 20 U.S.C. 1415(f)(3)(E)(ii) is not met. Although the District did not "offer" anything at all, neither the Student nor the Parents were substantively harmed by the District's failure to participate.[10] Consequently, I may not find that the Student did not receive FAPE during the 2010-11 school year.[11]

## Conclusion

[10] To be sure, failure to offer programming of any kind to an IDEA-protected student yields a substantive denial of FAPE in the vast majority of cases because such procedural violations usually lead to an actual change in the services that the student receives. This case is different because the District's failure caused no change in the Student's programming.

[11] The Student's education was both "free" and "appropriate." The answer to this question might be different if the District were seeking to reclaim any portion of the tuition that it paid during the 2010-11 school year.

First, the Student requires a residential program to receive FAPE. Second, the pendency issue is moot, but this decision makes residential programming part of the Student's stay-put placement. Third, the evidence shows a number of procedural violations regarding the 2010-11 school year, none of which resulted in a depravation of FAPE.

Again, I commend the parties and their attorneys. The parties and their counsel were able to disagree without being disagreeable – a good example for the bar.

## ORDER

And now this 23rd day of May, 2011, it is hereby **ORDERED** that:

1. The District's failure to offer the Student a free, appropriate public education for the 2010-11 school year pursuant to the IDEA and Section 504 is a procedural error that did not result in substantive harm;
2. The pendency issue as stipulated by the parties is moot; and
3. The Student must be provided with residential programming in order to receive a free, appropriate, public education and make meaningful educational progress pursuant to the IDEA.

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

/s/ Brian Jason Ford
HEARING OFFICER